Two Cases, Two Different Freedoms: Student Free Speech Through Social Media and the Rights of Minoritized Students

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INTRODUCTION

Inequities based on racial and other ascriptive identities have pervaded our American society for centuries in terms of policies, practices, and social

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norms.[1] While this foundational claim is not new, our society, even our educational policymakers, leaders, and associations, has now become more open to discussing matters around equity and inclusion.[2]

For the past eighty-one years, the U.S. Supreme Court has provided increasing guidance on student free speech laws in public schools. Starting with *Minersville School District v. Gobitis*,[3] which was later overturned,[4] the U.S. Supreme Court upheld a Pennsylvania law mandating that children in public schools salute the national flag and recite the Pledge of Allegiance in unison.[5] The family, as Jehovah's Witnesses, opposed the state law asserting a conscientious religious belief against such behavior because they believed that the "Bible, as the Word of God, is the supreme authority"—not the flag, as saluting would portray.[6] At the time, the Court disagreed. Writing for the majority, Justice Felix Frankfurter wrote:

> Situations like the present are phases of the profoundest problem confronting a democracy—the problem which Lincoln cast in memorable dilemma: "Must a government of necessity be too *strong* for the liberties of its people, or too *weak* to maintain its own existence?" No mere textual reading or logical talisman can solve the dilemma. And when the issue demands judicial determination, it is not the personal notion of judges of what wise adjustment requires which must prevail.[7]

1. *See, e.g.*, Brenda X. Mejia-Smith & Edmund W. Gordon, *Class, Race, and Educational Achievement*, *in* SECOND INTERNATIONAL HANDBOOK OF EDUCATIONAL CHANGE 985–1000 (Andy Hargreaves, Ann Lieberman, Michael Fullan, & David Hopkins eds., Springer Dordrecht 2010) (examining the relationship among class, race, and education achievements to fully understand the political economic arguments about educational achievement and embedded social inequities for students of color); *see generally* Jessica Cardichon & Linda Darling-Hammond, *Protecting Students' Civil Rights: The Federal Role in School Discipline*, LEARNING POL'Y INST. (May 2019), https://learningpolicyinstitute.org/sites/default/files/product-files/Federal_Role_School_Discipline_REPORT.pdf [https://perma.cc/3J47-7584] (demonstrating the role of federal guidance to reduce the discriminatory effects found in school discipline actions).

2. *See* LAW AND EDUCATION INEQUALITY: REMOVING BARRIERS TO EDUCATIONAL OPPORTUNITIES (Susan C. Bon & Jeffrey C. Sun eds., 2015); *see also* RACE, EQUITY, AND EDUCATION: SIXTY YEARS FROM *BROWN* (Pedro A. Noguera, Jill C. Pierce, & Roey Ahram eds., 2016) (discussing the development of education policy in the years after school integration).

3. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

4. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (overruling *Gobitis* and its progeny).

5. Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 591 (1940).

6. *Id.*

7. *Id.* at 596.

Although it may be true that this case about saluting the flag and reciting the Pledge of Allegiance in unison represents a matter that only a practicing democratic nation-state may face, we respectfully disagree that these case decisions do not inherently draw on the personal rationalization of judges. Instead, we argue that judges and even our U.S. Supreme Court Justices, who are surrounded by younger citizens, likely more in-tune with the general American population, still draw on their positionality as learned judges living within a very different cultural context than much of the United States.[8] Their social sphere and wage earnings alone place them in an elitist social category, which, at times, makes their decisions clouded by their subjective reality and inconsistent with modern or subcultural groups' interpretations of doctrine.[9]

This Article asserts the foundational proposition that the doctrinal rules of the First Amendment as applied to school-aged students have been crafted, in some cases, to further inequities. Specifically, as a matter of practical illustration, we demonstrate the inequities in terms of treatment of Minoritized students, who are oppressed, underserved, or non-culturally normative by our socially constructed understandings for school-aged students.[10] This effect on Minoritized students is significant because it demonstrates society's beliefs about what is legitimized and what is not, or, stated another way, it outcasts what is not culturally conforming to our

8. While federal judges are perceived as impartial arbiters, judicial decision-making research has revealed that prior knowledge, which is anchored from the judges' lived experiences, cannot be fully removed from the legal processing of cases. Summarizing several claims that support this proposition about influences from prior knowledge and experiences, Professor T. K. Daniel and Attorney Scott Greytak posited that "a judge's personal attitudes about social policy – as constructed by his or her situational history – are the most determinative influences in his or her decision-making process." Philip T. K. Daniel & Scott Greytak, *Recognising Situatedness and Resolving Conflict: Analysing US and South African Education Law Cases*, 46 DE JURE L. J. 24, 26 (2013).

9. *Compare* Ryan Monton, *US Supreme Court Chief Justice Salary 2021: Here's How Much John Roberts Earns Annually*, INT'L BUS. TIMES (Mar. 25, 2021, 7:11AM), https://www.ibtimes.com/us-supreme-court-chief-justice-salary-2021-heres-how-much-john-roberts-earns-annually-3168814 [https://perma.cc/JR68-6D5V] (reporting Chief Justice Roberts's annual salary at $280,500 and associate justices at $268,300), *with* Jeffrey B. Wenger & Melanie A. Zaber, *Most Americans Consider Themselves Middle-Class. But Are They?*, RAND BLOG (May 14, 2021) https://www.rand.org/blog/2021/05/most-americans-consider-themselves-middle-class-but.html [https://perma.cc/NH8H-KAQE] (reporting that the median U.S. household income was $68,703 in 2019).

This argument does not diminish their value as lawyers. We acknowledge that the U.S. Supreme Court Justices are paid well-below Biglaw market rates and estimates from Biglaw Investor suggests that our U.S. Supreme Court Justices are paid nearly the salaries of third- and fourth-year associates at Biglaw firms, before factoring in bonuses. *Biglaw Salary Scale*, BIGLAW INVESTOR, https://www.biglawinvestor.com/biglaw-salary-scale/ [https://perma.cc/R3YP-F3P3] (last visited June 12, 2022).

10. *But see* Three years later, the U.S. Supreme Court overruled its decision in *Gobitis* in *Barnette*, 319 U.S. at 642 (granting followers of minority religions protection under the Establishment Clause from adverse state action in schools).

dominant, hegemonic approaches as acceptable expressions deserving of First Amendment protection.

The newest case, *Mahanoy Area School District v. B.L.*,[11] has unveiled another layer of the constitutional parameters under which free speech applies to students' expressions within the public-school context. It has elucidated some general principles. Depending on one's reading of *Mahanoy*'s principles, they may reflect consistency, inconsistency, or an unanswered question to a previous case, *Bell v. Itawamba County School Board,*[12] which was denied certiorari.

While Bell's expression was largely based on a song symbolically conveying the student's objection to teachers' harassment and discrimination through music,[13] and B.L. posted a message conveying her disdain for the school and cheer team expressing "Fuck school fuck softball fuck cheer fuck everything,"[14] each social media post presents an objection to school actions, but only one was awarded a U.S. Supreme Court hearing. Now, attorneys, educators, and scholars interested in free speech have two cases that demonstrate, by juxtaposition, the inequities imposed on Minoritized students or otherwise may show a slowing convergence. Said another way: while the cases offer legal rulings which are seemingly objective, driven by doctrinal rulings, and allegedly bereft of external biases and influences, a critical review of the recent judicial cases, court briefs, and related legal documents (e.g., judicial memos and legal reviews) unveil interpretations and treatment of language in differing ways for Minoritized students.

Drawing heavily on the U.S. Supreme Court and federal appellate court decisions to understand the doctrinal guideposts within the law, this Article seeks to extrapolate the rules and implications of free speech law on Minoritized students. Specifically, this examination will revolve around the free speech protections and implications for Minoritized students in terms of racial-ethnic identities with a liberating systems approach, which seeks to critique the operational environment and policy sphere and recommend equity-minded solutions through systems-thinking strategies. Taking on a liberating systems approach that searches for equity and solutions, this research: (1) outlines the doctrinal rules crafted under the First Amendment free speech clause with the intended effort to balance student free speech and maintain school order; (2) highlights the limits of First Amendment free speech for Minoritized students; (3) examines the meanings of "threat" in the school context; (4) evaluates speech with a critical lens noting the cultural

11. *See* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038 (2021).

12. *See* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

13. *Id.* at 383–89.

14. *Mahanoy*, 141 S. Ct. at 2043.

deficit inherent in subcultures; and (5) proposes a true balancing of interests by embracing culturally competent institutions as an approach to further equity and voice for Minoritized students.

Our examination of school-based First Amendment Free Speech rights has historically adopted a social conformance approach.[15] Although this analytic approach may have been appropriate for many prior cases, social media opens access to greater cultural variations. This diffusion of many culturally normative, expressive forms from significant subgroups takes place through social media. Yet, individuals on the fringes (i.e., the Minoritized voices) are often silenced, ignored, or deemed as defiant in society when the manner of expression is not legitimized by nor socially conforms to the dominant society. Simply put, those expressions become outcasted Minoritized students' voices. This effect is ironic given First Amendment Free Speech rights, by their very doctrinal principles, are intended to protect minority voices.

I. BALANCING STUDENT FREE SPEECH AND MAINTAINING ORDER IN SCHOOLS

In school-based First Amendment law, a student's right to free speech is limited. While students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]"[16] the Supreme Court has held that "the First Amendment rights of students in public schools 'are not automatically coextensive with the rights of adults in other settings,'[17] and must be 'applied in light of the special characteristics of the school environment.'"[18] As such, the U.S. Supreme Court has identified and applied four categories of speech that school officials may constitutionally regulate: (1) vulgar, lewd, obscene, and plainly offensive speech;[19] (2) school-sponsored speech;[20] (3) messages that promote illegal activity;[21] and (4)

15. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683–85 (1986) (upholding Fraser's suspension in response to his speech, which was filled with sexual innuendos, and declared as "vulgar and offensive terms in public discourse"); *see also* Morse v. Frederick, 551 U.S. 393, 397–98 (2007) (upholding student's suspension for failing to take down sign expressing "BONG HiTS 4 JESUS," which the school principal interpreted as "encouraging illegal drug use").

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

17. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).

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

19. *Fraser*, 478 U.S. at 685–86.

20. *Kuhlmeier*, 484 U.S. at 273.

21. Morse v. Frederick, 551 U.S. 393, 410 (2007).

speech falling outside of these categories that meet the school disruption standard established in *Tinker*.[22]

As the Court's decisions illustrated, *Tinker* was the operative ruling to analyze *Mahanoy* and *Bell*. In *Tinker*, the Court determined that schools have a special interest in regulating on-campus student speech that "materially disrupts classwork or involves disorder or invasion of the rights of others. . . ."[23] Some courts have held that a school's authority to regulate student speech may apply to off-campus speech in specific circumstances such as when the speech includes: serious or severe bullying or harassment targeting particular individuals[24] and threats aimed at teachers or other students.[25] However, the Supreme Court offered no clear general guidance regarding off-campus expressive student speech until *Mahanoy* in 2021.

