NOTE

BELL V. ITAWAMBA COUNTY SCHOOL BOARD: TESTING THE LIMITS OF FIRST AMENDMENT PROTECTION OF OFF-CAMPUS STUDENT SPEECH

MARGARET MALLOY*

After hearing that his female classmates were being sexually harassed by two coaches at his school, eighteen-year-old high school senior and aspiring rapper Taylor Bell recorded a rap song off-campus criticizing and arguably threatening harm to the coaches. When the high school's administrators found out, they suspended Bell. Bell subsequently filed suit, alleging a violation of his First Amendment right to free speech.

These events and the subsequent years of civil litigation surrounding them highlight the murky state of student speech law. The reigning "substantial disruption" standard derived from *Tinker v. Des Moines Community School District* is too vague and outdated to protect either students or administrators when it comes to off-campus speech. Additionally, the case law governing when schools can punish student speech that originates off-campus remains unclear.

This Note highlights the lack of consensus among courts dealing with student speech issues and urges courts to adopt a modified version of the standard that Judge E. Grady Jolly of the Fifth Circuit proposed in his concurring opinion in *Bell v. Itawamba County School Board*. To be effective, the Jolly standard must be clarified with regard to what constitutes an "actual threat." This Note further argues that clarifying these standards, in light of the ubiquity of social media and current alarming levels of school violence, is essential. The proposed standard would prohibit schools from punishing off-campus speech in most cases—except where the speech implicates a compelling school interest, such as maintaining safety on campus.

* J.D. Candidate, University of Wisconsin Law School, 2017. Thank you to all those who offered their insight and feedback on this Note.

INTRODUCTION

When Taylor Bell posted his rap "P.S. Koaches" to his Facebook,[1] he hardly could have imagined how deeply it would plunge him into the rabbit hole of First Amendment law. The rap's lyrics, its online forum, and the incidents it addressed left Bell at the crossroads of First Amendment jurisprudence governing student speech, threatening speech, and speech addressing a public concern. The Fifth Circuit's decision in *Bell v. Itawamba County School Board*[2] represents a strained application of *Tinker v. Des Moines Community School District*,[3] the seminal case on student speech, and underscores the shortcomings of the *Tinker* standard in the age of social media. In *Tinker*, the Court held that schools can punish on-campus student speech that substantially disrupts, or can reasonably be forecast to substantially disrupt, school activities.[4]

The Fifth Circuit's holding in its December 2014 decision,[5] and its subsequent reversal in August 2015 after re-hearing en banc,[6] highlights the need for the Supreme Court to clarify its legal standards regarding off-campus student speech. The issue is particularly compelling where, as here, there are weighty policy concerns on both sides.[7] On one hand, Taylor Bell's rap specifically sought to raise awareness of sexual harassment of minors by adult authority figures at his school[8]—a public concern that merits First Amendment protection.[9] On the other, "P.S.

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1. *Bell v. Itawamba Cty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012); *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 282 (5th Cir. 2014), *rev'd en banc*, 799 F.3d 379, 383 (5th Cir. 2015).

2. 799 F.3d 379 (5th Cir. 2015) (en banc).

3. 393 U.S. 503 (1969).

4. *Id.* at 514.

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

6. *Bell*, 799 F.3d 379 (en banc).

7. *See infra* Part II (weighing school safety concerns against the special protection afforded to speech that invokes an issue of public concern).

8. *Bell*, 774 F.3d at 283.

9. *See infra* Part I.B.1 (discussing speech on a matter of public concern). A matter of public concern is one "relating to any matter of political, social, or other

Koaches" described (and arguably threatened) gun violence against two specifically named teachers[10] at a time in which school shootings are a tragic and all-too-frequent occurrence. As many courts and academics have acknowledged, the application of the Supreme Court's student speech precedent—as developed in *Morse*,[11] *Fraser*,[12] and *Tinker*—to off-campus speech remains uncertain because the Supreme Court has never directly addressed the issue.

Part I of this Note provides background on *Bell* and a brief overview of the student speech origins and framework applied in *Bell*. Part II considers the tests applied in *Bell* to find authority over Bell's speech and argues that the majority position is problematic. Part II also addresses both the public concern issue, balanced against the school's interest in preventing violence, and the protective principle underlying student speech precedent. This Note argues that—rather than trying to force the *Tinker* analysis to meet the facts of *Bell*—the Fifth Circuit should have adopted a narrowly tailored rule akin to that articulated by Judge E. Grady Jolly in his concurring opinion.[13] Judge Jolly would find school authority only where an actual threat of harm related to the school community is communicated to the school community. After clarifying the test for when speech "actually" threatens school violence by applying a reasonable administrator test, the Jolly standard creates a workable framework. Finally, this Note concludes that under such a test, public schools would not be able to punish most off-campus speech, but would be able to act where off-campus speech implicates on-campus safety.

I. BELL'S RAP AND ITS PLACE AMONG STUDENT SPEECH LAW

Whether student speech is punishable is a fact-specific inquiry.[14] Thus, analysis of *Bell* requires an understanding all of the facts that unfolded in this particular case. This section provides the facts and procedural history of *Bell*, and then considers how the case compares to the Supreme Court's student speech precedent.

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concern to the community." *Connick v. Meyers*, 461 U.S. 138, 146 (1993). Speech on matters of public concern "is at the heart of the First Amendment's protection." *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 776 (1978).

10. *Bell*, 774 F.3d at 283–85.

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

12. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).

13. *See infra* Part II.A.2.

14. *See, e.g.*, *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 1094, 1111 (C.D. Cal. 2010).

A. Taylor Bell's Rap and the Legal Fallout

At the time he created and posted the rap in December 2010, Bell was an 18-year-old senior at Itawamba Agricultural High School with ambitions of becoming a professional rapper.[15] His stated reasons for creating the rap were two-fold. First, several female classmates told Bell about inappropriate behavior by two coaches at the school, and Bell believed that by creating the rap he could call attention to the issue.[16] Second, he seized the opportunity to create a new song to further his own career ambitions.[17] His dual motivations influenced his choices in writing and circulating the song.[18]

Several of Bell's female classmates told him about incidents in which two male coaches at Itawamba High School (Coach W. and Coach R.[19]) either made inappropriate comments to them or touched them in a way that made them uncomfortable.[20] Four students later provided affidavits regarding the incidents.[21] Bell did not report these incidents to the school, citing his belief that the school would not act.[22] Rather, over his Christmas break he composed a rap about the incidents at a professional recording studio.[23] He posted the recording to his Facebook in early January 2011—while off campus and while using a personal computer.[24] The stipulated version of the rap includes the following lyrics:

Let me tell you a little story about these Itawamba coaches

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15. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 282 (5th Cir. 2014).

16. *Id.* at 283 ("Bell admitted that he did not report these complaints to school authorities, but he explained that, in his view, the school officials generally ignored complaints by students about the conduct of teachers and coaches . . . According to Bell, he believed that if he wrote and sang about the incidents, somebody would listen to his music and that it might help remedy the problem of teacher-on-student sexual harassment.").

17. *Id.* at 287.

18. *Id.* Bell testified at a disciplinary hearing that he "re-mastered" the song from its original Facebook format to a YouTube version, both because he wanted people to "'clearly understand' his intentions with respect to the song," and also to create a version of the song that was "more targeted at record labels than the Facebook version." *Id.*

19. Although Bell used the coaches' real names, the courts primarily referred to them as Coach R. and Coach W. The courts occasionally used their full names, but that is not necessary for the purposes of this Note. *See, e.g.*, *Bell*, 799 F.3d at 384.

20. *Bell*, 774 F.3d at 283.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* at 285. This is significant, as *Tinker* and other Supreme Court precedent are unclear regarding school jurisdiction over off-campus speech. *See infra* Part II.A.1.

