SCHOOLS, SPEECH, AND SMARTPHONES: ONLINE SPEECH AND THE EVOLUTION OF THE TINKER STANDARD

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ABSTRACT

Under the Supreme Court's holding in Tinker v. Des Moines Independent Community School District, *public schools may only restrict student speech where the speech is reasonably forecasted to cause a "substantial and material disruption." With online forums calling into question who may control speech and forecast its impact, the circuit courts have granted public schools broad authority to monitor, and punish, their students for online activity that occurs off-campus. The Supreme Court recently declined the opportunity to reverse this disturbing trend by denying certiorari for* Bell v. Itawamba County. *As a result, questions remain unanswered regarding students' right to free speech and how courts should address First Amendment cases in the digital realm.*

INTRODUCTION

Today's high school students often express themselves digitally, utilizing texts, Facebook, Tweets, and Tumblr to share their innermost thoughts and impressions.[1] One of the hallmarks of online speech is its ability to be quickly copied and disseminated, allowing an original thought to be perpetually shared and duplicated outside the control of the original speaker.

Circuit courts have struggled to apply First Amendment law to online speech. As a result, there has been a lack of uniformity in their application of the First Amendment to issues like occupational speech[2] and

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[1] Amanda Lenhart, *It Ain't Heavy, It's My Smartphone: American Teens & the Infiltration of Mobility into Their Computing Lives*, PEW RESEARCH CTR. (June 14, 2012), available at http://www.pewinternet.org/2012/06/14/it-aint-heavy-its-my-smartphone-american-teens-and-the-infiltration-of-mobility-into-their-computing-lives/.

[2] Speech uttered in a professional context, not as a personal expression. *See, e.g.*, Hines v. Alldredge, 783 F.3d 197, 201–02 (5th Cir. 2011) (cert. denied Nov. 30 2015) (holding that a content-neutral regulations of the veterinary practice that require a veterinarian "physically examine an animal . . . before treating it" does not violate the First Amendment").

online threats.[3] The Supreme Court has never addressed how online speech should be analyzed under the First Amendment, and has, at times, deliberately sidestepped the issue when presented directly.[4]

One of the most important questions is how public schools can regulate and punish the online speech of their students. The seminal case relating to this topic is *Tinker v. Des Moines Independent Community School District*[5], a 1969 case permitting schools to only punish speech which causes or leads the school to forecast a "material and substantial interference" at the school.[6] The years since *Tinker* have seen a number of other cases which chip away at *Tinker's* protections, as well as technological innovations that change the way students communicate. The ambiguity regarding *Tinker's* application to online speech has allowed public schools to use the "material and substantial interference" rule as a justification to invade their students' privacy and punish them for speech originating off-campus.

The Court had a chance to address this question in *Bell v. Itawamba County School Board*,[7] a Fifth Circuit case in which a student was punished for a song he recorded and uploaded off-campus, but denied certiorari.[8] With the Court now persisting on a course of declining to address online speech cases, circuit courts continue to advance competing views that erode the First Amendment rights of public school students.

I. THE EVOLVING *TINKER* STANDARD

Before *Tinker*, it was not clear whether First Amendment protections for public school students ended at the school door.[9] *Tinker*— which held that a public school could not punish students for wearing black armbands in protest of the Vietnam War— was a decisive victory for students, creating a "material and substantial interference" test that

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[3] *See Elonis*, 135 S.Ct.; U.S. v. Bagdasarian, 652 F.3d 1113 (9th Cir. 2011); Jackson v. Ladner, 626 F. App'x. 80 (5th Cir. 2015).

[4] *See, e.g.*, Elonis v. United States, 135 S.Ct. 2001, 2012 (2015) ("Given our disposition [reading a mens rea requirement of at least knowledge into the statute and holding that the defendant did not have the requisite mens rea under the statute], it is not necessary to consider any First Amendment issues.").

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

[6] *Id.* at 511.

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

[8] *See id.*

[9] Kristi L. Bowman, *The Civil Rights Roots of Tinker's Disruption Tests*, 58 AM. U. L. REV. 1129, 1130 (2009).

balanced the necessity of an orderly school environment with the rights and freedoms afforded to students by the Constitution.[10]

In considering what constitutes a "material and substantial interference," cases that came before the Court seemed to hinge less on an actual disruption to the schoolroom and more on the Court's own sense of decorum, or judgment calls on what students should and should not be exposed to.

