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FIRST AMENDMENT—STUDENT SPEECH— WHY *BELL* TOLLS A REVIEW OF *TINKER*'S APPLICATION TO OFF-CAMPUS ONLINE STUDENT SPEECH

Katherine E. Geddes*

WHILE the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech,” the U.S. Supreme Court has explained that this right to free speech is not absolute, especially in an educational setting.¹ But the reach of the educational setting remains in dispute—especially with the advent of the Internet—forcing courts to determine whether off-campus online student speech may be regulated.² In the Fifth Circuit’s most recent struggle with this issue, the en banc majority followed some of its sister circuits by applying the *Tinker* test to off-campus online student speech, but also created an exception for threatening, harassing, or intimidating student speech intentionally directed at a school community.³ This Note argues that while valid policy justifications underlie the majority’s reasoning, the court missed an opportunity to clarify the law for off-campus online student speech by misapplying *Tinker* and creating a vague exception that neglects to give students or schools a better understanding of when off-campus student speech can be regulated without violating students’ rights.

On January 5, 2011, Taylor Bell, also known as “T-Bizzle,” posted a rap song with violent language to his online public Facebook account.⁴ The song alleged that two coaches had sexually harassed female students at Itawamba Agricultural High School, where Bell was a senior.⁵ Bell wrote,

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1. U.S. CONST. amend. I; *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

2. See cases cited *infra* note 28.

3. *Tinker*, 393 U.S. at 513 (holding that student speech must “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others” to warrant regulation); *Bell v. Itawamba Cty. Sch. Bd. (Bell II)*, 799 F.3d 379, 393–96 (5th Cir. 2015) (en banc), *rev’g* *Bell v. Itawamba Cty. Sch. Bd. (Bell I)*, 774 F.3d 280 (5th Cir. 2014), *petition for cert. filed*, No. 15-666 (U.S. Nov. 17, 2015).

4. *Bell II*, 799 F.3d at 383–85.

5. *Bell I*, 774 F.3d at 283.

recorded, and uploaded the song away from campus and during non-school hours.⁶ Instead of garnering the attention of a record label as Bell had hoped, the song drew the scrutiny of school officials.⁷ The day after Bell uploaded the song online, one of the coaches heard about it and asked a student to play the song at school.⁸ That coach reported the song to the principal, who informed the school-district's superintendent; both interviewed Bell about his song's allegations the next day and sent him home early.⁹ Bell did not return to school for a week because school was cancelled due to inclement weather, and during that time he posted a final version of his rap to YouTube.¹⁰ When school reopened, the assistant principal removed Bell from class and told him he was suspended, pending a disciplinary committee hearing.¹¹

During Bell's disciplinary hearing, he testified that he did not report his complaints to school administrators because he thought they would ignore them and that he uploaded the song to help others understand the situation and his message.¹² Bell also stated that he never meant to threaten, harass, or intimidate the coaches, but that the song alluded to the potential for someone related to the female students to react violently to the harassment allegations.¹³ Lastly, Bell told the committee that he posted the song online because he knew others, specifically students, would likely listen to it since most students had Facebook.¹⁴ The disciplinary committee found that Bell's song harassed and intimidated the two coaches and upheld Bell's suspension.¹⁵ Bell appealed the disciplinary committee's ruling to the school board, but it unanimously found that Bell's speech not only harassed and intimidate the coaches, but also threatened them.¹⁶

Bell and his mother sued the Itawamba County School Board in the Northern District of Mississippi claiming that the board had violated Bell's First Amendment rights.¹⁷ After the court ruled Bell's request for a preliminary injunction moot, both sides filed motions for summary judgment.¹⁸ In March 2012, the court granted the school's motion for summary judgment and denied Bell's.¹⁹ Bell appealed to the Fifth Circuit, and in December 2014, a divided panel reversed.²⁰ In February 2015, the

6. *Id.*

7. *See Bell II*, 799 F.3d at 383; *Bell I*, 774 F.3d at 286.

8. *Bell II*, 799 F.3d at 385.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 385–86; *Bell I*, 774 F.3d at 286.

13. *Bell I*, 774 F.3d at 287.

14. *Bell II*, 799 F.3d at 393–96.

15. *Id.*

16. *Id.* at 387.

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

18. *Bell II*, 799 F.3d at 388.

19. *Id.* at 388–89.