> Dirty ass n***** like some fucking coacha roaches . . .
> The reason he fucking around is cause his wife ain't got no titties
> This n**** telling students that they sexy, betta watch your back
> I'm a serve this n**** like I serve the junkies with some crack . . .
> Can't stand the truth so to you these lyrics going to hurt
> What the hell was they thinking when they hired Mr. R.
> Dreadlock Bobby Hill the second / He the same see . . .
> 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 the truth so don't you try to hide it now
> Rubbing on the black girls' ears in the gym . . .
> 30 years old fucking with students at the school . . .
> 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 . . .
> Middle fingers up if you want to cap that n****
> Middle finger up / he get no mercy n****[25]

Shortly after, Coach W. heard about the rap from his wife and brought it to the attention of school officials.[26] The school's principal, superintendent, and the school district's attorney questioned Bell at school about the contents of the rap and sent Bell home for the rest of the day.[27] While at home over the next week (due to inclement weather), Bell further edited the song and posted a version to YouTube, both to clarify what he was saying and for record labels to view.[28] The next school day, school administrators pulled Bell from class and informed him that he was suspended effective immediately.[29] After a January 26 disciplinary hearing, the school's disciplinary committee upheld Bell's seven-day suspension and elected to have him attend an "alternative school" for the next nine weeks; the committee also prohibited him from attending Itawamba High School events during that

25. *Bell*, 774 F.3d at 284–85.
26. *Id.* at 285–86.
27. *Id.* at 285.
28. *Id.* at 286–87.
29. *Id.* at 286.

time.[30] The Itawamba County School Board upheld the suspension, and Bell and his mother filed suit in federal district court alleging that the punishment violated his First Amendment free speech rights.[31]

The District Court for the Northern District of Mississippi entered summary judgment in favor of the defendants on all charges.[32] The district court noted, erroneously, that the *Tinker* Court "specifically ruled that off-campus conduct causing material or substantial disruption at school can be regulated by the school,"[33] and then cited several cases in which courts applied *Tinker* to speech originating off-campus.[34] Finding that Bell's rap "in fact caused a material and/or substantial disruption at school," the court upheld Itawamba High School officials' authority to suspend Bell for his off-campus rap.[35]

Bell appealed to the Fifth Circuit Court of Appeals, which reversed. The Fifth Circuit's December 2014 panel decision held, contrary to the district court's holding, that the Supreme Court had never addressed, either in *Tinker* or after, the extent of school authority to punish speech that takes place off-campus and not at a school event.[36] Further, the court reasoned, even if *Tinker* did apply, Bell's speech would still be protected because it neither caused nor could reasonably be forecasted to cause a substantial disruption of school activities.[37] Judge Rhesa Barksdale wrote an emphatic dissent, arguing that the court should rule in favor of the school board based on a *Watts*[38] "true threat" analysis,[39] or, in the alternative, that the *Tinker* standard could be applied to the off-campus speech to find that the speech caused a

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30. *Bell v. Itawamba Cty. Sch. Bd.*, 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012); *Bell*, 774 F.3d at 288.

31. *Bell*, 774 F.3d at 289.

32. *Bell*, 859 F. Supp. 2d at 842.

33. *Id.* at 837–38.

34. *Id.* at 838–39. The district court seemed to draw this conclusion from the phrase in *Tinker* that "conduct by the student, in class or out of it" that "materially disrupts classwork" is not protected. *Tinker v. Des Moines Indep. Cmty Sch. Dist.*, 393 U.S. 503, 513 (1969). However, read in its context, the phrase refers to the campus as a whole but does not clearly contemplate off-campus speech. In the preceding sentence of *Tinker*, the Court wrote "when he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . . ." *Id.* at 512–13. This implies that the "in class or out of it" phrase is limited to campus.

35. *Bell*, 859 F. Supp. 2d at 840.

36. *Bell*, 774 F.3d at 291.

37. *Id.*

38. *Watts v. United States*, 394 U.S. 705 (1969). The *Watts* Court held that the appellant's statement, "[i]f they ever made me carry a rifle the first man I want to get in my sights is L.B.J." was not a true threat, considering "the conditional nature of the statement and the reaction of the listeners." *Id.* at 706, 708. The Court did not explicitly define true threat. *Id.* at 708.

39. *Bell*, 774 F.3d at 314 (Barksdale, J., dissenting).

substantial disruption.[40] The Fifth Circuit certified the case for rehearing en banc in February 2015[41] and issued its decision reversing the panel in August 2015.[42]

The en banc majority returned to applying *Tinker* and ultimately ruled in favor of the Itawamba County School Board.[43] The decision included several thoughtful concurrences and dissents, which merit consideration in evaluating how to deal with student speech cases.[44] Examining the court's analysis first requires an overview of the Supreme Court's limited body of student speech precedent.

B. Bell*'s Context Among Student Speech Precedent*

In *Tinker*, the Court established that the First Amendment protects students from being punished for their speech, except when the speech causes a substantial disruption of school activities or when school officials can reasonably forecast that it will cause a substantial disruption.[45] *Tinker* was decided in 1969,[46] as American involvement in the Vietnam War escalated and sparked controversy across the nation. The plaintiffs were a group of students who wore black armbands to school as a form of "silent, passive expression of opinion" against the war.[47] When the school enjoined the students from wearing the armbands, they sued, claiming a violation of their First Amendment rights.[48] The *Tinker* Court found that the school had indeed violated the students' right to free speech, a right not "shed . . . at the schoolhouse gate."[49] *Tinker* provides that school officials cannot regulate speech simply out of "a mere desire to avoid discomfort and . . . unpleasantness,"[50] nor out of "undifferentiated fear or apprehension of a disturbance" not based on identifiable facts.[51] Rather, school officials must be able to point to specific evidence either that the speech

40. *Id.* at 317–18 (Barksdale, J., dissenting).

41. *Bell v. Itawamba Cty. Sch. Bd.*, 782 F.3d 712, 712 (5th Cir. 2015).

42. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 400 (5th Cir. 2015) (en banc).

43. *Id.*

44. *See id.* at 400–01 (Jolly, J., concurring); *id.* at 401–02 (Elrod, J., concurring); *id.* at 401–02 (Costa, J., concurring); *id.* at 403–33 (Dennis, J., dissenting); *id.* at 433–35 (Prado, J., dissenting); *id.* at 435 (Haynes, J., dissenting in part); *id.* at 435–36 (Graves, J., dissenting).

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

46. *Id.* at 503.

47. *Id.* at 508.

48. *Id.* at 504.

49. *Id.* at 506, 514.

50. *Id.* at 509.

51. *Id.* at 508.

substantially disrupted the school or that it was reasonable to act to prevent a substantial disruption.[52]

The Supreme Court's three subsequent student speech cases have "chipped away" at the *Tinker* requirement, carving out circumstances in which schools can regulate student speech without further evidence of a substantial disruption.[53] In 1986, the Court held in *Bethel School District v. Fraser*[54] that schools can punish students for using "vulgar and offensive language" in the school setting in order to maintain discipline.[55] Just two years later, the Court further held in *Hazelwood School District v. Kuhlmeier*[56] that schools can regulate student speech where it "might reasonably [be] perceive[d] to bear the imprimatur of the school."[57] Most recently, in *Morse v. Frederick*,[58] the Court held that schools are empowered to punish student speech that promotes drug use, since such speech implicates "the special characteristics of the school environment," and poses a special danger to young people.[59] Notably, the speech at issue in *Morse* took place off-campus, albeit at a school event just across the street from campus.[60]

While the Supreme Court has not addressed off-campus student speech (with the narrow exception of *Morse*), the lower courts have—generally in the context of speech that originates off campus but somehow ends up on campus.[61] A common theme among these decisions is that "violent speech is almost always reacted to harshly and

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52. *Id.* at 511.

53. Scott L. Sternberg, *Outside the Schoolhouse Gate: The Limits of* Tinker v. Des Moines Independent Community School District, 30 COMM. LAW 20, 21 (2014) ("Through subsequent decisions, however, the Supreme Court has chipped away at the maxim that the school 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 accompanies an unpopular viewpoint.") (internal quotation omitted).

54. 478 U.S. 675 (1986).

55. *Id.* at 683. A high school student gave a speech filled with sexual innuendos before an audience of around 600 fellow students at a school assembly. *Id.* at 677–78. The Court found that the school was empowered to punish the speech regardless of whether it had caused a substantial disruption. *Id.* at 685.

56. 484 U.S. 260 (1988).

57. *Id.* at 271. The Court found that the school had power to control the content of a school-sponsored, student-written newspaper, since the contents might reasonably be interpreted as being school-sanctioned. *Id.* at 273.

58. 551 U.S. 393 (2007).

59. *Id.* at 408–09. A high school student unfurled a banner reading "BONG HiTS 4 JESUS" at a school-sponsored rally just across the street from the school. *Id.* at 397. The Court found that the school had power to punish the speech, since it could be interpreted as supporting illegal drug use, and that schools have a duty to protect their students from the particular dangers of illegal drugs. *Id.* at 409–10.

60. *Id.* at 397.