In *Bethel School. District No. 403 v. Fraser*,[11] the Court held that a high school could punish a student who gave a "lewd" speech, incorporating sexual references and hip thrusting, at a school assembly.[12] It caused great amusement among most classmates, confusion among others, and fury and embarrassment on the part of the teachers.[13] While not beyond what one might encounter in the average high school hallway, the Court held that the speech could be punished, citing "bewilderment" shown by some students who did not fully understand the sexual innuendo as evidence of a substantial and material disruption.[14] This was the first time that student confusion, without evidence that such confusion caused further disruption, satisfied the *Tinker* standard.

The Court continued to broaden the right of schools to punish student speech in *Hazelwood School District v. Kuhlmeier*.[15] In *Hazelwood*, a school district deleted two pages from articles from an issue of the student-led newspaper.[16] These articles were about teen pregnancy and divorce, featuring interviews with unidentified students who had experience with such issues.[17] The principal feared these students (or their families) would be embarrassed when the articles were published, even though the students had consented to the interviews.[18] The majority noted this was not a case about tolerating speech, as in *Tinker*, but was rather a case about "promoting" speech (the school allowing the newspaper to be published would be seen as a promotion of the speech inside).[19] In this context, the Court seemed to focus on what was "appropriate" for the school environment, remarking that, "such frank talk was inappropriate in

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[10] *Tinker*, 393 U.S. at 511; Clay Weisenberger, *Constitution or Conformity: When the Shirt Hits the Fan in Public Schools*, 29 J.L. & EDUC. 51, 52–53 (2000).
[11] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[12] *Id.* at 685.
[13] *Id.* at 678.
[14] *Id.* at 683.
[15] Hazelwood Sch. Dist. v. Kuhlmeier, 108 U.S. 560, 562 (1988).
[16] *Id.* at 565.
[17] *Id.* at 565–66.
[18] *Id.*
[19] *Id.* at 569–70.

a school-sponsored publication . . . ."[20] Recognizing that this did not meet the *Tinker* standard, the Court held that *Tinker* need not be applied when said speech was being published under the school's name (here, as part of a school-sponsored publication).[21] A school may censor such content if such censorship is "reasonably related to legitimate pedagogical concerns."[22] There was, however, no concern evidenced that the newspaper publication would appear to have been written by the school, or even officially approved by the school before publication. It was presented as wholly the work of the students, and yet, because the school facilitated the speech by publishing the newspaper, the Court allowed censorship of speech without application of *Tinker*.

The Court's decision in *Morse v. Frederick*[23] is the closest the Court has come to determining whether off-campus speech is subject to *Tinker*.[24] The student in *Morse* held up a banner reading "Bong Hits 4 Jesus" while at a school-sponsored function.[25] Though this did not take place directly on school grounds, it was just outside the actual school, happened during school hours, and took place at a school event, making it virtually indistinguishable from in-school speech. The banner was held up in front of television cameras.[26] It undoubtedly caused embarrassment to the school, but it is less apparent that it caused a substantial and material disruption to the school environment. The Court, finding that the banner was a disruption, limited its holding to restricting student speech at a school event when that speech is reasonably viewed as promoting illegal drug use.[27] The Court's reasoning distilled down to a fear that the banner would undo the school's hard work in warning students about the dangers of drugs. The Court thought "peer pressure" was a leading cause of drug abuse by students,[28] and worried that allowing the banner to go unpunished would allow students to pressure their peers into using drugs. Such an argument fails to utilize any part of the *Tinker* analysis. Nowhere in the Court's analysis was a substantial and material disruption identified.

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[20] *Id*. at 572.
[21] *Id.* at 571.
[22] *Id*.
[23] Morse v. Frederick, 551 U.S. 393 (2007).
[24] In his dissent, Justice Stevens notes the off-campus nature of the speech. "It is also relevant that the display did not take place "on school premises," as the rule contemplates. While a separate district rule does make the policy applicable to "social events and class trips," Frederick might well have thought that the Olympic Torch Relay was neither a "social event" (for example, prom) nor a "class trip." *Id*. at 440 n.2 (Stevens, J., dissenting) (citations omitted).
[25] *Id.* at 397 (majority opinion).
[26] *Id.* at 399.
[27] *Id.* at 397.
[28] *Id*. at 408.