20. *Bell I*, 774 F.3d at 282.

court granted the petition for rehearing en banc.²¹

In its en banc opinion, the Fifth Circuit reversed its prior judgment and found that *Tinker* applied to Bell's off-campus online speech and that no genuine issue of material fact precluded summary judgment for the school board.²² The court concluded that the school could have forecast a substantial disruption as a matter of law because a school official could have reasonably found that Bell's song threatened, harassed, and intimidated the coaches.²³ Reviewing the case de novo, the majority began its discussion with *Tinker*, which established the general rule governing student speech: students can only be disciplined for speech at school that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others."²⁴ Next the court reviewed precedent, both the Supreme Court's and its own, that permitted schools to punish students for speech that did not satisfy *Tinker*.²⁵ However, the majority determined that none of those exceptions applied to the song.²⁶ Rejecting Bell's argument that *Tinker* did not apply to off-campus speech, the majority emphasized that its own precedent from 1972 brought off-campus speech under *Tinker*.²⁷ In addition, the court cited sister circuits that held *Tinker* applied to off-campus speech.²⁸ Lastly, the majority argued that the Internet blurred any distinction between on-campus and off-campus speech, reinforcing its *Tinker* application.²⁹

Once the court established that *Tinker* applied to Bell's speech, the majority focused on which circumstances could lead to regulation of a student's off-campus speech under *Tinker*.³⁰ Again relying on its own precedent, the court stressed the importance of intent in the *Tinker* inquiry for off-campus speech.³¹ Because Bell knew students would listen

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

22. *Bell II*, 799 F.3d at 391.

23. *Id.*

24. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969); *Bell II*, 799 F.3d at 389.

25. *Bell II*, 799 F.3d at 389–92; see *Morse v. Frederick*, 551 U.S. 393, 410 (2007) (holding that schools may regulate student speech that promotes illegal activity during a school-sponsored event); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271–72 (1988) (explaining that schools retain greater authority to control student expression that is "disseminated under its auspices" or might bear its imprimatur); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) (establishing that students could be disciplined for "lewd, indecent or offensive speech" even when the speech did not satisfy *Tinker*); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 771–72 (5th Cir. 2007) (holding that speech that threatens certain school violence is unprotected).

26. *Bell II*, 799 F.3d at 391–92.

27. *Id.* at 393–94; *Shanley v. Ne. Indep. Sch. Dist.*, 462 F.2d 960, 970 (5th Cir. 1972).

28. *Bell II*, 799 F.3d at 394; see *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013); *S.J.W. ex rel. Wilson v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 773–76 (8th Cir. 2012); *Kowalski v. Berkeley Cty. Schs.* 652 F.3d 565, 571–73 (4th Cir. 2011); *Doninger v. Niehoff*, 527 F.3d 41, 50–52 (2d Cir. 2008). *But see* *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011).

29. See *Bell II*, 799 F.3d at 396.

30. *Id.* at 394.

31. *Id.* at 394–95; *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 n.22 (5th Cir. 2004).

to his rap if he posted it online, the majority determined that he intentionally targeted the school with his speech.³² The court next identified the type of speech that could warrant discipline if intentionally directed at a school community: language that a layperson would understand threatens, harasses, or intimidates a teacher.³³ Thus, the court's holding was twofold. First, *Tinker* applies to off-campus online student speech.³⁴ Second, an exception to First Amendment protection applies when a student intentionally targets a school community with speech a layperson would believe threatened, harassed, or intimidated a school official, even if "such speech originated, and was disseminated, off-campus."³⁵ However, the majority declined to apply a "rigid standard" and expressly refused "to adopt *or* reject approaches advocated by other circuits."³⁶

After determining that *Tinker* applied to Bell's speech, the court's inquiry focused on whether his rap caused a disruption or whether school officials could have reasonably forecast a disruption.³⁷ Giving much deference to the school board's decision, the majority found that Bell's rap qualified as the type of speech capable of regulation because a layperson could reasonably conclude that Bell's song threatened, harassed, and intimidated the two coaches.³⁸ Moreover, the majority found that because Bell's speech fell under this new exception, the school could have reasonably forecast that it would cause a substantial disruption.³⁹ The court even suggested that speech that threatened, harassed, or intimidated a teacher might always satisfy *Tinker as a matter of law*.⁴⁰ The majority bolstered its opinion with the policy of giving school officials the ability to prevent school violence, especially with the increased number of school shootings.⁴¹ Lastly, the court stressed that speech like Bell's "disrupts, if not destroys, the very mission for which schools exist—to educate."⁴²

Four judges dissented, concluding that the majority misapplied *Tinker* and created a broad exception that violated Bell's First Amendment rights.⁴³ One dissent stressed how the majority failed to recognize that Bell's song qualified as speech on a matter of public concern, meaning that the First Amendment afforded it special protection.⁴⁴ In addition, the majority's exception did not give students, parents, or school administrators adequate notice of what off-campus speech might cause a disrupt-

32. *Bell II*, 799 F.3d at 396.