61. Sternberg, *supra* note 53, at 22 ("When the lower courts have addressed off-campus student speech, it generally has involved off-campus student speech that somehow finds its way onto campus.").

with almost universal deference to the school district."[62] While there is not an explicit rule affording schools greater deference when faced with violent speech, several federal circuit courts have interpreted *Morse* (relying in part on Justice Alito's concurring opinion regarding threats to safety[63]) to allow censorship where speech even tenuously implicates safety concerns, even where such speech does not satisfy the *Tinker* standard.[64]

Widespread use of the Internet has ushered in a new set of student speech problems not addressed or contemplated by the Supreme Court's precedent,[65] which are also ill-suited to the *Tinker* framework. The ease with which students can share their message to large audiences via the Internet increases the potential for significant impact and disruption.[66] At the same time, student Internet use blurs the line distinguishing when speech is on- or off-campus. If a student can disrupt campus activities from a cellphone in their bedroom, should the school be able to address and possibly punish that activity? This becomes particularly troubling in the context of cyber-bullying, which on occasion has driven students to suicide.[67] While some states have passed legislation allowing schools to address cyber-bullying, many of these laws do not provide

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62. *Id.* at 23 (citing *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2d Cir. 2007); *D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011)).

63. *Morse*, 551 U.S. at 425 (Alito, J., concurring) ("[I]llegal drug use presents a grave and in many ways unique threat to the physical safety of students. I therefore conclude that public schools may ban speech advocating illegal drug use.").

64. William C. Nevin, *Neither* Tinker*, Nor* Hazelwood*, Nor* Fraser*, Nor* Morse*: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL OF RTS. J. 785, 804–05 (2015) ("[Alito's] mere mention of school safety as an issue for consideration resulted in the United States Court of Appeal for the Eleventh, Second, and Fifth Circuits broadly interpreting *Morse* to support censorship when safety might be a concern.") (citing Angie Fox, *Waiting to Exhale: How "Bong Hits 4 Jesus" Reduces Breathing Space for Student Speakers & Alters Constitutional Limits on Schools' Disciplinary Actions Against Student Threats in Light of* Morse v. Frederick, 25 GA. ST. U. L. REV. 435, 453 (2008)).

65. *See, e.g.*, James C. Hanks, *Recent Developments in Education Law: Regulating Student Speech in Cyberspace*, 43 URB. LAW 723, 731–42 (2011) (reviewing cases that address public school authority over students' cyber speech).

66. Harriet A. Hader, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563, 1565–66 (2009) ("Messages and pictures on the Internet are potentially more disruptive than messages sent by traditional media because the Internet distributes this information to a huge audience in a short amount of time."); *see also* Joe Dryden, *It's a Matter of Life and Death: Judicial Support for School Authority Over Off-Campus Student Cyber Bullying and Harassment*, 33 U. LA VERNE L. REV. 171, 172 (2012) (recounting the story of a boy who killed himself in 2005 after being cyber bullied).

67. Hader, *supra* note 66, at 1565–66.

students or administrators clear guidance on the extent of school authority over off-campus speech.[68]

The uncertainty regarding the extent of school authority over cyber-bullying, threatening student speech online, and other problematic forms of off-campus, online speech has also resulted in "a lack of fair notice to students" and "potential chilling of student Internet use and expression . . . ."[69] Thus, courts are caught in an uneasy balancing act: acknowledging schools' compelling interest in maintaining the safety and security of their students and personnel while simultaneously trying to preserve First Amendment principles. The current ambiguity has also led to a "plethora of litigation."[70]

Recognizing the uncertainty of *Tinker*'s reach and application, some courts have attempted to overcome this difficulty by adding a pre-*Tinker* analysis jurisdictional test. For example, in *J.S. v. Bethlehem Area School District*,[71] the Pennsylvania Supreme Court considered whether there was a "sufficient nexus" between the speech and campus before applying *Tinker*.[72] Other courts have first asked whether it was "foreseeable" that off-campus, online speech would reach the campus, and then asked whether the speech would substantially disrupt school activities under *Tinker*.[73] Still others, including the Fifth Circuit, have considered whether the speaker intended for the speech to arrive at campus.[74] The majority of courts, however, have applied the *Tinker* standard without a threshold test considering the speech's origin.[75]

Although the Fifth Circuit's August 2015 en banc decision carefully considered existing student speech precedent, the holding was marked by the characteristic ambiguity of student speech decisions. The court stated, "in holding [that] *Tinker* applies to the off-campus speech

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68. *Id.* at 1566–67 (citing, as examples of anti-cyber bullying statutes: OR. REV. STAT. ANN. § 339.351–.364 (2007); WASH. REV. CODE ANN. § 28A.300.285 (West 1961 & Supp. 2009)).

69. *Id.* at 1568.

70. *Id.* Because of this ambiguity, "schools disciplining such speech often have a compelling argument that no 'clearly established' law existed to guide their policy." *Id.*

71. 807 A.2d 847 (Pa. 2002).

72. *Id.* at 865.

73. Hader, *supra* note 66, at 1581 (discussing *Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 35 (2d Cir. 2007), in which the Second Circuit held that a student's First Amendment claims were properly dismissed because it was "reasonably foreseeable" that his Internet speech regarding violence against his teacher would cause a disruption at his school).

74. *See, e.g.*, *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004) (holding that the school could not punish a student for his drawing that was stored at home and was not intended to reach school).

75. Hader, *supra* note 66, at 1580 ("[T]he majority of courts have applied the *Tinker* analysis without considering where the online speech in controversy originated or how it reached campus."); *see also supra* Section II.A.1.

in this instance, because such determinations are heavily influenced by the facts in each matter, we decline: to adopt any rigid standard in this instance; or to adopt or reject approaches advocated by other circuits."[76] This Note argues that the Fifth Circuit missed the opportunity to adopt a rule that would have been instructive for fellow circuit courts.

II. BALANCING FIRST AMENDMENT PROTECTIONS WITH SCHOOLS' INTEREST IN SAFETY

Bell demonstrates the complicated overlay of student speech precedent and the need to establish a clear, uniform standard. Where off-campus speech potentially implicates gun violence, the need for a clear standard becomes even more pressing. This Note considers the factors at play in *Bell*, first addressing the threshold issue of jurisdiction and the application of *Tinker* to off-campus speech. This Note argues that the *Tinker* standard as applied in *Bell* is problematic in two essential ways: first, it is unclear what speech schools have authority to punish or enjoin; and, second, it is unclear what kinds of facts and circumstances are sufficient to satisfy the *Tinker* substantial disruption standard.

A refined version of the test that Judge Jolly proposed in his *Bell* concurrence, which includes a rigorous threshold test and is narrowly tailored to address violent speech, strikes an appropriate and workable balance. The Jolly standard declines to force the *Tinker* standard on circumstances drastically different from those under which it was established. It proposes instead that off-campus speech be subject to punishment where it conveys a threat against school staff or students, where that threat is "connected to the school environment," and where the threat is communicated to the school or its community members.[77] In order to be a workable standard, however, the Jolly test must be refined to clarify when speech is an "actual threat." This Note considers whether the public concern aspect of Bell's speech should trump school authority and concludes that it should not. Finally, this Note considers how the refined Jolly test would have applied to *Bell*.

A. Threshold Tests and Analysis of Off-Campus Student Speech

Tinker did not address student speech that takes place off-campus.[78] However, some courts have applied the *Tinker* substantial

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

77. *Id.* at 401 (Jolly, J., concurring).

78. Some courts and academics have argued that one isolated phrase used in *Tinker*, "in class or out of it," extends *Tinker*'s reach off-campus. However, read in its

disruption standard to student speech without considering where the speech originated.[79] Doing so without any threshold test of jurisdiction results in an indeterminate expansion of school authority over otherwise protected speech. That is, without a threshold test, *any* off-campus speech that disrupts school activities, no matter how important or how harmless, is subject to school authority. As a result, some courts, including the *Bell* en banc majority, have considered threshold tests specifying conditions that must be met before applying *Tinker* to off-campus speech. Unfortunately, the *Bell* court declined to adopt clear guidance on school authority over off-campus speech, thereby perpetuating the ambiguity. A simpler and more practical approach to off-campus speech would be to forego the *Tinker* analysis entirely and establish a rule akin to that proposed in Judge Jolly's concurrence.