Instead, it found a long-term interest in preventing drug abuse—which may never have manifested itself while the listeners were students. This case punished the speech simply for its offensive nature, or more generously, for its potential long-term effects, rather than the actual or possible effect on the school environment.[29]

What is most concerning about these decisions is their passing consideration of the actual or projected impact of the speech at the school, instead focusing on the Court's subjective perception of the speech. What is shocking, offensive, or indecorous to courts may very likely be commonplace to high-school students, and what is commonplace is less likely to disrupt the school environment. Because judges and justices are far closer in age to the administrators, courts have tended to interpret speech similarly to teachers and administrators.[30] However, since *Tinker* hinges on student reactions, *Tinker* requires that student perceptions be considered. Because students are so acclimated to explicit or sexual language, they are much less likely to be "disrupted" with sexually explicit or profanity-laced speech.[31] The above cases have therefore twisted *Tinker* into a license to punish speech that is not materially disruptive, but merely offensive to judicial and administrative sensibilities.

In light of this erosion, *Tinker*'s application must be specifically examined in the context of online speech by the ultimate authority of the Supreme Court. The alternative is that *Tinker* will continue to be used as a one-size-fits-all justification by school administrators to censor student speech.

II. *TINKER* AND ONLINE SPEECH

Questions about a public school's right to punish online speech became a concern shortly after online forums for speech (e.g. Myspace, chat rooms, and digital hangouts) first began appearing online.[32] The question in such cases is whether a school has any right to punish off-

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[29] Further, the Court was clear that there was no other applicable First Amendment doctrine beside *Tinker* that could be applied in this case. *See id*. at 393 ("Frederick's argument that this is not a school speech case is rejected.").

[30] Mary-Rose Papandrea, *Student Speech Rights in the Digital Age*, 60 FLA. L. REV. 1027, 1092 (2008) ("[L]ower courts applying the *Tinker* standard have tended to give substantial deference to a school's determination that the challenged expressive activity was in fact substantially and materially disruptive.").

[31] *See, e.g.*, Anna-Brita Stenström, TRENDS IN TEENAGE TALK: CORPUS COMPILATION, ANALYSIS AND FINDINGS 78 (1996) ("Even the most obscene words do not seem to offend the teenagers.").

[32] *See* Marie L. Bittner, *Beyond the Schoolhouse Gate: Students' First Amendment Speech Rights in the Digital Age*, 86 CLEARING HOUSE 174 ,176 (2013).

campus speech—in short, whether *Tinker* should even apply to off-campus speech, regardless of its effect.

It was not until 2008 that any circuit addressed a case of a student punished for speech that originated off-campus.[33] Since then, four other circuits (totaling five) have considered the issue, advancing several different approaches on how to best determine when off-campus speech can be punished.[34] No circuit court has completely protected online speech from the schools. In fact, current approaches advocated by the circuit courts allow for all speech by teenagers enrolled in public schools to be considered "student speech," which may seriously infringe on student freedom of speech.

A. The "Foreseeability" Test

In *Doninger v. Niehoff*, the second circuit held that a high-school student could be punished for a blog post where she expressed frustration with one of her teachers.[35] The court recognized that the off-campus nature of the speech was problematic:

> "If Avery had distributed her electronic posting as a handbill on school grounds, this case would fall squarely within the Supreme Court's precedents recognizing that the nature of a student's First Amendment rights must be understood in light of the special characteristics of the school environment… [i]t is not clear, however, that [these precedents] appl[y] to off-campus speech."[36]

Despite this recognition, the court decided that *Tinker* was applicable, as school discipline is permissible where it is "reasonably foreseeable that the [speech] would come to the attention of school authorities and that it would create a risk of substantial disruption."[37] In other words, any speech by students is subject to the jurisdiction of school administrators so long as the material or substantial interruption required by *Tinker* is foreseeable, regardless of where or when it originated.

This "foreseeability test" is not clearly defined in *Doninger* or any subsequent cases which rely on the second circuit's holding. It alters the foreseeability test defined in *Tinker*, where *Tinker* looks at what the school could reasonably foresee, not what the student could reasonably foresee. The analysis, however, appears to be the same. In *Doninger*, the factors that led the court to determine *Tinker* was applicable were the same factors

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[33] *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008).
[34] The First, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits, as well as the Supreme Court, have been wholly silent.
[35] *Doninger*, 527 F.3d at 45, 53.
[36] *Id.* at 49.
[37] *Id.* at 50.

that allowed the court to determine *Tinker* could punish Doninger's speech. Although there appears to be a separate part of the analysis given in the opinion— that it must first be foreseeable that the speech would come to the attention of the school authorities— courts assume if the speech can foreseeably cause a substantial or material disruption, it is foreseeable that it will reach the school authorities. Therefore, there is really no separate analysis being undertaken. Once the court has determined the speech can reach the school authority, it has already determined the speech can be forecasted to cause a substantial or material disruption.