In *Mahanoy*, a public high school student brought action against her school district, alleging a First Amendment violation after she was suspended from the junior varsity cheerleading squad because of a social media post made off-campus.[26] Within the school building, school officials are granted substantial autonomy regarding the regulation and limitation of student conduct to ensure order is maintained and educational goals are met—but in general, this power is restricted to the school campus itself.[27] Nonetheless, some courts permitted student discipline of off-campus expressive conduct when this conduct "would foreseeably create a risk of substantial disruption within the school environment[,]" at least when it was similarly foreseeable that the off-campus expression might also reach campus by applying *Tinker*.[28] In *Mahanoy*, the Supreme Court noted that public schools may have a special interest in regulating some off-campus student speech.[29] Acknowledging potential types of "off-campus behavior that may call for school regulation" from the parties' briefs and *amici*, the Court outlined that

22. *See, e.g.*, Pinard v. Clatskanie Sch. Dist. 6J, 467 F.3d 755, 765 (9th Cir. 2006).

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

24. *See, e.g.*, Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567 (4th Cir. 2011) (upholding suspension of student for creating webpage that ridiculed fellow student); *see also, e.g.*, C.R. v. Eugene Sch. Dist., 835 F.3d 1142, 1146 (9th Cir. 2016) (affirming discipline of middle school student for harassing speech targeted at two fellow students with disabilities).

25. *See, e.g.*, Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 920–26 (3d Cir. 2011) (upholding student's suspension for misappropriating school principal's profile depicting him as sex addict and pedophile and using profanity throughout text); *see also, e.g.*, Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064–65 (9th Cir. 2013) (upholding school expulsion for expressing plans for school shooting); *see also, e.g.*, McNeil v. Sherwood Sch. Dist. 88J, 918 F.3d 700, 704 (9th Cir. 2019) (upholding school expulsion for journal entry with a "hit list" of fellow students who "must die").

26. *Id.* at 2042–43.

27. Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1052 (2d Cir. 1979).

28. Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist., 494 F.3d 34, 40 (2d Cir. 2007), *cert. denied*, 552 U.S. 1296 (2008).

29. *Mahanoy,* 141 S. Ct. at 2045.

school regulation might occur in such instances as when the expression includes:

> [S]erious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.[30]

The special interests offered by the school, such as "prohibiting students from using vulgar language to criticize a school team or its coaches—at least when that criticism might well be transmitted to other students, team members, coaches, and faculty[,]"[31] in this case, were not sufficient to overcome the student's interest in free expression.[32]

This landmark case reiterated the need to protect and preserve fundamental societal interests.[33] The issue presented, however, was not the first of its kind. Prior to *Mahanoy*, the Supreme Court had the opportunity to review another off-campus free speech case, *Bell v. Itawamba County School Board*, to provide the necessary guidance on the "the difficult issues of off-campus online speech."[34] The need for the Supreme Court to establish a standard for addressing school regulation of off-campus student speech was evident in the opinions written by the Fifth Circuit when they addressed *Bell* in 2012. After reviewing this off-campus student speech case, the Fifth Circuit produced eight separate opinions as a result of the differing standards and approaches each judge used to evaluate whether or not the student's speech should have been protected.[35] The petitioners' brief included urgent requests to the Supreme Court to address the "disarray," "inconsistent results," and "lack of direction" in the lower courts regarding school regulation of off-campus student speech.[36] Petitioners expressed that this case would be the ideal vehicle to establish the extent to which schools may regulate student speech outside of the school environment.[37] The Supreme

30. *Id.*

31. *Id.* at 2047.

32. *Id.* at 2048.

33. *Id.*

34. Elizabeth A. Shaver, *Denying Certiorari in* Bell v. Itawamba County School Board*: A Missed Opportunity to Clarify Students' First Amendment Rights in the Digital Age*, 82 BROOK. L. REV. 1539, 1580 (2017).

35. Reply Brief at 1–2, Bell v. Itawamba Cnty. Sch. Bd., 577 U.S. 1181 (2016) (No. 15-666).

36. *Id.* at 4.

37. *Id.* at 12.

Court denied the petition to review the case and left lower courts without the Justices' clear guidance on the constitutionality of school discipline resulting from students' off-campus electronic speech.[38]

The Supreme Court's decision to review *Mahanoy* after denying review of *Bell* may have been influenced by the growing use of technological communication and remote learning due to COVID-19,[39] and thus, the possibility of schools overstepping their scope of authority in regulating the speech of the "mainstream" student. Careful comparison of these cases, however, reveals inequities in free speech protections. Said another way, patterns suggest that Minoritized students assume limited First Amendment Free Speech protections compared to those granted to students of the dominant culture.

II. THE LIMITS OF FREEDOM ON MINORITIZED STUDENTS

Like the student in *Mahanoy*, Taylor Bell, a Black student in Mississippi, faced punishment for an online post made off-campus, in his case, about two members of the school staff.[40] Unlike the student in *Mahanoy*, however, the Supreme Court denied the review of Bell's claim that his punishment violated his First Amendment right to free speech—despite the severity of his punishment, the off-campus nature of his speech, its significance as a matter of public concern, and the artistic value of pure speech. Occurring only a few years earlier,[41] what about Bell's case made it unworthy of review?

The question *Bell* asked was whether the reasonable forecast of a substantial disruption of school operations from off-campus student speech is the appropriate standard to evaluate a First Amendment violation.[42] In

38. *Id.*

39. Mark Walsh, *How a Cheerleader's Snapchat Profanity Could Shape the Limits of Students' Free Speech*, 40 EDUC. WEEK (Apr. 12, 2021), https://www.edweek.org/policy-politics/how-a-cheerleaders-snapchat-profanity-could-shape-the-limits-of-students-free-speech/2021/04 [https://perma.cc/5QU3-A65H] (recounting key points of the case and presenting its legal issue as to whether *Tinker* applies to a high school student's off-campus expressions, which is "critical in the age of social media, and even more so when the line between campus and off-campus activity is blurred by the prevalence of remote learning during the pandemic." *Id.*).

40. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 383 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

41. Taylor Bell posted his song in 2011 and the Supreme Court denied certiorari in 2016. *Id.*; B.L. posted her "snap" in 2017 and the Supreme Court granted certiorari in 2021. Complaint at 5, B.L., *ex rel.* Levy v. Mahanoy Area Sch. Dist.,141 S. Ct. 2038 (2021) (No. 3:17-cv-01734-ARC); *see also* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038 (2021).

42. *See* Petition for a Writ of Certiorari at 1, Bell v. Itawamba Cnty. Sch. Bd., 577 U.S. 1181 (2016) (No. 15-666) 2015 WL 7299351.

2011, Taylor Bell, a high-school senior, wrote, recorded, and posted a rap recording on Facebook and YouTube which alleged misconduct against female students by two male school faculty members.[43] Typical of "gangsta" rap,[44] the lyrics incorporated violent themes.[45] "The last two verses include the phrases: (1) 'looking down girls' shirts/drool running down your mouth/messing with wrong one/going to get a pistol down your mouth' and (2) 'middle fingers up if you can't stand that nigga/middle fingers up if you want to cap that nigga.'"[46] After the school became aware of the song, the principal, the district superintendent, and the school board attorney accused Bell of "making threats and false allegations," which he denied.[47] Bell also restated that the allegations in his song of improper contact with female students were true.[48] The Committee decided to suspend Taylor Bell for seven days allegedly for "harassment and intimidation of teachers and possible threats against teachers."[49] In addition, the Committee recommended Bell's transfer to an alternative school for the remainder of his senior year.[50] Upon appeal, the school board upheld the punishment and affirmed that Bell "threatened, harassed, and intimidated school employees" with the posting of his song.[51] Bell's mother filed a complaint alleging that her son's punishment violated his First Amendment right to free speech and that his punishment violated her parenting rights guaranteed by the Fourteenth Amendment's Due Process Clause.[52] Other counts alleged that Taylor Bell's speech was entitled to heightened protection as speech on a matter of public concern and that Bell's punishment for exercising his right to free speech violated Mississippi law.[53]

The District Court in the Northern District of Mississippi held that Bell's song was not protected by the First Amendment, and that the school's discipline of Bell for posting the song did not violate his mother's due process

43. *Bell,* 799 F.3d at 383.

44. Amici Curiae Brief of Erik Nielson, Charis E. Kubrin, Travis L. Gosa, Michael Render (aka "Killer Mike") and Other Scholars and Artists in Support of Petitioner at 5–6, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 390 (5th Cir. 2015) (No. 15-666) [hereinafter Bell Scholar Amicus Brief] ("[T]he phrases deemed 'threats' by the Fifth Circuit were, in actuality, well-worn rap lyrics borrowed—at times nearly verbatim—from some of music's most successful and acclaimed performers.").

45. Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012), *aff'd in part*, *rev'd in part and remanded*, 774 F.3d 280 (5th Cir. 2014), *on reh'g en banc*, 799 F.3d 379 (5th Cir. 2015), *and aff'd*, 799 F.3d 379 (5th Cir. 2015).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

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

53. *Id.*

rights to determine how to best raise, nurture, discipline, and educate her child.[54] On appeal, a three-judge panel of the U.S. Court of Appeals for the Fifth Circuit held that school officials could not reasonably forecast substantial disruption from, and no actual disruption occurred due to Bell's rap video, and that Bell's speech was not a true threat.[55] The school board then petitioned the Fifth Circuit to rehear the case *en banc* to address two issues: whether the lower court correctly applied *Tinker* to uphold the School Board's exercise of disciplinary authority over student cyber speech that originated off-campus and whether Bell's rap song constituted a true threat under *Watts v. United States*.[56] However, when the Fifth Circuit reheard the case *en banc*, the court held that while Bell's recording did not reach the level of posing a grave and unique threat to the physical safety of students, it was subject to *Tinker* because his recording threatened, harassed, and intimidated two adults (i.e., the two teachers/coaches who allegedly sexually harassed female students) and his expressions, via the rap song, were directed at the school community.[57] It then followed that his recording reasonably could have been forecast to cause a substantial disruption of the school.[58] In their opinion, the majority notes that circuit courts have taken varied approaches on the issue, and it declined to "adopt any rigid standard[.]"[59] The majority held that *Tinker* applies to a student's off-campus speech when (a) "a student intentionally directs [speech] at the school community," and (b) the speech is "reasonably understood by school officials to threaten, harass, and intimidate a teacher[.]"[60] Thus, to address whether the school had violated Bell's First Amendment rights, the majority considered whether his speech either had caused a substantial disruption or could have been reasonably forecast to cause a substantial disruption.[61]

The court concluded that school officials could have reasonably foreseen that Bell's rap song would cause a future substantial disruption had he not been disciplined.[62] First, the court determined that the manner in which he voiced his concern—with what it considered to be threatening,

54. *Id.* at 840–41.

55. Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280, 304 (5th Cir. 2014).

56. *See* En Banc Brief of Appellees at ix, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (2015) (No. 12-60264). In *Watts v. United States*, the Supreme Court recognized that threats of violence fall within a category of speech that can be prohibited without violating First Amendment protections, however, "[w]hat is a threat must be distinguished from what is constitutionally protected speech." Watts v. United States, 394 U.S. 705, 707 (1969).

57. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 397–400 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

58. *Id.* at 397–400.

59. *Id.* at 395–96.

60. *Id.* at 396.

61. *Id.* at 397.

62. *Id.* at 399–400.

intimidating, and harassing language—could have led to the serious injury or death of the two teachers mentioned by name in the song, which would ultimately be a substantial disruption.[63] Secondly, the school's administrative policy lists "'[h]arassment, intimidation, or threatening other students and/or teachers' as a severe disruption[,]" and the court noted that the policy's violation can be used as evidence supporting the reasonable forecast of a future substantial disruption.[64]

Based upon the "far-reaching" and "deeply troubling consequences" on student speech that this holding had, Bell petitioned for a Writ of Certiorari in the Supreme Court urging the Court to set limits on a school's authority to punish students for off-campus speech to avoid "inevitably encourag[ing] school officials to silence student speakers . . . solely because they disagree with the content and form of their speech."[65] The petition provided examples of off-campus speech that schools could choose to punish—so long as a school official could foresee a substantial disruption—such as expressing controversial religious ideas in church or writing a blog about abortion.[66] Considering that Bell's song addressed child sexual abuse, an urgent matter of public concern, the petition asked the Court to resolve the "important and recurring issue" of off-campus student speech touching upon on a matter of public concern and "to safeguard students' freedom to express themselves—through music and otherwise—especially on matters of public concern."[67] Despite this urgent call for the Court's intervention to protect speech made on a matter of public concern and in the form of an artistic expression, the Court denied review.[68]

When analyzing why the Supreme Court granted review of *Mahanoy* and not *Bell*, one might argue that Bell's speech differed from B.L.'s speech in *Mahanoy* in that Bell included threats, which are not protected, towards teachers.[69] However, a closer look at the details of Bell's case reveals the cultural bias that dictated how Bell's speech was evaluated and, therefore, punished.

63. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 398–99 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

64. *Id.* at 399.

65. Petition for a Writ of Certiorari at 2–3, Bell v. Itawamba Cnty. Sch. Bd., 577 U.S. 1181 (2016) (No. 15-666).

66. *Id.* at 3.

67. *Id.* at 4.

68. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

69. "A true threat is 'an expression of an intention to inflict evil, injury, or damage on another' and such speech receives no First Amendment protection." Fogel v. Collins, 531 F.3d 824, 830 (9th Cir. 2008).

III. WHEN LANGUAGE IS CONSIDERED A THREAT

Taylor Bell faced severe punishment for his off-campus speech because the school concluded that the language in his rap threatened, harassed, and intimidated school employees, violating school policy.[70] The general rule courts follow regarding the special circumstances that permit schools to punish students for off-campus speech has been limited to threats and severe bullying or harassment.[71] As mentioned, courts are split regarding the use of *Tinker* for off-campus student speech.[72] Twenty states use the *Tinker* standard in their cyberbullying or cyber harassment laws, seventeen do not, and the rest are unclear.[73] In *Bell*, the Fifth Circuit chose to apply *Tinker* in evaluating whether or not Bell's rap would have caused a substantial disruption to the school.[74] In his concurring opinion, Judge Jolly believed that because the facts of *Tinker* did not include threatening language nor did it consider "the technological and societal environs of the times[,]" it was not the appropriate standard to evaluate Bell's speech.[75] Instead, he suggested a more limited rule focusing solely on threats of violence:

> 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.[76]

Judge Jolly's opinion limits the scope of authority for schools to address off-campus speech to *actual threats* of violence only.[77] That judicial interpretation infers that he would not have addressed off-campus student speech when it cannot be construed as harassing or intimidating a teacher.[78] If the court erred in applying *Tinker* to Bell's case and instead applied Judge

70. Bell, 799 F.3d at 387–88.

71. *See* Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2045 (2021).

72. Petition for a Writ of Certiorari at 15, Bell v. Itawamba Cnty. Sch. Bd., 577 U.S. 1181 (2016) (No. 15-666) 2015 WL 7299351.

73. Mariana Viera, *How the Lyrics of Two Violent Rap Songs Could Redefine Your Online Free Speech Protections,* HUFF POST, https://www.huffpost.com/entry/how-the-lyrics-of-two-violent_b_7966792 (Aug. 11, 2016). [https://perma.cc/G84L-AAV9]

74. *Bell*, 799 F.3d at 394 (5th Cir. 2015).

75. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 401 (5th Cir. 2015) (Jolly, J., concurring).

76. *Id.* (Jolly, J., concurring) (emphasis added).

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

78. *See id.* (Jolly, J., concurring).

Jolly's rule, it would need to be determined if Bell's speech constituted an actual threat.

A. Discerning An Actual Threat

Determining the veracity of lyrical content posted online is not a new task for the courts. In 2015, the Supreme Court in *Elonis v. United States* analyzed whether the rap lyrics Elonis posted on Facebook containing graphically violent language and imagery concerning his wife, co-workers, a kindergarten class, and state and federal law enforcement constituted a threat.[79] His posts often included disclaimers that his lyrics were "fictitious."[80] The Court averred that the defendant's crime required showing that he intended to issue threats or knew that communications would be viewed as threats, thus his conviction could not stand.[81] It concluded that the jury instructions erred in stating that the Government only needed to prove that a reasonable person would regard Elonis's communications as threats because "wrongdoing must be conscious to be criminal."[82]

Although the Justices considered whether rap lyrics on social media constitute a threat, the Supreme Court's ruling in *Elonis* did not address every concern related to student speech.[83] The true threat doctrine related to school speech with an identifiable target was, however, addressed in *Burge ex rel. v. Colton School Dist. 53*.[84] In this case, Braeden, an eighth grade student, posted a series of comments on his private Facebook page out of frustration about his teacher.[85] While on his home computer on a day that school was not in session, Braeden posted that he wanted to "start a petition to get mrs. Bouck [sic] fired" and that "she needs to be shot."[86] Instructed by his mother who monitors his Facebook page, Braeden removed the post within twenty-

79. Elonis v. United States, 575 U.S. 723, 726–31 (2015) (resolving the true threat subjective-intent requirement based on a federal statute and statutory interpretation analyses for 18 U.S.C. § 875(c)).

80. *Id.* at 727.

81. *Id.* at 739–40.

82. *Id.* at 740 (quoting Morissette v. United States, 342 U.S. 246, 252 (1952)) (internal quotation marks omitted).

83. The case focused on federal criminal liability and did not consider the balancing act that schools must take to ensure safety and order for the broader community. *Elonis*, 575 U.S. at 740.

84. Burge *ex rel*. Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1067–68 (D. Or. 2015); *cf.* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064–65 (9th Cir. 2013) (expressing progressively violent and threatening messages on social media, while at home, coupled with context such as expressions of social isolation justified school expulsion as permissible under the First Amendment).

85. Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1060 (D. Or. 2015).

86. *Id.*

four hours.[87] Six weeks later, the parent of another student anonymously shared a printout of Braeden's post with the school principal.[88] Braeden, who had never been disciplined for any act of violence or convicted of any juvenile crime before, was given in-school suspension for three and a half days.[89] Braeden shared that he did not intend for the teacher, Ms. Bouck, to see his comments, did not intend to threaten or otherwise communicate with Ms. Bouck, and did not seriously believe that Ms. Bouck should be shot.[90]

The District Court in Oregon held that Braeden's comments did not present a "true threat" and that his comments did not trigger the school's ability to restrict speech.[91] The true threat exception of the First Amendment requires a two-part analysis: a subjective requirement and an objective requirement.[92] The subjective requirement is met "only if 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.'"[93] The objective test asks whether "a reasonable person would foresee that the statement would be interpreted by those to whom he communicates the statement as a serious expression of intent to harm or assault."[94] The objective test requires the fact-finder to "look[] at the entire factual context of [the] statements including: the surrounding events, the listeners' reaction, and whether the words are conditional."[95]

The opinion in *Burge* also mentioned that while the Supreme Court had not addressed whether *Tinker* governs off-campus speech by students, the Ninth Circuit had previously applied *Tinker* in *Wynar v. Douglas County School District*.[96] Since the District Court held that Braeden's comments did

87. *Id.*

88. *Id.* at 1061.

89. *Id.*

90. *Id.*

91. Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1070 (D. Or. 2015).

92. Virginia v. Black, 538 U.S. 343, 359–60 (2003).

93. *Burge*, 100 F. Supp. 3d at 1068 (quoting Virginia v. Black, 538 U.S. 343, 359 (2003)).

94. *Id.*at 1069 (quoting Fogel v. Collins, 531 F.3d 824, 831 (9th Cir. 2008)) (internal quotation marks omitted).

95. *Id.* (citing United States v. Bagdasarian, 652 F.3d 1113, 1119 (9th Cir. 2011)) (internal quotation marks omitted).

96. *See id.* at 1070–71. In *Wynar*, the school board charged Landon, a sophomore at the time, with violating Nevada Revised Statute § 392.4655 based on written evidence that he "threatened or extorted another pupil, teacher, or school employee." In this case, Landon messaged friends on MySpace about shooting people in school. His friends informed their coach of these messages and, together, they notified the principal and the police. Despite claiming his messages were jokes, the school suspended Landon for ten days. Landon and his father, acting as guardian, sued the school district, school administrators, and school district officials and trustees for violations of Landon's constitutional rights under 42 U.S.C. § 1983, as well as for negligence and negligent infliction of emotional distress. The Ninth Circuit held that the school district did not violate Landon's First Amendment rights because his comments constituted "an identifiable threat of school violence" and would substantially disrupt or materially interfere with school activities." The Ninth Circuit did not

not rise to the level of a true threat, the court followed the circuit's application of *Tinker,* determining whether the school district could reasonably conclude that Braeden's Facebook comments "would '*materially and substantially* interfere with the requirements of appropriate discipline in the operation of the school.'"[97] The court noted that "although an actual disruption is not required, school officials must have more than an 'undifferentiated fear or apprehension of disturbance' to overcome the student's right to freedom of expression."[98] This could be determined by considering "whether school administrators are pulled away from their ordinary tasks to respond to or mitigate the effects of a student's speech."[99] Meanwhile, no substantial disruption exists, "at least [when] there is no evidence that classroom activities were substantially disrupted" and student speech cannot be punished "on the basis of . . . embarrassment to school officials."[100] The court determined that there was no evidence that Braeden's Facebook post had any impact on classroom activities and that there were no incidents or discussions concerning the Facebook post.[101] Braeden also continued to attend the class with the teacher he wrote about unsupervised and without incident.[102] Further, during the six-week period before the principal became aware of Braeden's Facebook comments, no one talked about or otherwise acknowledged the posts.[103] Additionally, the conduct of the school administration did not demonstrate any fear of future substantial disruption or violence.[104] The principal did not question Braeden or his family to see if

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explain, however, what constitutes "an identifiable threat of school violence." *See generally* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062 (9th Cir. 2013). Drawing on *Tinker*, school officials in *Wynar* suspended then expelled the student, who had progressive "violent and threating instant messages" originating from his home in which he expressed plans for a school shooting. *Wynar*, 728 F.3d at 1064–66. The federal appellate court in *Wynar* pointed out why school officials took the student's message seriously as a credible or planned school attack. Among the concerns, the appellate court observed the student's fascination with previous school shootings. Also, he "explicitly invoked the deadliest school shooting ever by a single gunman and stated that he could kill even more people without wasting a single bullet. The given date for the event—April 20—implicitly invoked another horrific mass school shooting—the massacre at Columbine." *Id.* at 1071.

97. Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1072 (D. Or. 2015) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969)).

98. *Id.* (quoting *Tinker*, 393 U.S. at 508).

99. *Id.* (quoting J.C. v. Beverly Hills Unified Sch. Dist., 711 F. Supp. 2d 1094, 1113–14 (C.D. Cal. 2010)).

100. *Id.* (quoting *J.C.*, 711 F. Supp. 2d at 1111 and Burch v. Barker, 861 F.2d 1149, 1159 (9th Cir. 1988)) (internal quotation marks omitted).

101. *Id.*

102. *Id.*

103. Burge *ex rel.* Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057, 1073–74 (D. Or. 2015).

104. *Id.* at 1073 (D. Or. 2015); *Cf.* Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1071 (9th Cir. 2013) ("[The student] stated that he had access to weapons and ammunition, so his friends and the school had reason to believe he had the ability to carry out a shooting. When questioned, [he] confirmed to a police officer that, as reported by his friends, he had weapons and ammunition at his house.").

he had access to guns, and did not contact the police or have him evaluated by a mental health professional.[105]

As held in *Burge*, students should not be punished for off-campus speech featuring language that does not constitute an actual threat. The true threat inquiry set forth in *United States v. Dinwiddie* provides factors to determine if student language rises to the level of a true threat.[106] In *Dinwiddie*, the Eighth Circuit emphasized the intensive nature of the true threat inquiry and held that a court must view the relevant facts to determine "whether the recipient of the alleged threat could reasonably conclude that it expresses 'a determination or intent to injure presently or in the future.'"[107] Factors to determine how a reasonable recipient would view the purported threat include: (1) the reaction of those who heard the alleged threat; (2) "whether the threat was conditional"; (3) whether the person who made the alleged threat communicated it directly to the object of the threat; (4) whether the speaker had a history of making threats against the person purportedly threatened; and (5) whether the recipient had a reason to believe that the speaker "had a propensity to engage in violence."[108]

When reviewing *Bell* en banc, the Fifth Circuit chose to apply *Tinker* and found it unnecessary to complete a true threat inquiry.[109] However, Judge James Dennis, who dissented, opined that Bell's rap was protected speech on a matter of public concern and that *Tinker* did not authorize the school to censor Bell's speech.[110] He accused the majority of committing "several serious and unfortunate constitutional errors" by "permitting a school policy to supplant parental authority over the propriety of a child's expressive activities on the Internet outside of school, expanding schools' censorial

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105. *Burge*, 100 F. Supp. 3d at 1073 (D. Or. 2015).

106. United States v. Dinwiddie*,* 76 F.3d 913, 925 (8th Cir. 1996).

> When determining whether statements have constituted threats of force, we have considered a number of factors: the reaction of the recipient of the threat and of other listeners, . . . whether the threat was conditional, . . . whether the threat was communicated directly to the victim, . . . whether the maker of the threat had made similar threats to the victim in the past, . . . and whether the victim had reason to believe that the maker of the threat had a propensity to engage in violence.

Id. (internal citations omitted). *See also* Elonis v. United States, 575 U.S. 723, 731 (2015).

> The jury instructions instead informed the jury that "[a] statement is a true threat when a defendant intentionally makes a statement in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted by those to whom the maker communicates the statement as a serious expression of an intention to inflict bodily injury or take the life of an individual."

Id.

107. *Dinwiddie,* 76 F.3d at 925 (8th Cir. 1996) (quoting Martin v. United States, 621 F.2d 1235, 1240 (8th Cir. 1982), *cert denied*, 459 U.S. 1211 (1988)).

108. *Id.* at 925.

109. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 400 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016).

110. *Id.* at 406–12 (Dennis, J., dissenting).

authority from the campus and the teacher's classroom to the home and the child's bedroom."[111] In Judge Dennis's analysis of the issue, he treated Bell as a citizen, not just a student.[112] Characterizing Bell's rap song as speech on an issue of public concern—the sexual harassment of female students—Judge Dennis opined that Bell's speech was speech that "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection."[113] He further stated that the vulgar and violent words used in the song did not alter the conclusion that the song addressed a matter of public concern, even if Bell's words "f[e]ll short of the School Board's aesthetic preferences for socio-political commentary. . . ."[114] He criticized the majority's two-part test for determining whether Bell's rap song was subject to the disciplinary power of school authorities, noting that the requirement that a student's speech be "intentionally directed" at the school community would violate the First Amendment.[115] Under this reasoning, the majority's decision punishes the speaker for attempting to communicate his message to others.[116] In his opinion, the second requirement—that the speech would be reasonably understood to constitute threatening, harassing, or intimidating language toward a teacher—would be constitutionally unworkable as the majority failed to define "threatening," "harassing," or "intimidating" language in its articulated test.[117] His concern was that this vague language would rely on any interpretation of speech and "the *Tinker* standard itself could be viewed as somewhat vague."[118] His conclusion—that even if school officials had the authority to discipline Bell for his off-campus speech, the facts did not demonstrate either an actual substantial disruption at school or a reasonable forecast of a substantial disruption—conflicted with the majority, which demonstrates the vagueness of the *Tinker* standard.[119] Further, he believed that these "various layers of vagueness" and broad discretion would restrict students' First Amendment protections.[120] Concluding that the *Tinker* standard did not apply, and even if it did, the requirements would not be met, and that Bell's song did not constitute a threat, Judge Dennis believed the school violated Bell's First Amendment

111. *Id.* at 404, 406 (Dennis, J., dissenting).

112. *Id.* at 403–05 (Dennis, J., dissenting).

113. *Id.* at 406 (Dennis, J., dissenting) (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

114. *Id.* at 409 (Dennis, J., dissenting).

115. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 412–13 (5th Cir. 2015) (Dennis, J., dissenting).

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

117. *Id.* at 412–13, 418 (Dennis, J., dissenting).

118. *Id.* at 418 (Dennis, J., dissenting).

119. *Id.* at 420–21 (Dennis, J., dissenting).

120. *Id.* at 419 (Dennis, J., dissenting).

rights, the "most elementary and important of our Constitution's guarantees."[121]

Despite concurring with the majority, Judge Jolly cautioned the use of *Tinker* in this case and instead suggested:

> 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.[122]

This rule would also require a true threat inquiry to determine if speech contains an actual threat. If the court declined to apply *Tinker* and instead evaluated if Bell's speech constituted a true and actual threat, would the outcome have been different?

B. Applying The True Threat Inquiry To Bell

An analysis of the facts from *Bell* against the true threat inquiry factors would help determine if Bell's rap song constituted a true threat. The first factor of the true threat inquiry is to consider the reaction of those who heard the alleged threat.[123] Comments left by listeners of the song indicated that they did not view the lyrics as a threat by Bell against the coaches, but rather as art "(*e.g.*, 'Hey, don't forget me when you're famous' and 'Lol . . . Mane Im tellin you cuz . . . been tellin you since we was little . . . keep fuckin with it man you got all the talent in the world . . .')."[124] Additionally, neither coach mentioned in Bell's song claimed to feel threatened or intimidated; one coach testified that he felt the song was "just a rap."[125] Further, during the Disciplinary Committee hearing, one member of the committee failed to suggest that any of the language was considered a threat, instead maintaining a focus on the profanity used in the song and telling Bell to censor his material and remove the bad words.[126] The second factor considers if the

121. *Id.* at 432 (Dennis, J., dissenting).

122. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 401 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016) (Jolly, J., concurring).

123. *See supra* text accompanying note 107.

124. Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280, 303 (5th Cir. 2014).

125. *Id.* at 289.

126. *Bell*, 799 F.3d at 429 (5th Cir. 2015).

alleged threat was conditional.[127] During his disciplinary hearing, Bell disclosed that his rap served to caution the coaches of what could potentially happen if they continued their alleged misconduct.[128] His lyrics support his claim, as the violent lines do not use any specific language demonstrating that anyone, including himself, was actually going to commit an act of violence towards the coaches.[129] The third factor considers whether the person who made the alleged threat communicated it directly to the object of the threat, which did not occur in this case.[130] Bell shared that he wanted the school community to be aware of the coaches' misconduct and also wanted to use the song as an opportunity to move forward in his music career.[131] The fourth factor evaluates whether the speaker had a history of making threats against the person purportedly threatened.[132] Not only did Bell not make any threats towards the coaches prior to this allegation, but he also did not have a history of violence towards anyone and did not have any previous disciplinary issues.[133] The fifth and final factor considers whether the recipient had a reason to believe that the speaker had a propensity to engage in violence.[134] Again, nothing in Bell's history demonstrated that he was anything other than non-violent.[135] Neither the coaches nor the disciplinary committee demonstrated any concern that Bell would act in a violent way.[136] Applying the true threat inquiry to *Bell* reveals that his speech was not an actual threat. Thus, his speech should have been protected.

Indeed, actual threats to cause harm in the school environment should be addressed and handled accordingly. Given the special characteristics of the school environment and the potentially devastating results of violence in the school setting, school administrators should be able to act when a student's online speech contains a credible threat of violence.[137] Balancing

127. *See supra* text accompanying note 107.

128. "The last two verses include the phrases: (1) 'looking down girls' shirts/drool running down your mouth/messing with wrong one/going to get a pistol down your mouth' and (2) 'middle fingers up if you can't stand that nigga/middle fingers up if you want to cap that nigga.'" Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 836 (N.D. Miss. 2012).

129. *Id.*

130. *See supra* text accompanying note 107.

131. *Bell*, 799 F.3d at 385–86 (5th Cir. 2015).

132. *See supra* text accompanying note 107.

133. *Bell*, 799 F.3d at 428 (5th Cir. 2015).

134. *See supra* text accompanying note 107.

135. *Bell*, 799 F.3d at 428 (5th Cir. 2015).

136. *Id.*

137. Morse v. Frederick, 551 U.S. 393, 424 (2007).

> [A]ny argument for altering the usual free speech rules in the public schools cannot rest on a theory of delegation but must instead be based on some special characteristic of the school setting. The special characteristic . . . is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face.

order and safety of students with other students' rights is an essential job of school authorities.[138] However, it is just as important to ensure, when addressing concerns that might impact order and safety, internal biases resulting in disproportionate punishment do not harm students either.