1. THE MAJORITY'S THRESHOLD AND *TINKER* ANALYSIS

The en banc majority began its analysis by asking what, if any, off-campus speech schools may restrict, acknowledging that Fifth Circuit's precedent on the issue is "less developed."[80] The court looked first to its own precedent regarding off-campus speech, most notably in *Shanley v. Northeast Independent School District*[81] and *Porter v. Ascension Parish School Board*.[82] In *Shanley*, the court considered whether a high school could punish students for creating an "underground" newspaper, written and distributed off campus and outside school hours, with a few minimal connections to campus.[83] The court applied the *Tinker* standard to the off-campus speech, finding that it did "not even approach the 'material and substantial' disruption" requirement of the *Tinker* standard.[84]

The more recent *Porter* decision considered whether a school could punish a student who drew a picture of the school under a violent

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context, this phrase more likely refers to speech that is on-campus, but outside of the classroom. *See contra*, Shannon M. Raley, *Tweaking* Tinker*: Redefining an Outdated Standard for the Internet Age*, 59 CLEV. ST. L. REV. 773, 787 (2011) (arguing that although federal courts have traditionally understood *Tinker* to apply to speech originating on-campus, *Tinker*'s express language makes it applicable to any speech, on or off campus, that disrupts the school environment).

79. *See, e.g.*, Daniel Marcus-Toll, Tinker *Gone Viral: Diverging Threshold Tests for Analyzing School Regulation of Off-Campus Digital Student Speech*, 82 FORDHAM L. REV. 3395, 3423 (2014) (citing *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (assuming *Tinker*'s applicability without a threshold test)).

80. *Bell*, 799 F.3d at 394.

81. 462 F.2d 960 (5th Cir. 1972).

82. 393 F.3d 608 (5th Cir. 2004).

83. *Shanley*, 462 F.2d at 964.

84. *Id.* at 970.

siege and then stashed it in a closet at home.[85] Two years later, the student's younger brother found the drawing on a sketchpad in the home closet and brought the sketchpad to school.[86] The court relied heavily on the fact that the student did not *intend* for his brother or anyone else to bring the drawing to school in finding both that the drawing was not a true threat and that the school could not punish the student for drawing the image.[87]

Together, these Fifth Circuit cases do not provide clear guidance on the threshold issue of when schools may punish off-campus speech, if ever. On one hand, *Shanley* applied *Tinker* to off-campus speech without a threshold test. *Porter*, on the other hand, acknowledged the difficulty of the threshold issue,[88] and then focused its inquiry on the speaker's intent and whether the speech was "directed at the campus."[89] Using this Fifth Circuit precedent as a base, the en banc majority held that *Tinker* applies to off-campus speech, at least in some circumstances.[90]

The en banc majority went on to acknowledge the attempts of various other courts to address the threshold issue. It cited to the Ninth Circuit's position that schools can take action against off-campus speech that both meets the *Tinker* standard and presents "an identifiable threat of school violence."[91] It cited the Fourth Circuit's position that a school may apply the *Tinker* standard to off-campus speech where a "sufficiently strong . . . nexus" exists between the speech and the school's "pedagogical interests."[92] The court also examined the similar positions of the Eighth and Second Circuits, which require a two-part test, asking first whether it is foreseeable that the speech will arrive at

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85. *Porter*, 393 F.3d at 611.

86. *Id.*

87. *Id.* at 617 ("Adam did not knowingly or intentionally communicate his drawing . . . ."); *id.* at 620 ("Because Adam's drawing was composed off-campus . . . and not purposefully taken by him to EAHS or publicized in a way certain to result in its appearance at EAHS, we have found that the drawing is protected by the First Amendment.").

88. *Id.* at 619–20.

89. *Id.* at 620.

90. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 394 (5th Cir. 2015).

91. *Id.* at 395 (citing *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013)). In *Wynar*, a high school student sent instant messages from home to his friends, bragging about his weapons, threatening violence against specific classmates, and threatening a massacre like the Virginia Tech shootings, even specifying a date for the shooting. *Wynar*, 728 F.3d at 1064–65. The Ninth Circuit upheld his suspension and subsequent expulsion. *Id.* at 1072.

92. *Bell*, 799 F.3d at 395; *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).

campus and then applying the *Tinker* framework.[93] Ultimately, the majority concluded:

> Accordingly, in the light of our court's precedent, we hold *Tinker* governs our analysis, as in this instance, when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher, even when such speech originated, and was disseminated, off-campus without the use of school resources.[94]

The majority follows up this statement by saying, despite its conclusion that *Tinker* applies, that it declines "to adopt or reject approaches advocated by other circuits."[95]

The *Bell* majority's acknowledgement of threshold considerations is important because it provides a layer of First Amendment protection over off-campus student speech. The end result of this analysis, however, highlights how the *Tinker* standard fails as a viable framework for off-campus speech. The standard the court articulated means that courts will continue to decide similar issues on an ad hoc basis, rather than under a clear and uniform standard.

The *Bell* court took pains to say that it was not relying on *ipse dixit* or creating a per se rule that speech threatening violence is a disruption.[96] But at times, it seemed to do just that. The majority wrote "[a]rguably, a student's threatening, harassing, and intimidating a teacher inherently portends a substantial disruption, making feasible a *per se* rule in that regard."[97] The court cited to a school district policy identifying "harassment, intimidation, or threatening other students and/or teachers as a severe disruption."[98] While the court acknowledged that merely saying an action is a disruption does not necessarily make it so, the court still argued that the policy "can be used as evidence supporting the reasonable forecast of a future substantial disruption."[99]

The court's *Tinker* analysis underscores a troubling trend: that "courts are likely to entertain the possibility of school violence as a disruption fulfilling the requirements of the *Tinker* standard even as this

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93. *Bell*, 799 F.3d at 395; *D.J.M. v. Hannibal Pub. Sch. Dist.*, 647 F.3d 754, 766 (8th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 48 (2d Cir. 2008).

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

95. *Id.*

96. *Id.* at 399.

97. *Id.* at 397 (emphasis in original). Although the court declined to create a per se rule at that time.

98. *Id.* at 399.

99. *Id.*

violates the essence of the . . . [*Tinker*] holding."[100] That is, by finding that some speech is per se disruptive, the court shirks the *Tinker* standard while purporting to satisfy it. Under *Tinker*, school administrators must provide particular facts to evidence or forecast a substantial disruption, beyond "undifferentiated fear or apprehension of a disturbance."[101] To say that a student's speech is disruptive, without providing evidence of a disruption in the particular circumstance, is dangerously close to "undifferentiated fear or apprehension."[102]

The *Bell* court fell into such circular analysis, despite attempting not to do so. Rather than relying on specific events at Itawamba High School, the court first circled back to several of the threshold issues that gave the school authority in the first place: Bell's intent in transmitting the speech to the school community and the fact that the speech pertained to school officials.[103] The court then focused on the nature of Bell's speech, characterizing it as "threatening, intimidating, and harassing language."[104] Finally, the court argued that, especially in light of the current prevalence of school violence, threatening and intimidating speech necessarily disrupts the teaching process.[105] The dissent emphatically criticized this analysis, arguing that the evidence "simply does not support the conclusion, as required by *Tinker*, that Bell's song substantially disrupted school activities or that school officials reasonably could have forecasted that it would do so."[106]

At the heart of this confusion is the question *Tinker* left open: what is a substantial disruption? And even less certain: when can one be forecasted? Courts and legal scholars alike have acknowledged the ambiguity of the *Tinker* standard[107] and called for the "substantial disruption" framework to be better defined.[108] *Tinker* itself provides only a negative of the standard, since the Court held that the black armbands were an example what a substantial disruption is *not*.[109] The persisting ambiguity is particularly troubling when courts apply *Tinker*

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100. Nevin, *supra* note 64, at 815.

101. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969).

102. *Id.* ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.").

103. *Bell*, 799 F.3d at 398–99.

104. *Id.* at 398.

105. *Id.* at 399–400.

106. *Id.* at 405 (Dennis, J., dissenting).

107. The *Bell* majority writes that since the time *Tinker* was decided, "courts have been required to define its scope." *Id.* at 393.

108. *See, e.g.*, Raley, *supra* note 78, at 795 (recommending the addition of a factors test to determine when a substantial disruption has taken place and elimination of the on-campus requirement).

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

to off-campus speech. As Judge James Dennis wrote in his *Bell* dissent, "the *Tinker* framework is far too indeterminate a standard to adequately protect the First Amendment right of students . . . to engage in expressive activities outside of school . . . ."[110] If the *Tinker* standard is so vague that it leads to inconsistent regulation of on-campus speech, schools certainly should not be granted such broad discretion over off-campus expression.