The idea that *Tinker* must apply wherever it can punish is troubling, as it suggests limitless application of *Tinker*. The Fourth Circuit has created a test with a different name but a similar problem, as it too allows *Tinker* to apply wherever it can punish.[38]

B. "Sufficient Nexus" Test

In 2011, the Fourth Circuit held that a middle-school girl who created a MySpace page targeting one of her classmates could be punished by her school.[39] Rather than adopt wholesale the "foreseeability" test presented by the Second Circuit, the Fourth Circuit created an even more nebulous test, holding that *Tinker* can be extended to speech which has a sufficiently strong nexus with the school's pedagogical interests.[40] The pedagogical interest here was preventing bullying.[41] The court did consider foreseeability in determining whether the nexus existed, holding "it was foreseeable in this case that Kowalski's conduct would reach the school via computers, smartphones, and other electronic devices . . . ."[42] This test for foreseeability, coupled with the victim's shame and hurt, allowed Kowalski's off-campus speech to be punished as if it had occurred on-campus.

Kowalski presented a far less sympathetic student than that of *Doninger*— here was a student who targeted and bullied one of her classmates, encouraged other classmates to join in, and, undoubtedly, caused great pain and embarrassment to her victim.[43] The court seemed offended that she would even bring a lawsuit alleging a violation her rights, adding this admonishment to the opinion:

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[38] Kowalski v. Berkeley Cty. Schs., 652 F.3d 565, 574 (4th Cir. 2011).
[39] *Id*.
[40] *See id.* at 573.
[41] *See id*. at 572 ("[S]chool administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.")
[42] *Id.* at 574.
[43] *See id.* at 567–68.

> Rather than respond constructively to the school's efforts to bring order and provide a lesson following the incident, Kowalski has rejected those efforts and sued school authorities for damages and other relief. Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment.[44]

In such cyber-bullying cases there is undeniable appeal in allowing schools to punish such conduct. If not the school, who? What other institution has the power to stop such an insidious and harmful form of student-on-student misconduct? Yet *Kowalski's* holding is another example of how allowing *Tinker* to punish online speech erodes the First Amendment rights of our nation's youth, expanding the reach of public schools to regulate the speech of students when they are outside of school grounds and off school time.[45]

By reimagining the facts of *Kowalski* as a genuine off-campus, face-to-face interaction between the students, the idea of the school punishing the student for her speech seems far less likely. Allowing the school such power would be to give the school the right to reach into the private lives of their students. The end result would have been nearly the same— shame and hurt for the victim, and student gossip the following day among the students, which of course would have been foreseeable on the part of the bully— but the school would likely not have had the power to punish the bully. After all, in this hypothetical circumstance, the bully was acting outside her capacity as a student. The dichotomy is unjustified. Expanding *Tinker* into off-campus, online speech would suggest that Americans in the public school system are forced to surrender their First Amendment rights between the ages of five and eighteen.[46]

Moreover, the *Kowalski* holding once again allows *Tinker* to apply wherever it can punish. Here, the "pedagogical interest" can include keeping order in the classroom, or preventing a substantial disruption. The nexus is established based on the foreseeability that the speech would reach the classroom and disrupt this pedagogical interest. The analysis, then, jumps immediately to the *Tinker* analysis (and, indeed, the school's

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[44] *Id.* at 577.

[45] *See* James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1399 (2000) ("[T]he Court has indicated that its decisions limiting the rights of students in school do not limit their rights outside of school.").

[46] *See* Benjamin F. Heidlage, *A Relational Approach to Schools' Regulation of Youth Online Speech*, 84 N.Y.U. L. Rev. 572, 597 (2009) ("In and out of class, permissible conduct is defined by what is proper conduct of students *qua* students. Meaning, students acting in their capacity as students. The Court's decision [in *Tinker*] only regulated the student-school relationship." (emphasis added)).

punishment of Kowalski was found to be acceptable under *Tinker*),[47] as though there is no distinction between targeted bullying on school grounds and an online event outside of school.