For example, in *Doe v. Pulaski*, a similar case including rap lyrics with violent language, the Court of Appeals for the Eighth Circuit explored a threat assessment to determine if a student's lyrics constituted an actual threat.[139] Frustrated by a breakup and upset that his ex-girlfriend would not reconsider their relationship, the student "express[ed] a desire to molest, rape, and murder" his ex-girlfriend through "two violent, obscene, and misogynic" written documents.[140] According to the student, he intended to write a rap song with lyrics that mimicked the vulgar and violent rap songs performed by rappers such as Eminem, Juvenile, and Kid Rock.[141] After deciding that his lyrics failed to fit a beat or musical composition, he instead chose to convert his lyrics into a letter that he signed but kept to himself.[142] Weeks later, a friend found the letter in the student's bedroom.[143] The friend took the letter without the student's permission and gave it to the student's ex-girlfriend who then shared it with authorities.[144] The school suspended the student for a semester and transferred him to an alternative school.[145] When he and his parents appealed the recommended suspension, the school board chose to extend his suspension even further, until the end of the school year.[146] When the family sued the school district, the district court held that the student's composition was not a true threat.[147] The court rationalized that the letter was taken from his home and presented to his ex-girlfriend without his permission, and the writing's contents did not amount to an imminent threat.[148] The court then ordered the school district to terminate the expulsion because his writings were protected speech.[149] When the school district

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Id.

138. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).
> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.

Id.

139. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 622–23 (8th Cir. 2002).
140. *Id.* at 619.
141. *Id.*
142. *Id*.
143. *Id*.
144. *Id.* at 619–20.
145. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 620 (8th Cir. 2002).
146. *See id.* at 620.
147. *Id.*
148. *Id.*
149. *Id.*

appealed, the Eighth Circuit reversed the decision, holding that a reasonable recipient would have perceived the letter as a threat, so the expulsion did not violate the First Amendment.[150] The majority failed to consider the context of this letter and instead narrowed in on the words alone.[151] *Dinwiddie* notes that when evaluating the nature of a threat, the entire context must be considered.[152] Proof of actual intent to carry out the threat is necessary, and when a threat is not communicated to its object, further evidence suggesting acts will accompany the words is needed.[153] The facts here demonstrate that the student chose to emulate Eminem's style of rap as a way to process his hurt from the breakup and had no intention for anyone to ever see his personal expression of grief.[154]

Treating off-campus student expression as a threat when it is not—and then severely punishing a student for it—has damaging effects. Worse, unfettered discretion as to who will be punished, and how severely, leads to disproportionate damage. In addition to Bell's suspension, the school transferred him to an alternative school.[155] Although, as the court in *Bell* noted, "a transfer to an alternative school with stricter discipline does not deny the student's access to a free public education and therefore does not violate a federal protected property or liberty interest."[156] Still, there was no justification for the transfer. Further, even if the transfer did not deny the student's access to a free public education, it does not mean that there were no negative implications to the transfer.

Alternative schools typically receive less funding than regular schools, resulting in limited resources, including fewer credentialed teachers.[157] Many of these schools also do not have counseling staff to support the social-emotional needs of students.[158] Transferring students to alternative schools

150. *Id.* at 626–27.

151. *Id.* at 627–28 (Heany, J., dissenting).

152. United States v. Dinwiddie, 76 F.3d 913, 925 (8th Cir. 1996) (citing United States v. Lee, 6 F.3d 1297, 1306 (8th Cir. 1993)).

153. United States v. Crews, 781 F.2d 826, 837 (10th Cir. 1986) (Logan, J., dissenting).

154. *See* Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 619 (8th Cir. 2002) (According to the student, he intended to write a letter-style rap song similar to those of Eminem and other prominent rappers at the time because he was frustrated by the breakup.). *See also* Amber Randall, *Here's 19 Times Eminem Talked About Beating And Raping Women*, DAILY CALLER (Oct. 11, 2017), https://dailycaller.com/2017/10/11/heres-19-times-eminem-talked-about-beating-and-raping-women/ [https://perma.cc/H59M-F8ZS] ("Rapper Eminem has a long history of advocating for violence against women, making fun of gay people and rapping about his desire to rape women.").

155. Bell v. Itawamba Cnty. Sch. Bd., 859 F. Supp. 2d 834, 841 (N.D. Miss. 2012).

156. *Id.*

157. *See* Heather Vogell & Hannah Fresques, *'Alternative' Education: Using Charter Schools to Hide Dropouts and Game the System*, PROPUBLICA (Feb. 21, 2017), https://www.propublica.org/article/alternative-education-using-charter-schools-hide-dropouts-and-game-system [https://perma.cc/6BLN-Y4KP].

158. *Id.*

temporarily impacts the consistency of the student's learning environment, which interferes with the student's academic and social-emotional development.[159] Further, state governments "often hold alternative schools to lower standards[,]" sometimes exempting them from "achievement goals, oversight, or reporting rules [that] other schools must follow."[160] Although free and public, the lack of resources and accountability in alternative schools creates an inferior learning environment for students.[161] Research has shown that while "6% of regular schools have graduation rates below 50%, . . . nearly half of alternative schools do."[162]

To demonstrate a "deprivation of education," a plaintiff must: (1) "show that the alternative school is qualitatively inferior to regular schools"; or (2) "that the alternative school falls below the constitutional threshold for an adequate or equal education."[163] However, proving inadequacy places an impractical burden on individual students,[164] and thus, schools and courts continue to justify the application of this punishment. Worse, schools maintain discretion as to which students are sent to alternative schools, and reports show that these students are disproportionately students of color.[165] Failing to consider the harm that regulating speech beyond the school's authority has on students perpetuates the school-to-prison pipeline with no legitimate justification.

As in *Doe*,[166] Bell received severe punishment for language that would, if viewed through a critical lens, be understood as expressive communication—not a true threat. But, instead, the lens that the disciplinary committee used to evaluate Bell's actions fails to consider that a "reasonable" person can internalize biases that turn non-threats into threats. And as a matter of equitable justice, this current reasonable person standard discriminates against Minoritized students.

159. *See generally* Laura L. Brock, Timothy W. Curby, & Amy L. Cannell-Cordier, *Consistency in Children's Classroom Experiences and Implications for Early Childhood Development, in* KINDERGARTEN TRANSITION AND READINESS (Mashburn A., LoCasale-Crouch J., Pears K. eds., 2018).

160. Vogell & Fresques, *supra* note 158.

161. *Id.*

162. *Id.*

163. Derek W. Black, *Reforming School Discipline*, 111 NW. U. L. REV. 1, 39 (2016).

164. *Id.*

165. Vogell & Fresques, *supra* note 158.

166. Doe v. Pulaski Cnty. Special Sch. Dist., 306 F.3d 616, 620, 622–23 (8th Cir. 2002).

IV. EVALUATING SPEECH WITH A LIBERATING SYSTEMS LENS

Tone, language, values, and expectations differ throughout the various subcultures that exist within the United States. When evaluating speech according to what a "reasonable person" would understand or interpret, it is important to identify who the reasonable person is. The standard of reasonableness naturally is influenced by background, experience, and understanding. Varying contexts ultimately impact what a person considers reasonable.

A. Accounting For The Context Of Speech

Context matters. Taylor Bell's school condemned him for the language used in the rap lyrics he wrote but the school failed to consider the context surrounding his song.[167] The school and court erred by failing to acknowledge three important contextual factors of his speech: why he chose a rap song to share his concerns, how the school failed to address the allegations mentioned in the song, and the use and art of rap.

While reviewing the case, the Fifth Circuit noted that Bell chose to perform and post his rap to draw attention to alleged misconduct by school staff.[168] Bell's actions were criticized on the basis that if he genuinely had concerns, he should have gone to school personnel instead of publicizing the issue.[169] This criticism does not consider that Bell and students like him have a legitimate belief that authorities will not believe them. Bell testified that he produced his song because he believed that school officials would ignore any

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167. Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 410–11 (5th Cir. 2015) (en banc), *cert denied*, 577 U.S. 1181 (2016) (Dennis, J., dissenting).

> Beyond that basic First Amendment protection, however, the content, form, and context of Bell's speech indisputably reveals that it was also entitled to "special protection" against censorship because it was speech on a matter of public concern safeguarded "at the heart" of the First Amendment's protections. . . . Moreover, while it is not dispositive of this case, it bears mentioning that the School Board has never attempted to argue that Bell's song stated any fact falsely.
>
> The majority opinion, however, wholly ignores these critical aspects of Bell's speech, instead reflexively reducing Bell's rap song to "intimidating, harassing, and threatening" speech without any analysis whatsoever.

Id. (internal citations omitted).

168. Bell stated that he knew people were "gonna listen to it, somebody's gonna listen to it" instead of being ignored by school officials. *Id.* at 385.

169. *See* Bell v. Itawamba Cnty. Sch. Bd., 774 F.3d 280, 310 (5th Cir. 2014) ("Throughout the hearing, the school-board attorney and committee members . . . counseled [Bell] on what appropriate action he could have taken.").

report of teacher misconduct.[170] Not only was he punished for his song, but his presumption was correct. Although the Board never denied Bell's accusations, it is understood that the allegations were not investigated, despite the school receiving corroborating evidence.[171] Perhaps the school wanted to avoid liabilities for poor hiring decisions considering that in 2009, former Itawamba coach Bobby Hill "was arrested and accused of sending sexually explicit text messages to a minor student."[172] Regardless, punishing—or, worse, retaliating against—Bell not only silences him but all other students who need to bring similar issues to light.

It is worth noting that sexual abuse of minors is vastly underreported because often victims and witnesses fear that authorities will blame them or refuse to believe them. Here, authorities took this a step further by severely disciplining Bell for publicizing this issue.[173] Punishing any student for calling attention to the sexual abuse of minors—or any other important issue—is problematic. Yet, the majority failed to consider the context of his speech and ignored the implications of the message sent by their lack of support.[174] Speech on an issue of public concern is entitled to special protection, but instead Bell received severe punishment.[175] Not only did his previous experience warn him that he would not be believed, but the inaction of the school after hearing the song validated his prediction.[176]

B. The Criminalization of Rap And Its Impact On Student Speech

Bell's use of rap lyrics to express his concerns is not new. Ever since hip-hop was created in the mid-1970s, it has been used to bring attention to varying issues in a creative and relatable way.[177] Since its origination, hip-hop has evolved and diverged into specific genres, including "gangsta rap."[178] Gangsta rap was developed in the mid-1980s by young Black men involved in both hip-hop culture and gang and street life.[179] The themes of

170. *Id.* at 283.

171. Reply Brief, *supra* note 36, at 9.

172. *Bell*, 799 F.3d at 427.

173. Reply Brief, *supra* note 36, at 9.

174. *See* Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 406–07 (5th Cir 2015) (Dennis, J., dissenting).

175. Reply Brief, *supra* note 36, at 9.

176. *Id.*

177. *See* Taifha Natalee Alexander, *Chopped & Screwed: Hip Hop from Cultural Expression to a Means of Criminal Enforcement*, 12 HARV. J. SPORTS & ENT. L. 213, 213 (2021).

178. *Id.* at 214.