The *Tinker* analysis in *Bell* poses two essential problems. First, there is the jurisdictional issue. Although the majority noted that five of the six circuits that have addressed the issue have applied *Tinker* to off-campus speech,[111] the constitutional implications of those holdings are not settled.[112] Second, there is the problem of applying the *Tinker* standard itself. Under *Tinker*, school officials must be able to provide "evidence that it is necessary to avoid material and substantial disruption with schoolwork or discipline,"[113] beyond the "mere desire to avoid the discomfort and unpleasantness . . . [of] an unpopular viewpoint."[114] This requirement has proved to be a moving target.

The evidence that the court provided to demonstrate a "material and substantial disruption" at Itawamba High School following the rap is slim. For example, the only time the rap was played at school was when Coach W. requested that a student play the song on a cellphone.[115] The coaches both testified that as a result of the rap they were careful to avoid any appearance of impropriety with female students—likely not a significant disruption to schoolwork or discipline.[116] Nor did the evidence forecast that a future substantial disruption was brewing. Indeed, Coach R. testified that students' awareness of the incident "had not been about Bell's rap but rather

110. *Bell*, 799 F.3d at 405 (Dennis, J., dissenting).

111. *Id.* at 393.

112. For example, in the en banc rehearing of *J.S. ex rel. Snyder v. Blue Mountain School District*, five Third Circuit judges concurred in the result of the majority opinion, but argued that *Tinker* could not be applied to off-campus speech without "ominous implications." 650 F.3d 915, 939 (3d Cir. 2011) (Smith, J., concurring). Rather, "the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large." *Id.* at 936 (Smith, J., concurring). In that case, a middle schooler made a MySpace profile mocking her school principal and using adult and explicit language. *Id.* at 920. The majority held that because there had been no substantial disruption at school, the student's First Amendment rights had been violated. *Id.* at 925.

113. *Tinker*, 393 U.S. at 511.

114. *Id.* at 509.

115. *Bell*, 799 F.3d at 430 (Dennis, J., dissenting).

116. *Id.* at 430 (Dennis, J., dissenting).

about his suspension . . . ."[117] However, one of the coaches did testify that he felt "scared" for his safety because of the rap.[118]

These analytical difficulties with both the majority's threshold test and the *Tinker* standard itself support adoption of a different standard in this and similar cases. Courts face the unenviable task of protecting the safety of the school environment without eroding First Amendment rights. *Bell* and similar cases are better decided under an entirely different standard, such as the standard Judge Jolly proposed in his concurrence.

2. JUDGE JOLLY'S PROPOSED TEST AS AN ANSWER TO THE MAJORITY'S SHORTCOMINGS

Judge Jolly's opinion, concurring in the result, acknowledged the reality that the majority declined to address: *Tinker* is not a viable framework for off-campus speech. First, he stated, older student speech cases are useful for "block building, but only block building . . . ."[119] The facts, circumstances, and issues of *Tinker* bear very little resemblance to *Bell*. Rather than "slavish appli[cation]"[120] of *Tinker*, Judge Jolly proposed the following standard:

> Student speech is unprotected by the First Amendment and is subject to school discipline when that speech contains an actual threat to kill or physically harm personnel and/or students of the school; which actual threat is connected to the school environment; and which actual threat is communicated to the school, or its students, or its personnel.[121]

Judge Jolly's proposed standard better defines when a school can act, without triggering the majority's difficult and strained analysis. His standard eliminates the *Tinker* charade regarding off-campus speech. He articulated the groundwork for a standard that acknowledges the majority's legitimate concerns. He laid out specific elements:

1. The speech must be an "actual threat to kill or physically harm personnel and/or students of the school;"

2. The threat must be "connected to the school environment;" and

3. "Must be communicated to the school, its students, or its personnel."

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117. *Id.* (Dennis, J., dissenting).

118. *Id.* at 388.

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

120. *Id.* at 401 (Jolly, J., concurring).

121. *Id.* (Jolly, J., concurring).

However, the first prong of Judge Jolly's standard needs to be clarified in order to be an effective tool. Primarily, what is an "actual threat?" Is it a reference to the "true threat" standard introduced in *Watts v. United States*?[122] If so, it risks redundancy, since true threats are not protected speech, regardless of who the speaker is.[123] In addition, the true threat standard has itself been marked by ambiguity: namely what mental state, if any, is required for speech to be considered a true threat.[124] In its recent *Elonis v. United States*[125] opinion, the Supreme Court held that a true threat requires a culpable mental state beyond negligence, although it declined to decide whether a reckless mental state would be sufficient.[126] In order to be an effective tool, the "actual threat" standard would have to be a lower threshold than a "true threat," otherwise the speech would be appropriately addressed by law enforcement, not schools. A slightly lower standard would give administrators discretion to act without immediately involving police. In considering whether the First Amendment allows such regulation, the Supreme Court's holding in *Morse* is instructive, as discussed below.[127]

One potential answer to the "actual threat" question is to ask whether a reasonable teacher or administrator would consider the speech to be an actual threat against school members' safety.[128] Although the Court rejected the reasonable person test regarding threatening speech in *Elonis*, it did so in the context of a criminal case, noting that the reasonable person test is "a familiar feature of tort law" but is inconsistent with the requirements of criminal law.[129] The risks of subjecting a student to school punishment, while significant, are much less than the criminal liability (and bodily freedom) at stake in criminal cases. A reasonable administrator test is, admittedly, not perfect. It might reintroduce some of the ambiguity that comes with the *Tinker*

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122. *Watts v. United States*, 394 U.S. 705 (1969).

123. *See, e.g.*, Mary Margaret Roark, Elonis v. United States*: The Doctrine of True Threats: Protecting Our Ever-Shrinking First Amendment*, 15 U. PITT. J. TECH. L. & POL'Y 197, 197 (2015).

124. *Id.* at 210.

125. 135 S. Ct. 2001 (2015). Unlike *Bell*, however, *Elonis* was a criminal case dealing with the necessary mental state for transmitting threats under a federal criminal statute. *Id.* at 2002.

126. *Id.* at 2012–13.

127. *See infra* Part II.A.3.

128. This is the approach the en banc majority took in discussing whether *Tinker* applies. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 ("*Tinker* governs our analysis . . . when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher . . . .").

129. *Elonis*, 135 S. Ct. at 2011 (citing *Staples v. United States*, 511 U.S. 600, 606–07 (1994)).

framework because the varied facts of off-campus, online student speech cases make it difficult to create a bright line test for what qualifies as an "actual threat." However, because it would both come as part of the three-prong test, each of which must be independently met, and would apply only to a discrete category of speech, it would offer far greater protection than blanket application of *Tinker* to off-campus, online speech. Thus, a clarified Jolly test would include the three Jolly factors, and also ask whether a reasonable administrator would interpret the speech as an "actual threat" as part of the first factor.

The second and third prongs, requiring that the "threat be connected to the school environment" and that it be "communicated to the school," incorporate the sufficient nexus threshold test used by other courts. The Pennsylvania Supreme Court[130] and the Fourth Circuit,[131] among others, have articulated a requirement that off-campus speech bear a sufficient nexus to the school campus. In finding a sufficient nexus between off-campus speech and the school in *Bethlehem*, the Pennsylvania Supreme Court considered that the content of the speech (a website) was directed at the school, that it was accessed at the school, and that the student made attempts to bring it to other students' attention.[132] In *Kowalski*, the Fourth Circuit found a sufficient nexus where the speech interfered with the rights of others at the school, was specifically directed at a classmate, and "made its way to the school in a meaningful way."[133]

By requiring that each prong of a multiple-prong test be met, the Jolly test empowers schools to act where necessary, while providing sufficient protection to students' rights. If one prong fails, the speech is outside schools' authority to punish. Although it does not do so explicitly, it incorporates many of the considerations of the alternative sufficient nexus test that Judge Graves proposed in his *Bell* dissent.

Judge Graves proposed a standard under which schools can punish off-campus speech where it (1) satisfies the *Tinker* substantial disruption test, and (2) "demonstrates a sufficient nexus between the speech and the school's pedagogical interests . . . ."[134] To determine whether the second prong is met, Judge Graves proposed a factors test, including: whether it is reasonably foreseeable that the speech would reach the school; whether "the school's interest as a trustee of student well-being outweighs the interest of respecting the traditional parental role in

130. *J.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).