C. Remaining Circuit Approaches

The third,[48] eighth,[49] and ninth[50] circuits have taken similar positions, largely adopting *Doninger's* foreseeability test. Most cases in these circuits have punished students for their off-campus speech, though one case in the third circuit applied the *Tinker* standard and found the speech could not be punished because no substantial and material disruption was caused or foreseen.[51] On one hand, *J.S. ex rel Snyder* seems to have a positive effect for student speech rights, as it moves away from the idea that any speech that can be punished under the "substantial and material disruption" standard; on the other hand, this case assumes *Tinker* can be applied to all student speech regardless of its actual effect, once again reinforcing the idea that schools have unbounded authority to at least evaluate the speech their students' while off campus.[52] This raises questions of just how far a school can reach. Can they punish speech that occurs over summer vacation? What about speech from several years ago that remains in digital form?

In 2014, the Fifth Circuit appeared to have a similar holding to that of *J.S. ex rel Snyder*, until a rehearing returned to the idea that *Tinker* should be able to punish any speech that could foreseeably cause a substantial and material disruption. *Bell v. Itawamba County School Board*,[53] was the most recent case to confront *Tinker's* applicability to online speech, even requesting certiorari (an appearance before the Supreme Court).

D. Bell v. Itawamba County School Board

In *Bell v. Itawamba County School Board* a high school student and aspiring rapper named Marcus Bell created a rap song naming and

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[47] Kowalski, 652 F.3d at 574.
[48] J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (3rd Cir. 2011).
[49] S.J.W. *ex rel.* Wilson v. Lee's Summit R-7 Sch. Dist., 696 F.3d 771 (8th Cir. 2012)
[50] Wynar v. Douglas County Sch. Dist., 728 F.3d 1062 (9th Cir. 2013).
[51] *Snyder*, 650 F.3d at 931–33.
[52] In most student speech cases, the punishment comes after the disruption, when the school has been able to observe exactly what the effects of the speech are. However, because *Tinker* allows a school to punish where it is foreseeable that the speech might cause a disruption, it is possible that schools could search the online lives of their students for speech that might conceivably reach the school and cause a disruption, raising additional privacy concerns.
[53] 799 F.3d 379 (5th Cir. 2015)

shaming two teachers at his school for sexually harassing several female students.[54] His speech caused no demonstrable substantial or material disruption, though one of the teachers admitted to adopting a less familiar teaching style with female students[55] (arguably *preventing* further school disruption). The song was played only once on school grounds, by one of the accused teachers, who accessed it by listening to it on a student's smart phone, against school policy.[56]

When the case reached the Fifth Circuit, a three-judge panel, without explicitly finding that *Tinker* could reach the speech, found there was no (actual or foreseeable) substantial or material disruption caused by the speech.[57] The school board appealed and at a rehearing a divided panel reversed.[58] The majority focused on what they considered to be "threats" in Bell's song[59] and held that, though *Tinker's* application to off-campus speech was not a resolved issue, "Bell's admittedly intentionally directing at the school community his rap recording containing threats to, and harassment and intimidation of, two teachers permits *Tinker*'s application in this instance."[60]

A dissent by Judge James L. Dennis took issue with both the idea that *Tinker* could reach off-campus speech in general and the idea that Bell's speech caused a substantial and material disruption.[61] On the first point, Dennis noted that a textual analysis of *Tinker*, as well as subsequent student speech cases by the Court, supported the notion that only speech which took place inside the school or at school-sponsored events could be punished. Tinker's language not only referenced speech that took place "inside the schoolyard gate" but also the "special characteristics of the school environment," while noting that "school officials do not possess absolute authority over their students."[62][63]

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[54] Bell v. Itawamba Cty. Sch. Bd., 774 F.3d 280 (2014), *rev'd on rehearing en banc*, 799 F.3d 379 (2015).
[55] *Id.* at 290.
[56] *Id.*
[57] *Id.* at 282.
[58] Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 382 (2015), *cert. denied*, 136 S. Ct. 1166 (2016).
[59] Namely, "get a pistol down your mouth" and "gonna hit you with my Ruger," which Bell stated were not direct threats and the teachers admitted they did not take seriously. *Bell*, 774 F.3d at 309–10.
[60] *Bell*, 799 F.3d at 394.
[61] *Id.* at 403–33 (Dennis, J., dissenting).
[62] *Id.* at 384 (majority opinion).
[63] While it is true that *Tinker* also states that "conduct by the student, *in class or out of it*, which for any reason—whether it stems from time, place, or type of behavior— materially disrupts classwork or involves substantial disorder or