179. Leola Johnson, *Silencing Gangsta: Class and Race Agendas in the Campaign Against Hardcore Rap Lyrics*, 3 TEMP. POL. & CIV. RTS. L. REV. 25, 25 (1994).

gangsta rap represent the struggles of the low-income urban community and discuss street life as a way of survival by celebrating gang culture, referencing drug use, and largely disrespecting government authority.[180] Due to its themes, gangsta rap has been criticized and has faced campaigns to be censored.[181]

The themes found in gangsta rap have also created a stigma that leads people to associate gangsta rap with actual crime. In criminal cases, prosecutors have relied on rap lyrics to establish guilt, having concluded that the lyrics must be true.[182] In accepting rappers' lyrics as true, prosecutors and courts do not account for the reality that a defendant's lyrics are purely fictional.[183] At best, using rap music to criminalize speech is a result of the history of anti-Blackness in America; at worst, it is an intentional bad-faith approach to law based on the fallacy that Black people are inherently deviant and using lyrics as a means to prove what a person might do.[184] This policing and prosecutorial decision-making "is as dangerous as it is unconstitutional[,]" where Black men in particular are being convicted based on amateur rap videos and little evidence related to the crime, while the prosecution infringes on free speech guarantees.[185] Worse, it seems that "hip-hop, a musical genre that is predominantly populated by young Black men, is the only genre of art targeted in this way."[186]

For example, in *Commonwealth v. Knox*, Jamal Knox was convicted in a lower court of making terroristic threats and witness intimidation stemming from rap lyrics which referred to certain city police officers who were scheduled to testify against him.[187] The Supreme Court of Pennsylvania held that the Constitution allows states to criminalize threatening speech that is specifically intended to terrorize or intimidate and that the evidence presented was sufficient to support a finding that Knox acted with the subjective intent to terrorize or intimidate police officers through his rap song.[188] Hip-hop artists, including Chance the Rapper, Meek Mill, Killer Mike, Yo Gotti, Fat Joe, and 21 Savage, filed a brief urging the U.S. Supreme Court to hear Knox's First Amendment challenge to his conviction,

180. *Id.* at 25–26.

181. *Id.* at 26.

182. *E.g.* Montague v. State, 243 A.3d 546, 551–52 (Md. 2020); *see also* Alexander, *supra* note 171, at 231 (noting that prosecutors have attempted to use rap lyrics in criminal cases assuming they were true).

183. Alexander, *supra* note 178, at 231.

184. Donald F. Tibbs & Shelly Chauncey, *From Slavery to Hip-Hop: Punishing Black Speech and What's "Unconstitutional" About Prosecuting Young Black Men Through Art*, 51 WASH. U. J. L. & POL'Y 33, 38–39 (2016).

185. *Id.* at 35.

186. *Id.* at 38.

187. Commonwealth v. Knox, 190 A.3d 1146, 1151 (Pa. 2018).

188. *Id.* at 1158–59, 1161.

explaining that his lyrics are "a work of poetry" and are not intended to be taken literally, "something that a reasonable listener with even a casual knowledge of rap would understand."[189] However, the Supreme Court denied review of the case.[190]

It is clear that violent and sexual themes are prevalent in rap. But these themes are not unique to this genre of music:[191]

> There is one musical genre that seems almost wholly devoted to violence. Dozens of the most popular works in this genre graphically depict murders. Male protagonists boast about their physical and sexual prowess, frequently challenging other males to battles for no other reason than sheer pride. . . . [Women are often] portrayed as wanton and shallow and easily manipulated for sexual purposes. . . .
>
> . . . .
>
> That genre, of course, is opera.[192]

When violent and sexual themes are found in other genres of music like opera, it would be "bizarre" to take them as literal threats or descriptions.[193] If violent and sexual lyrics can be understood figuratively within other genres, why is language assessed differently in rap?[194]

Postdoctoral researcher Adam Dunbar explored this question by conducting experiments examining how stereotypes affect the way people view violence in songs.[195] In his study, predominantly white participants read

189. Motion for Leave to File Brief as Amici Curiae and Brief of Amici Curiae Michael Render ("Killer Mike"), Erik Nielson, and Other Artists and Scholars in Support of Petitioner at 19, Knox v. Commonwealth of Pennsylvania, 139 S. Ct. 1547 (2019) (No. 18-949) [hereinafter Scholar Motion for Amici].

190. Knox v. Pennsylvania, 139 S. Ct. 1547, 1547 (2019).

191. *See* Nicholas Stoia, Kyle Adams & Kevin Drakulich, *Rap Lyrics as Evidence: What Can Music Theory Tell Us?* 8 RACE & JUST. 330, 331 (2018) (noting that sexual and violent themes are prevalent in opera).

192. *Id.*

193. *Id.*

194. Jay-Z explains why rappers, as opposed to artists in other genres, receive such treatment: "The difference is obvious, of course: Rappers are young black men telling stories that the police, among others, don't want to hear." Bell Scholar Amicus Brief, *supra* note 45, at 10–11.

195. *See* Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCH. PUB. POL'Y & LAW 280, 283 (2016); *see also* Carrie B. Fried, *Bad Rap for Rap: Bias in Reactions to Music Lyrics*, 26 J. APPLIED SOC. PSYCH. 2135, 2135 (1996) (concluding "[w]hen a violent lyrical passage is represented as a rap song, or associated with a Black singer, subjects find the lyrics objectionable,

lyrics from a folk song, but were told that the lyrics were either rap or country.[196] The study found that when participants believed the lyrics to be rap, they deemed the identical lyrics more literally, offensively, and in greater need of regulation compared to country music.[197] Dunbar concluded that the "mere label of rap is sufficient to induce negative evaluations. . . ."[198] Other research reveals that when violent lyrics are described as rap, people are more likely to view the songwriter as being in a gang and having a criminal disposition, compared to when identical lyrics are described as country, punk, rock, or heavy metal.[199]

Studies such as this demonstrate how stereotyping can impact the considerations of the "reasonable person." Unfortunately, this prevalent stereotyping and implicit racial bias significantly influences the racialization of the criminal justice system and ultimately leads to the criminalization of specific Minoritized groups.[200]

This stereotyping was present in *Bell* as well. Although the disciplinary committee could have considered the context of Bell's rap and accepted it as a form of artistic expression, instead, the Fifth Circuit incorrectly chose to "delegitimize[] rap as an art form entitled to full protection under the Constitution."[201] Rap is art.[202] Like poets, rappers use figurative language and employ a full range of literary tools, developing new words, creatively altering meanings, and interweaving their lyrics with references that outsiders may not or choose not to understand.[203] Rappers typically create a persona, and in gangsta rap, that persona is often "the thug that he feels he

worry about the consequences of such lyrics, and support some form of government regulation. If the same lyrical passage is presented as country of folk music, or is associated with a White artist, reactions to the lyrics are significantly less critical on all dimensions.").

196. Dunbar et al., *supra* note 196, at 283–84.

197. *Id.* at 288–89.

198. *Id.* at 289.

199. *See* Adam Dunbar & Charis Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 521 (2018).

200. *See* Alexander, *supra* note 171, at 226.

201. Bell Scholar Amicus Brief, *supra* note 41, at 5.

202. Bell Scholar Amicus Brief, *supra* note 41, at 5; *see also* Baruti N. Kopano, *Rap Music as an Extension of the Black Rhetorical Tradition: "Keepin' it Real,"* 26 W. J. OF BLACK STUD. 204, 204–05 (2002) (explaining the role of rap as a rhetoric of resistance); *see also* Eric K. Watts, *An Exploration of Spectacular Consumption: Gangsta Rap as Cultural Commodity*, 48 COMM. STUD. 42, 42 (1997) (presenting how "hard-core rap artistry participates in a complex and fluid set of economic exchange relations among the lived experiences of artists, the operations of a consumer culture, and the dictates of rap music industry."); *see generally* ADAM KRIMS, RAP MUSIC AND THE POETICS OF IDENTITY (2000) (tracing the formation of cultural identities for both artists and audience as an artistic expression).

203. Bell Scholar Amicus Brief, *supra* note 45, at 5–6.

has to project."[204] Bell's lyrics reflect the commonly used exaggeration and hyperbole, narrating from the perspective of "T-Bizzle."[205] His provocative lyrics mimic various aspects of gangsta rap and borrow themes and stylistic approaches from well-known rappers.[206] Ignoring the artistic nature of rap "perpetuates enduring stereotypes about the inherent criminality of young men of color," and eliminates a protection granted to the dominant culture.[207]

In order to dismantle patterns of criminalization of the speech of young men of color, their expression needs to be viewed from a critical lens. For this to happen, dominant culture needs to improve their cultural competency. In 2018, 78% of public school principals nationally and 46% of students were white.[208] The lack of diverse representation in school leadership ultimately shapes the limited perspective on how student expression is viewed. Without cultural competency, the constitutional requirement of reasonableness would likely continue to exclude any reasonable speech or expression foreign to dominant culture and unfairly penalize Minoritized students.

V. CULTURAL COMPETENCY AS A LIBERATING APPROACH

When school leaders operate from a white-centered perspective, a student's behavior that falls outside of the dominant culture's expectations is often misinterpreted and penalized. Thus, this discussion offers a liberating systems perspective by recommending equity-minded solutions through systems-thinking strategies. Specifically, we posit that *without cultural competency, Minoritized students will continue to enjoy fewer freedoms than their white peers.*

A. The Value of Culturally Competent Schools

Failure to achieve cultural competency leads to negative consequences for Minoritized students. Without an understanding of the needs and interests

204. Stoia, Adams & Drakulich, *supra* note 192, at 331 (quoting Conrad Tillard, "The Hip-Hop Minister" (from Hurt, 2006) "Every black man who goes into the studio, he's always got two people in his head: him, in terms of who he really is, and the thug that he feels he has to project.").

205. Bell Scholar Amicus Brief, *supra* note 45, at 6.

206. *Id.*

207. *Id.*

208. NAT'L CTR. FOR EDUC. STATS., RACIAL/ETHNIC ENROLLMENT IN PUBLIC SCHOOLS 1 (May 2021), https://nces.ed.gov/programs/coe/indicator/cge [https://perma.cc/4EWG-CU74]; NAT'L CTR. FOR EDUC. STATS., CHARACTERISTICS OF PUBLIC SCHOOL PRINCIPALS 1 (May 2020), https://nces.ed.gov/programs/coe/indicator/cls [https://perma.cc/H3E8-SB7X].

of the minority, dominant culture silences Minoritized students' voices. Institutional structures and dynamics not only keep Minoritized students out of spheres of influence, but they also prevent opportunities for Minoritized students to address issues that the dominant culture does not experience or observe. When members of the dominant culture cannot relate to the experiences of the minority, these experiences are often considered exaggerated or worse, false. The constant diminution of Minoritized voices sends a message that those students do not matter. Further, lack of cultural understanding leads to inequitable punishment with a severely damaging impact on Minoritized students.