131. *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565, 573 (4th Cir. 2011).

132. *Bethlehem Area Sch. Dist.*, 807 A.2d at 665.

133. *Kowalski*, 652 F.3d at 573–74.

134. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 436 (5th Cir. 2015) (Graves, J., dissenting).

disciplining a student for off-campus speech;" and whether the content of the speech should be afforded heightened protection.[135]

One particular benefit of the Graves test—absent from the Jolly test—is that it gives more consideration to the content of the speech itself. Judge Graves would have courts consider whether the student's speech is "entitled to heightened protection."[136] This approach would allow the courts greater flexibility when faced with speech like Bell's, which both invokes a public concern and raises concerns about potential school violence. On the other hand, school administrators would have to undertake another layer of analysis (is the content of the student's speech protected?) in deciding whether to punish it, potentially creating greater confusion. Ultimately, the Graves standard adds to, rather than reworks, the hazy *Tinker* substantial disruption standard.[137] While Judge Graves' test offers some additional insight, a clarified version of Judge Jolly's proposed test more effectively protects against these concerns.

The Jolly test presents a more workable standard while also satisfying the primary concerns of the Graves test. It narrows school authority over off-campus speech by requiring that the speech both be connected to the school environment and be communicated to members of the school community. It also satisfies the second requirement of a "sufficient nexus . . . [with] the school's pedagogical interest"[138] by applying narrowly to threats of school violence. Yet it does not require applying the illusive "substantial disruption" framework to off-campus speech.

The primary difficulty, then, is for schools and courts to determine when student speech is "threatening" and when the school has authority to punish such speech without running afoul of the First Amendment. None of the Supreme Court's precedent specifically addresses hostile, on- or off-campus speech toward a school authority figure.[139] However, courts have consistently upheld punishment "even in cases where the threatening language about a school official cannot be taken seriously enough to trigger the true threat doctrine," particularly when that speech occurs on campus.[140] While courts have used varying rationales

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135. *Id.* at 436 (Graves, J., dissenting).

136. *Id.* (Graves, J., dissenting).

137. The test requires first that the school "provide evidence of facts that might reasonably have led school authorities to forecast a substantial disruption OR evidence of an actual substantial disruption . . . ." *Id.* (Graves, J., dissenting).

138. *Id.* (Graves, J., dissenting).

139. Emily Gold Waldman, *Badmouthing Authority: Hostile Speech About School Officials and the Limits of School Restrictions*, 19 WM. & MARY BILL OF RTS. J. 591, 593–94, 617 (2011).

140. *Id.* at 601. Courts seem similarly inclined regarding off-campus threats: "Just as courts are unsympathetic toward on-campus threatening speech about school

for these findings, the Supreme Court's precedent taken together indirectly supports the position. In particular, the Court's reasoning in *Morse* may be more relevant than *Tinker*.

3. THE PROTECTIVE PRINCIPLE UNDERLYING STUDENT SPEECH PRECEDENT

A common underlying theme in *Tinker* and subsequent student speech cases is protecting "other students and/or . . . the educational environment as a whole."[141] The *Tinker* substantial disruption test is based on that principle, and each subsequent Supreme Court student speech case has drawn on it, even when choosing not to apply the substantial disruption framework.[142] Among the four Supreme Court student speech cases, the protective principle is most apparent in *Morse v. Frederick*. The Court's position in *Morse* lends additional support to a refined Jolly test.

In *Morse*, an Alaska high school allowed its students to participate in an Olympic Torch Rally that passed through the street in front of the school during school hours.[143] As television cameras and crews approached, a student unfurled a large banner with the words "BONG HiTS 4 JESUS."[144] The Court held that, in suspending the student, the school had not violated his First Amendment rights, regardless of whether the banner caused a disruption under *Tinker*.[145] The Court relied on the *Tinker* principle that students' First Amendment rights must be "applied in light of the special characteristics of the school environment."[146] Specifically, the Court found that illicit drugs pose a special danger to students, and that schools have a duty to protect their students against the "dangers of drug abuse."[147] Even though the sign only indirectly supported using illegal drugs and was technically off-campus (though just across the street and at a school event), the Court found that it was closely tied enough to warrant school action.[148]

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officials, so too are they unsympathetic to such speech when it originates off campus." *Id.* at 620.

141. *Id.* at 596.

142. *Id.*

143. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

144. *Id.*

145. *Id.*

146. *Id.* at 403 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

147. *Id.* at 408.

148. *Id.* at 401. "[T]he phrase could be viewed as celebrating drug use . . . and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion." *Id.* at 402.

Some courts, including the Fifth Circuit in *Ponce v. Socorro Independent School District*,[149] have interpreted *Morse* to apply to threats of violence.[150] However, the *Bell* en banc majority, following a footnote in *Ponce*,[151] determined that threats against individual teachers are distinct from threats of "Columbine-style" shootings and therefore do not fall within the reasoning of *Morse*.[152] This draws an arbitrary distinction—holding that students' threats of violence against individual school officials are so much less harmful than threats against their peers that they do not trigger similar protection. It seems unlikely that school gun violence against an adult would be significantly less harmful to the environment than violence against fellow students.

Moreover, it is hard to imagine an issue that more tragically implicates the protective duties of school officials and the "special characteristics of the school environment" than school shootings, against both students and teachers. In the sixteen years since Columbine, school shootings have captured the public's attention, evoking all-too-frequent images of horror such as the tragedies at Virginia Tech and Sandy Hook. This specter loomed over *Bell* as the case made its way through the federal courts. In his dissent from the December 2014 panel decision, Judge Barksdale wrote: "[i]n the two years since the Sandy Hook shooting, in the United States there have been 93 school shootings . . . and 40 major school shootings . . . ."[153] Against this backdrop, courts are loath to tell schools they cannot respond to potentially threatening speech, even where the speech might not satisfy the true threat standard. Threats of gun violence against teachers would undoubtedly interrupt the classroom in a seriously destructive way.

Justice Alito's concurrence in *Morse*, joined by Justice Kennedy, addressed only speech that advocates illegal drug use.[154] Indeed, he began his concurrence by stating:

> I join the opinion of the Court on the understanding that (1) it goes no further than to hold that a public school may restrict

149. 508 F.3d 765 (5th Cir. 2007).

150. *Id.* at 766.

151. *Id.* at 771 n.2 ("[T]hreats of violence to individual teachers were analyzed under *Tinker*. Such threats, because they are relatively discrete in scope and directed at adults, do not amount to the heightened level of harm that was the focus both of the majority opinion and Justice Alito's concurring opinion in *Morse*.").

152. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 392 (5th Cir. 2015) ("[V]iolence forecast by a student against a teacher does not reach the level of the above-described exceptions necessitating divergence from *Tinker*'s general rule.").

153. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 305 (5th Cir. 2014) (Barksdale, J., dissenting), *rev'd en banc*, 799 F.3d 379 (5th Cir. 2015).

154. *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring).

> speech that a reasonable observer would interpret as advocating illegal drug use and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue . . . .[155]

However, much of his reasoning and language seems applicable to student speech that advocates or incites violence.[156] For example, he writes, "due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence."[157] His logic falls closely in line with the Jolly position that schools should be empowered to address speech that implicates school violence, even when the First Amendment might protect the same speech in other circumstances.[158] Justice Alito's reasoning is compatible with the Jolly test in that it expresses particular concern for student safety and provides that the substantial disruption framework need not be met in all circumstances. However, he also expresses particular concern that speech commenting on social issues not be censored.

Although the ability to punish speech that threatens violence against students, teachers, or personnel is not explicitly stated in *Morse*, the opinion emphasizes the importance of student safety and wellbeing. In addition, *Tinker*'s "second prong" requires that speech not interfere with the rights of others to be secure in the school environment.[159] These considerations support the underlying theme throughout much of student speech precedent: promoting safety and security in schools. Although balancing off-campus First Amendment rights against "a student or teacher's right to feel safe and secure while at school" is undoubtedly difficult,[160] the Jolly test, with further clarification regarding the meaning of "threatening," would strike an appropriate balance.

B. Competing Principles: Speech Regarding a Public Concern vs. the Compelling Interest in Student Safety

In addition to the ambiguity surrounding the appropriate standard, the court must grapple with the other compelling issues at play in this case. *Bell* is a particularly interesting case in that the speech at issue was not merely controversial off-campus speech, but also specifically

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155. *Id.* (Alito, J., concurring).

156. *Id.* at 424–25 (Alito, J., concurring).