Of all the student speech cases that have been heard, *Bell* was perhaps the best contender to reach the Supreme Court and establish the first real precedent on how student speech should be addressed. The speaker in question was not a student bully or an aggrieved student merely complaining about unfair policies; rather, he was being censored for bringing educators' sexual misconduct to the students' attention. However, like each case before it that appealed to the court, Bell's petition for certiorari was eventually denied by the Court.

III. SUBSTANTIAL QUESTIONS REMAINING

A. Student: A Day Job, or a State of Being?

By allowing off-campus speech to be punished by schools, courts implicitly hold that any child who is enrolled in public school is a student both on and off campus. The Fifth Circuit's *en banc* holding in *Bell* described "students qua students" or students acting in the capacity of students.[64] The court apparently believed that public-school attendees are *always* acting in the capacity of students whenever they create any speech that might be related to school, the students or faculty, or their feeling about the institution itself. The dissent noted this worrisome assertion:

> By simply assuming that all children speak "*qua* students," the majority's legal analysis begins with the false premise that the speech at issue constitutes "student speech" that must be "tempered in the light of a school official's duty" to teach students appropriate behavior. But the Supreme Court has never suggested that minors' constitutional rights *outside of school* are somehow qualified if they coincidentally are enrolled in a public school.[65]

When a child enrolled in public school returns home for the day, are they still a "student?" If not, their speech can hardly be termed "student speech." It is true that the school day takes up much of a student's time, and is where the majority of their relationships are formed (though the online world has even changed this; students can form close relationships

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invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech," Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (emphasis added), which would seem to suggest that *Tinker*'s exception does apply to off-campus speech, the opinion previously refers to comments made between students "outside of the classroom," referring to the school hallways. Therefore this sentence is best understood to allow regulation of any speech occurring on school grounds, whether during class or elsewhere in the school, and not as a license for the school to regulate off-campus conduct.

[64] *Bell*, 799 F.3d at 389.

[65] *Id*. at 415 (Dennis, J., dissenting).

with people they may never meet in person).[66] However, the school's influence surely must end somewhere. It would be unheard of for a school to punish a student for not following a school dress code when that student was at home on a Saturday. Digital verbal speech, however, has been judged in *Bell* and the like cases as something over which a public school should have a broader control.

There comes a point when a school's ability to regulate comes into conflict with a parent's right to discipline and control their own child. The Supreme Court has previously addressed this issue in the context of *in loco parentis.*[67] This doctrine has been articulated as early as the 1800s by American courts.[68] In brief, the doctrine allows schools to assume the power of parents during the school day, so they may punish student behavior which would disrupt the school environment.[69] It suggests that there is a clear delineation between a student on school grounds and a student at home, particularly in the context of what rights a school has over the student. Allowing schools to regulate online/off-campus speech puts schools in the position as acting as their students' "parent" at all times.

This broad power thus conflicts with a parent's right to discipline, though circuit court have yet to recognize this as a consequence of broad school control over student speech. In *Bell*, the student's mother, Dora Bell, alleged violation of her Fourteenth Amendment right to make decisions regarding the care and custody of her child.[70] The district court dismissed this claim,[71] and no other court has recognized this as a viable claim in similar student-speech cases.

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[66] *See* Wendy Walsh, Janis Wolak, & Kimberly J. Mitchell, *Close Relationships with People Met Online in a National U.S. Sample of Adolescents*, 7 CYBERPSYCHOLOGY 1, 4 (2013).

[67] *See, e.g.*, Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 383 (2009) (Thomas, J., concurring); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–55 (1995).

[68] *See* State v. Pendergrass, 19 N.C. 365 (N.C. 1837).

[69] *See Morse*, 551 U.S. 393, 413.

[70] Bell v. Itawamba County Sch. Bd., 859 F.Supp.2d 834, 841 (N.D. Miss. 2012), *aff'd in part, rev'd in part, and remanded*, 774 F.3d 280 (2014).