Studies have shown that Black students are disciplined at significantly higher rates than white students.[209] A 2018 report by the U.S. Department of Education Office for Civil Rights found that while Black students represented 15.1% of students attending public schools, they accounted for 38.2% of out-of-school suspensions and 38.8% of outright expulsions from schools.[210] Research shows that this data is not a result of inherent behavior issues or even socio-economic factors.[211] If Minoritized students are, for example, unfairly suspended or expelled from school, their academic performance will likely decline which, in turn, "puts many on the path to dropping out, delinquency, run-ins with the police, and even imprisonment."[212] Arbitrary and inequitable discipline can result in distrust and loss of respect for schools and their rules. This disconnect often leads students to turn away from education, and ultimately, to a less productive path.[213]

Failing to understand Minoritized students and thus limiting their full expression also stifles their ability to participate as equal citizens. A holistic education includes teaching students how to become productive members of society. Personal contributions to society include advocacy, production, and

209. The rates of disproportionality may differ regionally. In southern states, specifically, Black students were disproportionately suspended and expelled at rates five times or higher than their representation in the student population. Edward J. Smith, & Shaun R. Harper, DISPROPORTIONATE IMPACT OF K-12 SCHOOL SUSPENSION AND EXPULSION ON BLACK STUDENTS IN SOUTHERN STATES, UNIV. OF PA., CTR. FOR THE STUDY OF RACE & EQUITY IN EDUC. 1–3 (2015), https://web-app.usc.edu/web/rossier/publications/231/Smith%20and%20Harper%20(2015)-573.pdf [https://perma.cc/N8V2-T8YR].

210. U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., AN OVERVIEW OF EXCLUSIONARY DISCIPLINE PRACTICES IN PUBLIC SCHOOLS FOR THE 2017-18 SCHOOL YEAR 3, 12, 16 (June 2021), https://ocrdata.ed.gov/assets/downloads/crdc-exclusionary-school-discipline.pdf [https://perma.cc/LUM3-AW9Q].

211. Michael Rocque, *Unfair Punishment at School Can Push America's Minority Students into Troubled Lives*, SCHOLARS STRATEGY NETWORK (Mar. 1, 2013), https://scholars.org/contribution/unfair-punishment-school-can-push-americas-minority-students-troubled-lives [https://perma.cc/V64R-4W73].

212. *See id.*

213. *See id.*

collaboration. Constantly silencing student expression will likely cause students to limit their contributions out of fear of punishment. Thus, fewer societal contributions will come from Minoritized students, and new developments will be limited to that of the dominant culture. The consequences are not limited to individual student development; society also misses the opportunity to benefit from the ideas, innovations, and productivity of Minoritized students that are smothered by this system.

B. Overcoming The Opposition To Cultural Competency In Schools

The murder of George Floyd in 2020 sparked a racial reckoning in the United States where members of the dominant culture became enlightened about racial inequalities.[214] Businesses, organizations, and schools began publicizing commitments to address all forms of racism within their institutions.[215] This movement, however, caused fear in groups of people who believe that an agenda of "white genocide" exists.[216] Fear and misinformation morphed into complete and adamant opposition to general efforts to embrace diversity and promote equity.[217] Around the country, parents, guardians, and other community members have been attending school board meetings to fight against plans to dismantle racism in schools, including cultural competency training and development.[218] Coalitions in opposition of "discussions of race" in schools have gone as far as urging legislatures to enact laws preventing the acknowledgement and acceptance of diversity.[219] In Ohio, for example, Republican members of the House of Representatives proposed House Bill 327 which prohibits the "teaching, instruction or

214. *See* Elliott C. McLaughlin, *How George Floyd's Death Ignited a Racial Reckoning That Shows No Signs of Slowing Down*, CNN (Aug. 9, 2020, 11:31 AM), https://www.cnn.com/2020/08/09/us/george-floyd-protests-different-why/index.html [https://perma.cc/QNE6-5VJ8] (discussing interest convergence, vicarious trauma, and how COVID-19 helped to expose the interconnectedness of human vulnerability).

215. *See* Tracy Jan, Jena McGregor & Meghan Hoyer, *Corporate America's $50 Billion Promise*, WASH. POST (Aug. 24, 2021, 7:03 PM), https://www.washingtonpost.com/business/interactive/2021/george-floyd-corporate-america-racial-justice/ [https://perma.cc/X6V9-GT3A].

216. *Extremists See Critical Race Theory as Evidence of "White Genocide,"* ADL BLOG (June 30, 2021), https://www.adl.org/blog/extremists-see-critical-race-theory-as-evidence-of-white-genocide [https://perma.cc/Y9FS-XFTV].

217. *See* Elle Reeve, Samantha Guff & Deborah Brunswick, *The Critical Race Theory Panic Has White People Afraid That They Might Be Complicit in Racism*, CNN (July 8, 2021, 7:18 AM), https://www.cnn.com/2021/07/06/us/critical-race-theory-philadelphia/index.html [https://perma.cc/5F4F-XQFW] ("The idea that CRT is being used to teach young White children to hate themselves for being White has circulated in conservative media.").

218. *See id.*

219. *See id.*

training on 'divisive concepts,'" defining divisive concepts as concepts related to cultural superiority; promoting or insinuating inherent subconscious or conscious racism, sexism, or oppression; or implications of responsibility for actions committed in the past by other members of the same culture.[220] On its face, the bill implies a neutral application by treating all groups equally; however, "the appearance of neutrality primarily operates to obscure the fact that the perspective of the white majority is embedded within this view."[221] Cultural competency was not a hot topic on school board meeting agendas and among state representatives until dominant culture saw itself as the potential "victim" of discrimination. This inaccurate self-depiction alone demonstrates the need to ensure a complete education that includes the history of cultural dynamics in the United States, the cause and effects of systemic oppression, and the pathway to decentering whiteness for an inclusive society.[222]

Those who oppose education in cultural competency lack an accurate understanding of what cultural competency entails. Cultural competence is defined as "the ability to effectively interact with people from cultures different from one's own, especially through a knowledge and appreciation of cultural differences."[223] Culturally competent people possess the ability to "[U]nderstand people and treat them equitably despite cultural differences (which often result in very different views about what is expected or appropriate in a particular situation)."[224] The true source of opposition to

220. H.R. 327, 2021 Leg., 134th Reg. Sess. (Ohio 2021). *See generally* PEN AMERICA, EDUCATIONAL GAG ORDERS: LEGISLATIVE RESTRICTIONS ON THE FREEDOM TO READ, LEARN, AND TEACH (2021), https://pen.org/report/educational-gag-orders/ [https://perma.cc/892Z-34NL] (tracing the surge of state legislation and other policies blocking the teaching of critical race theory and historical oppression).

221. Kevin Brown & Darrell D. Jackson, *The History and Conceptual Elements of Critical Race Theory, in* HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 14 (Marvin Lynn & Adrienne D. Dixson eds., Routledge, 2013) (explaining that an "important aspect of [Critical Race Theory] seeks to reveal that the conceptions of racism and racial subordination as understood by traditional legal discourse are neither neutral nor sufficient to overcome the effects of centuries of racial oppression on people of color.").

222. David Gillborn, *The Policy of Inequity: Using CRT to Unmask White Supremacy in Education Policy*, *in* HANDBOOK OF CRITICAL RACE THEORY IN EDUCATION 132 (Marvin Lynn & Adrienne D. Dixson eds., Routledge, 2013) (quoting Zeus Leonardo, *The Souls of White Folk: Critical Pedagogy, Whiteness Studies, and Globalization Discourse*, 5 RACE ETHNICITY & EDUC. 29, 30–31 (2002)).

> "[W]hiteness" is not a race; "whiteness" (as discussed in the critical literature) is a form of belief, a system of assumptions and practices; it is not a description of a people: "Whiteness" is a racial discourse, whereas the category "white people" represents a socially constructed identity, usually based on skin color. . . .

Id.

223. *Cultural Competence*, *Historical & Current Events Dictionary*, DICTIONARY.COM, https://www.dictionary.com/e/historical-current-events/cultural-competence/ [https://perma.cc/TH5K-2DWX] (Jun. 11, 2021).

224. *Id.*

achieving institutional cultural competency is the elimination of dominant culture and thus, the elimination of its power. For some, maintaining power is the genuine goal, while others are driven by irrational fears and ignorance. Regardless of the reason, in order to overcome opposition, school leaders and policymakers must ensure school personnel are culturally competent for the benefit of students.

C. Transforming Schools To Be Culturally Competent

School districts can implement several changes to address cultural competency such as: training, diversifying leadership, and embracing new technology. Currently, states differ in how they value cultural competency within their school districts. New York, for example, developed a Culturally Responsive-Sustaining Education Framework with the goal of "[I]mproving learning results for all students by creating well-developed, culturally responsive-sustaining, equitable systems of support for achieving dramatic gains in student outcomes."[225] This framework, however, merely provides encouraged guidelines and is not required.[226] Similarly, the Ohio State Board of Education encourages the expansion and improvement of diversity training for school personnel, but cultural competency training is not mandatory.[227] Southern states such as Alabama and Mississippi seemingly do not have frameworks developed for cultural competency in schools, though the South Carolina House of Representatives drafted a bill to require their Criminal Justice Academy to develop and implement a cultural competency model training program curriculum for school resource officers.[228] In Nevada, effective July 2019, state law requires school districts to provide professional development for school personnel on cultural competency.[229] Even with a framework, some states, such as Kentucky,

225. N.Y. STATE DEP'T EDUC., CULTURALLY RESPONSIVE-SUSTAINING EDUCATION FRAMEWORK 7 http://www.nysed.gov/common/nysed/files/programs/crs/culturally-responsive-sustaining-education-framework.pdf [https://perma.cc/YGY9-DEUD] (last visited June 12, 2022).

226. "All stakeholders (students, teachers, school leaders, district leaders, families and community members, higher education faculty and administrators, and Education Department Policymakers) can consider implementing the following CR-S guidelines as a means to achieve a more culturally responsive-sustaining education system." *Id.* at 17.

227. OHIO STATE BD. OF EDUC., MEMORANDUM ON DIVERSITY STRATEGIES FOR SUCCESSFUL SCHOOLS POLICY 8–9 (2012), https://education.ohio.gov/getattachment/State-Board/State-Board-Reports-and-Policies/Diversity-Strategies-Policy/2012_EqualEducationalOpportunity_OhioSchoolsDraftPolicy_Final.pdf.aspx [https://perma.cc/UEP2-SEG8] (last visited June 12, 2022).

228. H.R. 3051, 2017–18, 122nd Sess. (S.C. 2017).

229. "Except as otherwise provided in NRS 391.027, the Commission shall adopt regulations: . . . . (h) Establishing the requirements for obtaining an endorsement on the license of a teacher,

codified cultural competency professional development as an optional offering.[230] Selected states in the Great Plains, such as Montana, Nebraska, North Dakota, and Wyoming with a generally homogenous demographic do not seem to provide frameworks for increasing cultural competency in schools. Although an occasional conference may be held every once in a while, its omission as an embedded focal point may offer better understanding, consideration, and inclusion of their Minoritized populations, especially Native Americans.

Yet, without effective training on the cultural differences of students, families, and colleagues, harmful stereotyping will continue. When a person cannot challenge their preconceived notions about a group of individuals, stereotypes will be reinforced.[231] Diversity, equity, and inclusion trainings help to break down preconceived notions and inaccurate belief systems that impact how people are viewed and treated.[232] Prioritizing these trainings helps build school cultures where Minoritized students can learn freely.