157. *Id.* at 425 (Alito, J., concurring).

158. *See supra* Part II.A.2.

159. Jon G. Crawford, *Student Rights: When Student Off-Campus Speech Permeates the Schoolhouse Gates: Are There Limits to Tinker's Reach?*, 45 URB. LAW 235, 236 (2013).

160. *Id.* at 249.

dealt with a matter of public concern. At the same time, the rap seemed to make serious threats against individual teachers, which is sufficient to satisfy Judge Jolly's proposed standard and a reasonable administrator test concerning an "actual" threat. The question is, then, does the school board lack authority to punish Bell because his speech invokes a public concern?

1. THE PUBLIC CONCERN ASPECT OF BELL'S SPEECH

Speech regarding matters of public concern is "at the heart of First Amendment protection" and is entitled to the highest level of protection.[161] Speech addresses public concerns "when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'"[162] In order to determine whether speech meets this standard, the court must consider the "content, form, and context" of the speech.[163]

In his dissent, Judge Dennis convincingly argued that the majority committed a fundamental error by failing to address Bell's claim that his speech was "concerning a matter of public concern."[164] There is no dispute that Bell wrote the rap at least in part in response to his concerns about adult coaches sexually harassing minor students.[165] He posted the rap in an online forum precisely because he hoped to spread awareness of the events.[166] That some might consider Bell's lyrics a crude or offensive form of speech on a matter of public concern does not change its protected status.[167] *Tinker* itself was centered on protected political speech dealing with the controversial public concern of the day: the Vietnam War.[168] Judge Dennis stated that by ignoring this aspect of Bell's speech, the majority "creates a precedent that effectively inoculates school officials against off-campus criticism by students."[169]

Moreover, the form of the speech, a rap song, strengthens the position that it addresses a matter of public concern. As Judge Dennis

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161. Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 1 (1990) (quoting *First Nat'l Bank of Bos. v. Belotti*, 435 U.S. 765, 776 (1978)).

162. *Snyder v. Phelps*, 562 U.S. 443, 444 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983)).

163. *Id.* (quoting *Connick*, 461 U.S. at 147).

164. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 406 (5th Cir. 2015) (Dennis, J., dissenting).

165. *Id.* at 385–86.

166. *Id.* at 410 (Dennis, J., dissenting).

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

168. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969).

169. *Bell*, 799 F.3d at 412 (Dennis, J., dissenting).

stated, "[M]usic, like other art forms, has historically functioned as a mechanism to raise awareness of contemporary social issues."[170] While recognized by scholars as a political form of speech, rap music has been subject to disparate scrutiny under the law when compared with other types of music with similarly controversial lyrics.[171] One commentator's analysis regarding rap's historically disfavored status remains accurate even twenty years later:

> [R]ap remains an inarguable example of the very sort of political speech protected by the First Amendment. Controversial rappers are some of the most ardently political musicians. Many drive home a message of non-violence, social justice and racial equality. Admittedly, at its extreme, rap seems consumed with violence, but the First Amendment surely protects violent speech.[172]

Against this backdrop, and given the clear connection to a matter of public concern, the decision to punish Bell's speech becomes weightier still.

In December 2015, an array of rap artists signed onto an amicus brief supporting Bell.[173] In the brief, stars including T.I., Big Boi, and Michael Render (Killer Mike) lent their support to Bell's First Amendment claim, stating that "the Fifth Circuit's decision effectively denies First Amendment protections to rap music . . . ."[174] The brief argued that by reading Bell's lyrics as a threat of violence, the en banc majority "ignores rap's artistic conventions, thereby negating it as an art form, and perpetuat[ing] enduring stereotypes about the inherent criminality of young men of color, the primary producers of rap

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170. *Id.* at 409.

171. Barry Glassner, *Rap Music and the Culture of Fear*, 21 ENT. & SPORTS L. 1, 17–18 (2003). The discrepancy in treatment also has a troubling racial element. Glassner points to multiple examples of white musicians of other genres describing extreme violence, without the social and legal repercussions faced by black rappers who describe similar violence. *Id.* at 18.

172. Jeffrey B. Kahan, *Bach, Beethoven and the (Home) Boys: Censoring Violent Rap Music in America*, 66 S. CAL. L. REV. 2583, 2589 (1993) (footnotes omitted).

173. Adam Liptak, *Hip-Hop Stars Supports Rapper in First Amendment Case*, N.Y. TIMES (Dec. 20, 2015), http://www.nytimes.com/2015/12/21/us/politics/hip-hop-stars-support-mississippi-rapper-in-first-amendment-case.html?_r=0 [https://perma.cc/S4QJ-3VUV]; *Rap Stars File a Supreme Court Brief*, N.Y. TIMES (Dec. 21, 2015), http://www.nytimes.com/interactive/2015/12/18/us/politics/document-taylor-bell-amicus.html [https://perma.cc/3HDA-VVVF].

174. Brief for Erik Nelson et al. as Amici Curiae Supporting Petitioner, at 3, *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016) (No. 15-666).

music."[175] The authors argued that rap is not only a sophisticated outlet for artistic expression, but also has a long history as "a potent tool for political engagement and mobilization," especially for marginalized communities.[176]

While such arguments convincingly highlight the social and political value of rap music broadly, they do not acknowledge the very specific situation that Bell's rap addressed: events at his school. Moreover, the record better supports a conclusion that Bell was punished based on the threatening implication of the song's lyrics, not the form of his song.[177] Contrary to Judge Dennis' statement that officials will be "inoculated" from student criticism, Bell was free to criticize and raise awareness on the issue–but he crossed the line by arguably threatening gun violence against the coaches. Types of rap that would otherwise be protected in the public at large may be appropriately limited in the context of student speech. If courts are willing to accept *Morse*-type limitations on student speech about drugs, it is reasonable to accept some restrictions on violent off-campus, online student speech–even in the context of a rap song.

2. BALANCING STUDENT ADVOCACY WITH THE "SPECIAL CIRCUMSTANCES" OF THE SCHOOL ENVIRONMENT

Even in light of the significant public concern aspect of Bell's speech, the school district should be able to retain authority over speech like Bell's, where each of the factors of the clarified Jolly test are met. In *Tinker*, the Court conceded that the purely political, non-aggressive speech at issue could have been subject to school punishment had it been disruptive.[178] Although Bell's rap took place away from school, it implicated the "special characteristics of the school environment" in a unique way that only a very limited subset of off-campus, online speech can. Bell graphically described gun violence against individual teachers, directly relating to on-campus events, and then disseminated the speech to both the public and members of the school community ("I'm going to hit you with my rueger . . . middle fingers up if you want to cap that n*****").[179] If the purely political speech in *Tinker* would have been subject to school regulation if it had been disruptive, surely there are

175. *Id.* at 6.

176. *Id.* at 11.

177. One of the school board committee members present at Bell's disciplinary hearing "told Bell that he 'really can rap' and explained there would have been no problem with the rap or its vulgar language if it had not included threats against school employees." *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 311 (5th Cir. 2014) (Barksdale, J., dissenting).

178. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969).

179. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 384 (5th Cir. 2015).

circumstances in which Bell's more objectionable speech might be subject to school regulation.

Courts should apply a clear, restrained test that grants schools authority to act regarding off-campus, on-line speech only when several threshold circumstances are met and where the need to act is particularly compelling, as with specific threats of gun violence. Although the dissent offers a thoughtful argument about the public concern aspect and inherent value of Bell's speech, it downplays the fact that courts accept some limitations on free speech in certain contexts, including schools.[180] Even though it originated off-campus, Bell's rap sufficiently implicated the "special characteristics of the school environment"[181] to warrant some limitation. To hold otherwise would cripple school officials' discretion. While limiting school authority to the physical boundaries of the school is appealing in its simplicity, it is not a viable limitation. For example, a school can punish a student who threatens to shoot a teacher in the hallway. Yet if schools could never reach off-campus speech under any circumstances, the student could make the same threat, with the same effect, on social media or just off campus with impunity.

To be clear, adopting the Jolly test would not grant school officials broad authority over off-campus speech. In his dissent, Judge Dennis wrote that the en banc opinion would "encourage school officials to silence student speakers . . . [if] they disagree with the content and form of their speech . . . ."[182] However by applying the Jolly test rather than the *Tinker* standard to off-campus speech, students would remain free to criticize their schools and their teachers, even in a crass and offensive way. What they would not be free to do is imply or threaten violence against teachers or fellow students on a forum that is communicated to the school community. Therefore, while most off-campus speech should not be subject to school jurisdiction, off-campus speech that directly implicates school safety and is communicated to the school should fall within the domain of school authority.