[71] The court acknowledged that there was a conflict, but held this did not equate to a violation of Dora Bell's constitutional rights. Under the prevailing standard set by *Gruenke v. Seip*, a school punishment that conflicts with the interests of the parents may prevail if the punishment is "tied to a compelling interest." Gruenke v. Seip, 225 F.3d 290, 305 (3d Cir.2000). Because protecting the school from a substantial and material disruption can always be termed a "compelling interest," Fourteenth Amendment claims by parents in student speech cases are unlikely to be successful if the Third Circuit test is widely adopted. There does not appear to be any Supreme Court cases offering a different test.

B. "Threatening" Online Speech

One of the chief concerns noted in the *Bell* opinion was the issue of "threatening" speech, with the opinion suggesting that shielding such speech from punishment might have dire consequences given the prevalence of school violence in recent years.[72] This reasoning, however, ignores current First Amendment law, which already has recourse to punish speech which threatens the safety of students and administrators.

Before a *Tinker* analysis can even begin, the speech in question must first clear other First Amendment hurdles. If a student were to hang up an obscene drawing in school, for example, his punishment would not undergo a *Tinker* analysis but rather a *Miller* analysis— the test which determines whether a communication falls under the "obscenity" exception to the First Amendment.[73] Courts have also carved out exceptions to the First Amendment where speech is threatening,[74] meaning that threats of school shootings or constant threats of death or injury would likely never even reach a *Tinker* analysis. Instead, the speech would be curtailed by a broader exception that applies to all Americans, not just students.

If a "true threat" analysis would have been performed in *Bell*, Bell's speech would have likely been found to be protected, as *Watts v. United States*[75] ruled that threats which are obviously hyperbole are protected by the First Amendment.[76] Bell's lyrics were not meant to be taken seriously as threats, and in fact were not taken seriously by anyone within the school; thus, *Watts* would likely hold it to be protected speech. There is no reason to believe that Bell's speech would need to undergo some deeper level of scrutiny simply because its subject was about two teachers. The Supreme Court has never made any rulings to the effect that a response to threats should be heightened when in a school environment, or that *Watts* would somehow not suffice to distinguish a student's protected hyperbolic speech from a student's unprotected threatening speech.

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[72] Bell v. Itawamba Cty. Sch. Bd., 799 F.3d 379, 432–34 (2015) (Dennis, J., dissenting), *cert. denied*, 136 S. Ct. 1166 (2016).

[73] *See* Miller v. California, 413 U.S. 15, 36-37 (1973).

[74] *See, e.g.*, Virginia v. Black, 538 U.S. 343, 344 (2003) (O'Connor, J., concurring) ("True threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat.")

[75] Watts v. United States, 394 U.S. 705 (1969).

[76] *Id.* at 708.

In fact, a "true-threat" analysis might even serve as a tool against cyber-bullying. The Eighth Circuit has previously applied this analysis to off-campus student speech in *Doe v. Pulaski County Special School District*,[77] in which an eighth grade student wrote two violent and threatening letters to his ex-girlfriend.[78] In these letters he berated her, insulted her, and threatened to rape and kill her.[79] The letters were written off-campus and were brought to school by a third student after the victim had already heard it, making it off-campus speech.[80] Rather than consider how *Tinker* should be applied, the Second Circuit focused on the threatening nature of the speech, holding that it fell under the "true threat" exception to the First Amendment.[81]

Pulaski did not feature online speech, but the same principle could apply to threats posted on Facebook or Twitter. It is true that many instances of cyber-bullying would not rise to this level of threat. Nonetheless, a true threat analysis is certainly a viable option in the most severe of cases, and it is the appropriate recourse when considering actual threats against the school and its students or administrators, as alleged in *Bell*. Further, schools have other means of recourse to prevent them from being helpless in the face of cyber-bullying, such as counseling for the bully and victim, which turns the situation into a learning experience rather than a First Amendment minefield.[82]

There is no evidence that a school has ever used the *Tinker* exception to stop a planned act of school violence, as such cases would likely require police involvement, not an act of school discipline. Giving schools the right under *Tinker* to punish off-campus threats would likely lead to punishing speech of the kind identified in the *Watts* exception and identified in *Bell*— hyperbolic statements made out of frustration by children who are using what they think is a safe outlet for their personal feelings. In such hyperbolic cases, the "forecasted" school disruption is more unreasonable than foreseeable, and punishing students for venting their frustrations could do more harm than good.