33. *Id.*

34. *Id.* at 394.

35. *Id.* at 396.

36. *Id.* (emphasis added); cf. *Kowalski v. Berkley Cty. Schs.* 652 F.3d 565, 573 (4th Cir. 2011); *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 39–40 (2d Cir. 2007).

37. *Bell II*, 799 F.3d at 397.

38. *Id.* at 396–97.

39. *Id.* at 398–99.

40. *Id.* at 397.

41. *Id.* at 399.

42. *Id.* at 400.

43. *See id.* at 404, 434–35 (Dennis, Prado, Haynes, & Graves, JJ., dissenting).

44. *See id.* at 404 (Dennis, J., dissenting).

tion.⁴⁵ Other dissents recognized the need for guidance from the Supreme Court and the broad reach of the majority's ruling.⁴⁶ One judge even called for a modified "Tinker-Bell standard" to apply to off-campus student speech.⁴⁷

While valid policy justifications influence the Fifth Circuit's en banc decision to regulate Bell's song, the court's opinion incorrectly applies *Tinker*, and misses the opportunity to clarify the law for off-campus online student speech, instead creating more confusion over when certain student speech may be subject to discipline.⁴⁸ The Fifth Circuit's initial starting point misses the mark. Instead of beginning with the presumption that school officials' ability to regulate student speech may be limited, the majority should have started with the presumption that students are "entitled to 'significant' First Amendment rights."⁴⁹ Thus, by positioning itself from the point of view of the school instead of from the student, the court sets itself up to improperly apply *Tinker* to Bell's speech. And although the majority follows some sister circuits by applying *Tinker* to Bell's rap song, *Tinker's* historical context suggests that the case was not meant to apply to off-campus online speech.⁵⁰ Instead, "*Tinker's* holding is expressly grounded in the 'special characteristics of the school environment,'"⁵¹ which is notably absent in Bell's case. Thus, it is inappropriate to apply *Tinker* to speech that inherently lacks those special educational qualities.⁵²

However, the Internet has changed the way students communicate with each other and with their schools, meaning that the law must also adapt.⁵³ In addition, courts must give great weight to the threats posed by potential school shootings and give school officials the ability to prevent such violence.⁵⁴ When off-campus online student speech does not fit within the narrow exceptions consistent with Supreme Court precedent, the circuit courts are not equipped with a sufficient alternative to *Tinker*.⁵⁵ Thus, while *Tinker* was not meant to apply to off-campus student speech, the combination of the Internet, the threat of school violence, and the silence

45. See *id.* at 418.

46. See *id.* at 433, 435 (Prado, Haynes, & Graves, JJ., dissenting).

47. *Id.* at 435–36 (Graves, J., dissenting) (combining *Tinker's* substantial disruption test with a sufficient nexus test).

48. See *id.* at 411, 417 (Dennis, J. dissenting).

49. *Id.* at 415 (quoting *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735–36 (2011)).

50. *Bell I*, 774 F.3d at 293–94.

51. *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 937 (3d Cir. 2011) (en banc) (Smith, J., concurring) (emphasis added) (quoting *Tinker v. Des. Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

52. See *Bell II*, 799 F.3d at 435 (Graves, J. dissenting); *J.S.*, 650 F.3d at 938.

53. See David J. Fryman, Note, *When the Schoolhouse Gate Extends Online: Student Free Speech in the Internet Age*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 557, 571–72 (2009).

54. See *Bell II*, 799 F.3d at 396; 165 *School Shootings in America Since 2013*, EVERYTOWN FOR GUN SAFETY SUPPORT FUND, Dec. 27, 2015, <http://everytown.org/1LL3P6X> [<https://perma.cc/X4FZ-MSMP>].

55. See *supra* notes 25 and 28.

from the Supreme Court, make *Tinker* an attractive test for the Fifth Circuit—and some of its sister circuits—to apply when faced with certain off-campus online student speech like Bell's.⁵⁶ But it does not follow that *Tinker* must apply to off-campus speech; because the speaker is a student, *Tinker* is not automatically implicated.⁵⁷ Instead, some judges have suggested that traditional First Amendment principles offer the proper analysis for off-campus online student speech.⁵⁸ Others have complained that because First Amendment doctrine “developed from restrictions on other media” it is ill-equipped to apply to student speech.⁵⁹ However, until the Supreme Court provides more guidance for off-campus online student speech, the trend of misapplying *Tinker* will likely continue in the circuit courts, as evidenced by *Bell II*.