Diversifying leadership would also help to create a more balanced approach to policies and school issues. Without diversity, members of a group often think the same way and lack the ability to consider anything outside of their areas of awareness. Different perspectives, however, can create an equitable learning environment and lead to the development of innovative ideas to improve schools. Further, the dismantling of white-centered institutional structures likely cannot occur without diversified leadership.

In addition to cultural appreciation training and diversifying leadership, schools would benefit from embracing new technologies as opportunities for growth and productivity, rather than allowing their unfamiliarity to create fear and confusion. The continuous development of new technology and social media applications has led to school management issues because guidelines and policies did not initially account for the digital arena. Instead of viewing technology in a negative light out of fear of the possible harm it can cause, by embracing technology, schools can develop responsible users. By teaching students about the benefits of technology and instructing students on the power of reach and impact—both good and bad—certain unwanted behaviors can be mitigated.

In addition to practical changes, schools can benefit from making philosophical changes. In the past, society expected children to remain quiet

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administrator or other educational personnel in cultural competency." NEV. REV. STAT. § 391.019 (2022).

230. KY. REV. STAT. ANN. § 156.095(3) (West 2022).

231. Alexander, *supra* note 178, at 227.

232. *See* Edward H. Chang, et al., *Does Diversity Training Work the Way It's Supposed To?*, HARV. BUS. REV. (July 9, 2019), https://hbr.org/2019/07/does-diversity-training-work-the-way-its-supposed-to [https://perma.cc/ZQ4S-LHUT].

and do as they were told. This expectation encouraged the use of harsh language and corporal punishment when children did not comply.[233] In time, research revealed that children can maintain order, exhibit positive behavior, and develop skills without severe punishment.[234] Research has also exposed the harm that severe punishment causes in the development of a child.[235] Since 1974, thirty-one states have banned the use of corporal punishment in schools.[236] Meanwhile, others still maintain outdated policies despite the harm they cause.[237]

For instance, many school districts currently implement zero-tolerance policies that require school officials to hand down harsh punishment—

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233. Rex Forehand & Britton McKinney, *Historical Overview of Child Discipline in the United States: Implications for Mental Health Clinicians and Researchers*, 2 J. CHILD & FAM. STUDS. 221, 222 (1993) (discussing primary trends of disciplinary practices from the 1600s to present day in the United States).

> In the 1600s and 1700s in the United States, there were several trends that emerged with regard to discipline. First, religion, particularly Puritan values, was very influential in guiding methods of discipline. Children were taught that, by disobeying their parents, they were forcing God to condemn them to eternal death. By using strict discipline, the Puritans felt that they could give their children salvation. If disobedient, children were whipped in public and forced to make public confessions at meetings . . . . Matters such as rights of children were never considered.

Id. (internal citations omitted).

234. AM. PSYCH. ASS'N, APA RESOLUTION ON PHYSICAL DISCIPLINE OF CHILDREN BY PARENTS 2 (2019), https://www.apa.org/about/policy/resolution-physical-discipline.pdf [https://perma.cc/AJ2V-3UEX] ("[R]esearch has shown that children learn from the behavior modeled by parents, and therefore physical discipline may teach undesirable conflict resolution practices.") (internal citations omitted).

235. *See* Eve Glicksman, *Physical Discipline is Harmful and Ineffective*, AM. PSYCH. ASS'N (May 2019), https://www.apa.org/monitor/2019/05/physical-discipline [https://perma.cc/82EN-MECY] (explaining how longitudinal research found that physical discipline can lead to emotional, behavioral, and academic problems); *see also* Robert D. Sege & Benjamin S. Siegel, *Effective Discipline to Raise Healthy Children*, 142 PEDIATRICS 1, 4 (2018) ("In a longitudinal study investigating the relationship between harsh verbal abuse by parents and child outcomes, researchers noted that harsh verbal abuse before 13 years [old] was associated with an increase in adolescent conduct problems and depressive symptoms between ages 13 and 14.").

236. Tim Walker, *Why Are 19 States Still Allowing Corporal Punishment in Schools?*, NAT'L EDUC. ASS'N (Oct. 17, 2016), https://www.nea.org/advocating-for-change/new-from-nea/why-are-19-states-still-allowing-corporal-punishment-schools [https://perma.cc/3KX2-TXVU] (*Editor's Note*: Some text in the article indicates that thirty states have banned corporal punishment in school, but the headline, other text, and graphics in the article state that nineteen states allow corporal punishment. This appears to leave one state unaccounted for, but we presume that thirty-one states, not thirty, have banned the practice and that the article features a small mathematical error.).

237. "Corporal punishment is being widely and unfairly used and often at shocking and disturbing levels." *Id.* (discussing how corporal punishment in schools is still legal in 19 states). Trends in disciplinary approaches in schools may coincide with parenting approaches. The President of the American Psychological Association suggests most parents raise children in the same manner they were raised, stating, "I don't think most people know how to discipline without spanking. We don't teach people to do it differently; alternatives seem time-consuming." Glicksman, supra note 236.

usually suspension or expulsion—when students violate certain rules.[238] The punishment applies regardless of the circumstances, the reasons for the behavior, or the student's disciplinary history.[239] However, research has shown that not only are zero-tolerance policies ineffective, but they have also created greater issues.[240]

In 2014, 2.8 million K–12 students received one or more out-of-school suspensions.[241] Research has consistently shown that suspensions lead to negative student outcomes such as an increased likelihood of dropping out or entering the juvenile justice system.[242] Further, harsh school disciplinary policies are applied disproportionately, impacting Black and Latinx students, students with disabilities, and students in poverty most severely.[243]

When faced with a behavioral issue, instead of approaching the issue with a predetermination that punishment is the appropriate response, schools should seek to understand the root cause of the behavior. Understanding that behavior is communicating an unmet need and approaching the problem with the goal of meeting the need will not only address the behavior but will also address the root cause to prevent future incidents. Sometimes, school

238. *See* Russell Skiba, et al., *Are Zero Tolerance Policies Effective in the Schools? An Evidentiary Review and Recommendations*, 63 AM. PSYCH. 852, 853 (2006).

239. *Id.* at 853.

240. Brief of Mississippi Center for Justice as Amicus Curiae in Support of Petitioner at 9–11, Bell v. Itawamba County School Bd., 577 U.S. 1181 (2016) (No. 15-666).

> Most suspensions are for nonviolent infractions, making it difficult to argue that suspensions make schools safer. In fact, according to the American Psychological Association ("APA"), the data do not show a clear link between, on the one hand, the use of suspension, expulsion, or so-called "zero-tolerance" policies—under which often severely punitive "predetermined consequences" follow regardless of the gravity of misbehavior, context, or mitigating circumstances—and, on the other, improvements in student behavior or school safety. Instead, studies have shown that the schools that frequently suspend and expel students have worse school climates and governance structures, spend a disproportionate amount of time on disciplinary matters, and, even controlling for demographic factors, fare worse on state accountability tests. Exclusionary discipline is also associated with an increase in behavioral problems, academic difficulty, detachment from school, and dropout rates.

Id.

241. U.S. DEP'T OF EDUC. OFF. FOR CIV. RTS., 2013–2014 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3 (2016), https://www2.ed.gov/about/offices/list/ocr/docs/2013-14-first-look.pdf [https://perma.cc/6KTS-R9Z7].

242. *See generally* Andrew Bacher-Hicks, Stephen B. Billings & David J. Deming, *The School to Prison Pipeline:*
Long-Run Impacts of School Suspensions on Adult Crime 4–5 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26257, 2019).

243. "[B]lack students are suspended and expelled at a rate three times greater than white students, while students with disabilities are twice as likely to receive an out-of-school suspension as their non-disabled peers." *School Climate and Discipline: Know the Data*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/gen/guid/school-discipline/data.html [https://perma.cc/6K89-RFVZ] (last visited Jun. 12, 2022).

officials are so focused on the issue at hand, that they completely miss the bigger picture.

For example, in *Johnson v. New Brighton Area School District*, after students and at least one teacher repeatedly referred to the plaintiff, Johnson, as Osama Bin Laden, a teacher alleged that Johnson responded, "If you guys don't quit calling me that, I'm going to pull a Columbine."[244] This teacher thought Johnson should be punished for making the statement and that even if his statement was a joke, he should not be allowed to "escape punishment" because, "kids nowadays try to get out of everything."[245] Johnson was suspended for ten days despite having decent grades and no disciplinary record.[246] What if instead the teacher considered that Johnson was responding to being bullied? Why was it acceptable to refer to a student by the name of a terrorist and expect for the student not to respond? The teacher's statement exhibits her desire to punish rather than to help the student. The real issue in this case was not his response but the bullying itself, which the school failed to address and protect Johnson from. Instead, Johnson—the victim—was punished.

This focus on punishment also caused the disciplinary committee in *Bell* to lose sight of the actual issue—the allegations of sexual misconduct by school staff members. What could have been an alert to school officials of alleged child abuse and a mere learning experience for Bell in increasing awareness of the potential of his speech to be misconstrued, the school instead chose to punish Bell—a decision that benefited no one yet caused him harm.

If schools reevaluate their perspectives on school discipline, everyone benefits. When addressing student needs and behavioral issues, if possible, school officials should partner with families. In situations where families are not involved, schools should find ways to learn students' needs to best support them. Schools are public service institutions and should maintain a posture of service to the students in every way. By building relationships with students and families, schools can address root issues before they become actual problems. This would ultimately create a safer learning environment, reduce behavioral issues, and reduce actual violent threats. When students are viewed with dignity and care, issues are addressed with genuine concern rather than as a problem to eliminate.

244. Johnson v. New Brighton Area Sch. Dist., No. CIV A 06-1672, 2008 WL 4204718, at *1 (W.D. Pa. Sept. 11, 2008).

245. *Id.* at *2.

246. *Id.* at *3.

CONCLUSION

In review, free speech and the implications of free speech differ from student to student. Despite having an issue that failed to fit any category of review established by student free speech precedents as well as the overwhelming support for the U.S. Supreme Court's review, it still denied *Bell* certiorari. Not only was Bell denied his constitutional protections, but he also was punished for shedding light on an issue of public concern. Worse, his punishment was significant. Meanwhile, B.L., a student who posted a message displaying her frustration of her failure to make her varsity cheerleading team had her case reviewed by the U.S. Supreme Court when her punishment was the prohibition of cheerleading for a year—on a team she did not even want to be on. Bell was criminalized while B.L. lost privileges. Bell made a public statement addressing school staff misconduct while B.L. was venting. If not addressed, the infiltration of racial bias in the evaluation of student rights will continue to lead to the unequal protection of the right to free speech for students. Without diversified leadership and effective training on the cultural differences of students, families, and colleagues, harmful stereotyping will continue. The ability for schools to understand different cultures has real consequences for our children, as a limited understanding of culture has the power to disadvantage some while privileging others. Thus, employing a liberating systems approach, which critiques operational systems and policy spheres with new solutions, when approaching student speech and expression will help to de-center dominant ideologies, embrace the wholeness of diverse students, and prevent the criminalization of Minoritized students.