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[77] Doe v. Pulaski County Special Sch. Dist., 306 F.3d 616 (8th Cir. 2002).
[78] *Id.* at 619.
[79] *Id.*
[80] *Id.* at 632.
[81] *Id.* at 622.
[82] See Papandrea, *supra* note 30, at 1098. Counseling would be unlikely to be considered a "punishment" or suppression of speech for which a student could seek a legal remedy, as there would be unlikely to be an injury on which a student could establish standing for suit.

C. The Necessity of Student Freedom of Expression

It can be easy to think of student speech in terms of the harm it can cause: the victims of bullying, the in-school disruptions, the possible in-school violence. Such consequences to speech are really only present in the school environment, perhaps explaining why *Tinker's* exception erodes First Amendment protection granted to adults. But children and teenagers benefit most from freedom of expression,[83] and curtailing their rights might have grave consequences.

The Supreme Court itself has noted that "the character of a juvenile is not as well formed as that of an adult."[84] That character is formed by exploration, by experience, and by expression. It has been long-held that freedom of expression leads to discovery of truth,[85] and there is arguably no group in greater search of truth than juveniles. The Supreme Court has even noted that it is through exposure to new information that a student passes from the realm of a child, whose constitutional rights are in some manners curtailed, to an adult.[86]

Furthermore, curtailing the rights of children on the assumption that children require special regulation, due to their fragility or inability to think before they speak, does harm to all of society. The social significance of affording right of expression to children sends a message to society as a whole that expression is to be celebrated and encouraged from a young age, and promotes important discourse in every age group.[87]

Allowing schools to access and judge students' online thoughts also raises grave concerns about student privacy. Settings on profiles such as on Facebook might allow students to regulate who is able to see their

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[83] A child's right to freedom of expression is in fact so important that it has been recognized by the Convention on the Rights of the Child. Convention on the Rights of the Child, art. 13, adopted Nov. 20, 1989, 1577 U.N.T.S. 3 ("The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.").

[84] Roper v. Simmons, 543 U.S. 551, 569–70 (2005).

[85] Stanley Ingber , *The Marketplace of Ideas, A Legitimizing Myth*, 1984 DUKE L.J. 1, 3 (referencing Justice Holmes' dissent in Abrams v. United States, 250 U.S. 616 (1919)).

[86] See Bellotti v. Baird, 443 U.S. 622, 647 (1979) (allowing a teenaged student to make a decision about an abortion if she could show she was "mature and well enough informed."); see also Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982) (discussing the importance of the right to receive information in the public school setting).

[87] John Eekelaar, *The Importance of Thinking that Children Have Rights*, 6 INT'L J. L., POL'Y, & THE FAM., 221, 224 (1992).

posts, but schools, claiming a concern about a potential disruption, could easily curtail such restrictions. Indeed, in Bell, the rap song was initially posted on Facebook under settings that only allowed Bell's online friends access. Students who post something anonymously could be identified by the public if the school could claim a material disruption, to identify the speaker. Giving school administrators the right to examine "private" thoughts, or at least those meant to be shared with a select group of people, is akin to flipping through a student's diary. Online privacy is a nebulous idea and has been left largely untouched by courts.[88] The privacy of students is an important issue that demands resolution.

Today many school campuses restrict the ability to access social media sites where much off-campus online speech can be found. Therefore, when this speech comes to campus, it usually comes on smartphones, as in *Bell*. Just as schools hold searches of lockers or bags for reasonably expected incriminating material, will we be seeing routine searches of smartphones for inappropriate texts or online posts under the broad *Tinker* justification?

CONCLUSION

Tinker is considered a landmark case, not for affording schools the right to punish speech, but for the broad freedom of expression it gives public school students. In the years following *Tinker*, the Court has seemingly regretted giving students such freedom, and has carved numerous exceptions to *Tinker*'s ultimate provision: that there are only very rare circumstances where student expression can be punished.

Today, teenagers' speech is particularly vulnerable to school punishment due to digital media. Without clear direction from the Court, the circuits have adopted conflicting approaches to when schools can punish speech originating off-campus. This not only gives schools greater control over teenagers' off-campus lives, but sends a message that student speech is less worthy of protection than that of adults.

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[88] *See* Daniel Benoliel, *Law, Geography and Cyberspace: The Case of On-Line Territorial Privacy*, 23 CARDOZO ARTS & ENT. L.J. 125, 129 (2005).