Even if *Tinker* provides the proper test for evaluating off-campus online student speech, the Fifth Circuit created a broad and vague exception that is inconsistent with its own past precedent and the Supreme Court's.⁶⁰ This exception grants a school wide discretion to regulate off-campus online student speech that targets a school and that a layperson would understand to be threatening, harassing, or intimidating.⁶¹ While the majority claims this standard is not “rigid,” it instead creates a test that is too flexible, making it too vague for practical application.⁶² Assuming a layperson is equivalent to what is known as law's “reasonable man,”⁶³ the majority's opinion “fails to apprehend that reasonable minds may differ about when speech qualifies as ‘threatening,’ ‘harassing,’ or ‘intimidating.’”⁶⁴ The facts of the Bell case serve to highlight the exception's ambiguity—while one of the coaches said the rap made him feel “‘scared,’” the other testified that the song was “‘just a rap,’” nothing to be threatened by.⁶⁵ The majority's exception is not only vague, but also broad because it fails to account for both the speech as a whole and its context.⁶⁶ Taken in its entirety, Bell's song qualifies as rap music where the use of violent language is prevalent.⁶⁷ However, the court's standard for threatening, harassing, or intimidating speech does not account for an analysis of the speech in its entirety, making it too broad “for the First Amendment to tolerate.”⁶⁸ Also, off-campus speech inherently occurs away from the educational context that grounds the Supreme Court's ex-

56. See *supra* note 28.

57. See *Bell II*, 799 F.3d at 425 (Dennis, J., dissenting).

58. See *id.* at 404; *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 936 (3d Cir. 2011) (en banc) (Smith, J., concurring).

59. *Bell II*, 799 F.3d at 433 (Prado, J. dissenting).

60. Cf. *supra* notes 25 and 28.

61. See *Bell II*, 799 F.3d at 396 (majority opinion).

62. See *id.*

63. See, e.g., RESTATEMENT (SECOND) OF TORTS § 283 (AM. LAW INST. 1965).

64. *Bell II*, 799 F.3d at 418 (Dennis, J., dissenting).

65. *Id.* at 388, 429.

66. See *Snyder v. Phelps*, 562 U.S. 443, 444 (2011).

67. *Bell I*, 774 F.3d at 301.

68. See *Bell II*, 799 F.3d at 396, 417.

ceptions for regulation of student speech.⁶⁹ Without including a contextual analysis, the majority's exception will likely have broad practical implications because it will regulate protected speech, chilling student speech overall.⁷⁰

In addition to creating this vague and broad exception, the majority expressly refused to adopt or reject another circuit's approach to off-campus online student speech.⁷¹ By deciding not to clarify the law, the majority foolishly chose not to consider the reasoning of sister circuits that have already faced the difficult issue of regulating off-campus online student speech.⁷² Instead, the Fifth Circuit adds yet another test to the tangle of case law applied to off-campus online student speech.⁷³ The court's refusal to evaluate its sister circuits' reasoning means that students, parents, and schools will not have "constitutionally adequate notice of when student speech crosses the line between permissible and punishable off-campus expression."⁷⁴

Despite the need for clarity, the Fifth Circuit's *Bell II* decision misapplies *Tinker* and creates even more ambiguity with its vague exception.⁷⁵ The holding fosters both inconsistency among courts' analysis and inadequate notice for when student speech may be regulated.⁷⁶ While both the Internet and the prevalence of school violence legitimately support the majority's holding, the court's final decision suggests that the time has come for the Supreme Court to review and clarify *Tinker's* application to this new breed of student speech.⁷⁷

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

70. See *Bell II*, 799 F.3d at 419; cf. *Bell I*, 774 F.3d at 302.

71. See *Bell II*, 799 F.3d at 396.

72. See *id.*; cf. *supra* note 28.

73. See *supra* notes 25 and 28.

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

75. See *id.* at 396 (majority opinion).

76. See *id.* at 405 (Dennis, J., dissenting); cf. *supra* note 28.

77. See *Bell II*, 799 F.3d at 399, 433 (Prado, J., dissenting). Ultimately the Court declined to hear Bell's case. *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015), *cert. denied*, No. 15-666, 2016 WL 763687, at *1 (U.S. Feb. 29, 2016) (mem.).