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180. *See, e.g.*, Karen M. Clemes, Lowell v. Poway Unified School District: *An Elementary Lesson Against Judicial Intervention in School Administrator Disciplinary Discretion*, 33 CAL. W.L. REV. 219, 233 (1997) ("To fulfill its unique educational mission and to maintain order, schools need to limit the individual speech of children in many instances."). *Tinker* itself signifies that "in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Morse*, 551 U.S. 393, 422 (2007) (Alito, J., concurring). Although these arguments refer specifically to in-school speech, the reasoning readily transfers to off-campus speech directed at the school that implicates school safety.

181. *Morse*, 551 U.S. at 394 (quoting *Tinker*, 393 U.S. at 506).

182. *Bell*, 799 F.3d at 405–06 (Dennis, J., dissenting).

C. The Clarified Jolly Test's Application to Bell

On November 19, 2015, Bell petitioned the Supreme Court for certiorari.[183] The Court denied certiorari on February 29, 2016.[184] However, if the Court chooses to take another off-campus student speech case, it will have the opportunity to clarify the appropriate standard for determining when and if schools can punish off-campus, online speech. By adopting the Jolly test or a similar standard, the Court could provide a narrowly tailored ruling, while still offering important insight on the unresolved issues surrounding student speech.

First, by taking a speech case similar to *Bell*, the Court could shed light on the important threshold issue: do school officials ever have authority over off-campus speech? If so, do they only have authority when that speech satisfies the *Tinker* standard? Bell's speech clearly originated off-campus. It was recorded at a professional recording studio and posted to his personal Facebook page and on YouTube from his personal computer.[185] Yet it also clearly concerned people and events at his school and raised potential safety concerns.[186]

Rather than apply the *Tinker* standard to off-campus speech, the Court should apply a standard akin to the Jolly standard. The *Tinker* standard alone, without threshold inquiries, does not sufficiently protect students' right to off-campus expression.[187] Under that standard, for example, Itawamba County officials could have chosen to punish a thoughtful, entirely non-threatening song written about the incidents, if the song sufficiently disrupted school activities. Schools should, however, be able to enjoin off-campus speech only where the schools' interest (here, maintaining safety) outweighs the student's interest in expression[188]—an idea inherently reflected in the Jolly test. The interest in protecting school community members against violence, as was the case here, is the foremost example of that principle. Although the First Amendment surely protects Taylor Bell's right to criticize his teachers'

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183. Petition for a Writ of Certiorari, *Bell v. Itawamba Cty. Sch. Bd.*, 136 S. Ct. 1166 (2016) (No. 15-666).

184. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (Feb. 29, 2016) (No. 15-666).

185. *Bell v. Itawamba Cty. Sch. Bd.*, 774 F.3d 280, 282 (5th Cir. 2014).

186. *Id.* at 283.

187. *See supra* Part II.A.1.

188. *Cf.* Justin P. Markey, *Enough Tinkering with Students' Rights: The Need for an Enhanced First Amendment Standard to Protect Off-campus Student Internet Speech*, 36 CAP. U. L. REV. 129, 150–51 (2007) (suggesting that *Tinker* should apply to off-campus Internet speech that the student "intentionally or recklessly" distributes on campus, followed by a balancing test weighing the "competing interests of the school and the First Amendment rights of the student").

behavior, it need not tolerate his statement that his teachers are "going to get a pistol down [their] mouth."[189]

The refined Jolly test, or a similar test, is a good answer to these competing interests. Although the Court will not review *Bell*,[190] the facts of *Bell* provide an example of how the Jolly standard would apply. Under that standard, the Court would ask first if Bell's speech contained a threat against teachers or students at his school. Although it is unclear that Bell's rap would satisfy the true threat standard, given the multiple references to gun violence, it would likely pass a "reasonable administrator" test, finding it reasonable to interpret the rap as an actual threat.[191] Second, the Court would consider whether the rap was connected to the school environment. Since the rap directly discussed teachers and events at Bell's school, this prong is also satisfied.[192] Finally, under the Jolly standard, the Court would consider whether the rap was communicated "to the school, or its students, or its personnel."[193] Since it was distributed widely to both the public and a large number of Bell's classmates, Bell's rap also satisfies that requirement.[194]

Because the Jolly test only addresses threatening speech, it presumes that all other off-campus speech is protected. Yet it does not foreclose the Court from adopting a similar standard in other compelling circumstances—such as, perhaps, cyber-bullying. With this narrow exception, if off-campus speech caused a disruption on campus, that off-campus speech would remain protected. The school could choose to punish disruptive in-school behavior, but not protected off-campus speech.

The clarified Jolly standard resists being over-inclusive; it does not allow punishment or censorship of off-campus speech in the vast majority of situations.[195] Nor does it force school officials to wait and see if threats of violence will materialize into acts of violence. As the en banc majority noted, the "now-tragically common violence increases

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

190. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, 136 S. Ct. 1166 (Feb 29, 2016) (No. 15-666).

191. *See supra* Part II.A.2.

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

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

194. Although Bell stated that he did not know that the coaches would hear the rap, he acknowledged that by placing it on Facebook, he knew that other students would listen to it. He noted that "students all have Facebook." *Id.* at 386. Further, Bell "acknowledged several times . . . that he posted the recording to Facebook because he knew it would be viewed and heard by students." *Id.* at 385. Bell also reported that "at least 2,000 people contacted him about the rap recording in response to the Facebook and YouTube postings." *Bell*, 774 F.3d at 309.

195. *See supra* Part II.A.2.

the importance of clarifying the school's authority to react to potential threats before violence erupts."[196] When a student's speech implicates potential school violence, school officials should be held to a somewhat lesser standard than true threat, both to maximize school safety and to make it clear that threats of violence against school community members are not acceptable.[197] That may be by notifying the student's parents, or as in *Bell*, suspending the student. Undoubtedly such authority would not be a panacea for preventing school violence, but it would provide the school meaningful recourse without escalating to the level of police involvement.

CONCLUSION

Schools have the highest-stakes challenge: protecting the lives and wellbeing of children. Considering the proliferation of violence in schools,[198] administrators must take violent speech seriously. Yet the legal and administrative standards used to determine when schools can punish student speech are unacceptably vague.

Tinker left open the question of whether schools can punish speech that takes place off-campus.[199] This ambiguity is further complicated by the rise of social media and the Internet age, in which the average person has an unprecedented ability to spread their message widely and rapidly with little effort. The current ambiguous state of the law has created inconsistency across courts, failing both students and administrators. Neither students nor administrators have clear guidance about what speech can be censored or punished. The result is the potential chilling of student speech, potential liability for teachers and administrators, and potential second-guessing by teachers and administrators when faced with dangerous situations unfolding at their schools.

Courts should respond with the greatest level of clarity and uniformity possible. As Judge Jolly stated, "[j]udges can help to address these concerns by speaking clearly, succinctly and unequivocally."[200] Rather than adhering to a standard created decades ago for a situation that bears little resemblance to *Bell*, courts should follow Judge Jolly's factors tests. If a student's speech is (1) a threat

196. *Bell*, 799 F.3d at 393 (citing *Morse v. Frederick*, 551 U.S. 393, 408 (2007)).

197. *See supra* Part II.A.2.

198. Polly Mosendz, *Map: Every School Shooting in America Since 2013*, NEWSWEEK (Oct. 6, 2015, 5:31 PM), http://www.newsweek.com/list-school-shootings-america-2013-380535 [https://perma.cc/74JN-2NE8] (reporting 142 school shootings in the United States since 2013).

199. *See supra* Part I.B.

200. *Bell*, 799 F.3d at 401 (Jolly, J., concurring).

that would be considered an actual threat to harm personnel and/or students by a reasonable administrator; (2) "connected to the school environment;" and (3) communicated to the school community, it should be subject to school discipline.[201] The test is specific and rigorous enough to protect students' First Amendment rights and to empower school administrators to create a safe environment for both students and school personnel.

A Supreme Court decision on student speech would promote fair notice to students and teachers alike, create consistency across the federal circuits, and clarify decades of ambiguity. In light of the many developments since previous Supreme Court student speech cases, the area is in serious need of clarification—clarification provided by a refined version of Judge Jolly's test.

201. *Id.* (Jolly, J., concurring).