PUT *MAHANOY* WHERE YOUR MOUTH IS: A CLOSER LOOK AT WHEN SCHOOLS CAN REGULATE ONLINE STUDENT SPEECH

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INTRODUCTION

It was the Snapchat story that sparked four years of litigation,[1] viral press coverage,[2] and a trendy t-shirt design[3]: "Fuck school fuck softball fuck cheer fuck everything."[4] By June of 2021, it was finally settled law: high school sophomore Brandi Levy's cathartic Snapchat rant after failing to make the varsity cheerleading team is protected speech that falls outside the disciplinary authority of her public high school.[5]

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1 Aubrey Rhoadarmer & Talia Parlane, B.L. v Mahanoy *and Free Speech off Campus: How the Verdict of a Supreme Court Case Could Affect Student's Free Speech Rights*, FALCON (May 12, 2021), https://thefalcon.online/10616/news/b-l-v-mahanoy-and-free-speech-off-campus/ [https://perma.cc/XRX7-2CFL].

2 *See, e.g.*, Devin Dwyer & Jacqueline Yoo, *Teen Cheerleader's Snapchat Brings Supreme Court Clash over Schools and Free Speech*, GOOD MORNING AM. (Apr. 2, 2021), https://www.goodmorningamerica.com/news/story/teen-cheerleaders-snapchat-brings-supreme-court-clash-schools-76396105/ [https://perma.cc/XE9C-7HN2]; Ian Millhiser, *The Free Speech Case So Complicated It Seems to Have Stumped the Supreme Court*, VOX (Apr. 28, 2021, 3:40 PM), https://www.vox.com/2021/4/28/22407813/supreme-court-cursing-cheerleader-mahanoy-school-free-speech-tinker-kavanaugh-sotomayor/ [https://perma.cc/7JTU-2R4B].

3 *Aclu Fuck Everything T Shirt Beige-Unisex T-Shirt,* TRENDSHOTUS, https://trendshotus.com/campaign/aclu-fuck-everything-t-shirt-beige/ [https://perma.cc/YRE7-ZLLS].

4 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2043 (2021).

5 *Id.* at 2048.

Though the Supreme Court's decision in *Mahanoy Area School District v. B.L.* was lauded as a "big[] free speech victory"[6] for public school students, the Supreme Court actually took a far more restrained approach to online student speech than the previous Third Circuit opinion.[7] Instead of holding that a school simply can *never* regulate any online or off-campus speech, the Court applied a test from *Tinker v. Des Moines Independent Community School District* to determine whether Levy's particular kind of online speech was punishable by her school. This *Tinker* test considers whether a student's speech or expression "materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school" or "collid[es] with the rights of others."[8] Reception to the Court's *Mahanoy* decision has been mostly positive, and commentators in the legal community say the court made the appropriate call.[9] However, in a digital age where online activity is used as an outlet for severe bullying, harassment, and threats, the *Tinker* test alone is too imprecise to provide lower courts and public schools adequate guidance on when online student speech can be disciplined.

Various approaches to public school authority over online student speech present less of a circuit "split" and more of a "splintering." The question of whether off-campus online speech should be susceptible to school discipline is particularly hard to tackle as online activity encompasses an especially wide array of speech ranging from mere profanities to school shooting threats. Before the Supreme Court reviewed *Mahanoy*, approaches to this question varied from establishing a "sufficient nexus" to a school's pedagogical interests,[10]

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6 Jonathan Zimmerman, Opinion, *SCOTUS Siding with Pa. High Schooler on Snapchat Rant Is a Bigger Free Speech Victory*, PHILA. INQUIRER (Jun. 24, 2021), https://www.inquirer.com/opinion/commentary/scotus-mahanoy-school-cheerleader-brandi-levy-free-speech-20210624.html [https://perma.cc/W7MQ-5VF5].

7 B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 196 (3d Cir. 2020) ("[O]urs is the first Circuit Court to hold that *Tinker* categorically does not apply to off-campus speech.").

8 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

9 Kalhan Rosenblatt, *'Sigh of Relief': Student Activists Celebrate Ruling in School Free Speech Case*, NBC NEWS (June 23, 2021, 6:39 PM), https://www.nbcnews.com/news/us-news/sigh-relief-student-activists-celebrate-ruling-school-free-speech-case-n1272180/ [https://perma.cc/J2AM-M7PG] (public reception); Joette Katz & Thomas B. Mooney, *SCOTUS Gets It Right in 'Mahanoy' with Measured Response to Student Speech*, SHIPMAN (June 28, 2021), https://www.shipmangoodwin.com/insights/scotus-gets-it-right-in-mahanoy-with-measured-response-to-student-speech.html [https://perma.cc/X8BM-KHF3].

10 *See, e.g.*, Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 577 (4th Cir. 2011).

to using a "foreseeable risk" of substantial disruption test.[11] The Third Circuit, meanwhile, outright refused to apply the *Tinker* test to off-campus speech and categorically protected online student speech from any public school regulation.[12] After *Mahanoy*, the Third Circuit's approach has explicitly been taken off the table, while the other two appear inconsistent with the Supreme Court's approach. However, each of these approaches to *Tinker* only seem to explore its first prong, the substantial disruption prong. *Tinker*'s second prong addresses speech that "collid[es] with the rights of others,"[13] and this prong has gone relatively underexplored by courts. But this second prong could be the key to how courts justify school intervention in online activity in the future.

The Supreme Court's *Mahanoy* opinion clarifies that the *Tinker* test does apply to off-campus speech, but otherwise the majority opinion was narrow and did not provide the precise test necessary to clarify when a school can regulate harmful forms of online speech like cyberbullying or online threats. Justice Breyer, who wrote *Mahanoy*'s majority opinion, mentioned that bullying is a possible exception for school regulation, but he used limiting qualifiers, writing: "Circumstances that *may* implicate a school's regulatory interests include *serious or severe* bullying or harassment *targeting particular individuals*[] [or] *threats* aimed at teachers or other students . . . ."[14] Meanwhile, Justice Alito's concurrence contends that "[b]ullying and severe harassment are serious (and age-old) problems, but these concepts are not easy to define with the precision required for a regulation of speech."[15]

This brief acknowledgement that cyberbullying could be an issue fails to address how the internet has exploded the potential for bullying, harassment, and threats to spread quickly on a school campus, follow students wherever they go, and create perpetual disruption in their daily lives.[16] It also fails to address the way relative

11 *See, e.g.*, Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 39 (2d Cir. 2007).

12 *Mahanoy*, 964 F.3d at 196.

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

14 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2041 (2021) (emphasis added).

15 *Id.* at 2057 (Alito, J., concurring).

16 *See, e.g.*, Sara Skilbred-Fjeld, Silje Endresen Reme & Svein Mossige, *Cyberbullying Involvement and Mental Health Problems Among Late Adolescents*, 14 CYBERPSYCHOLOGY: J. PSYCHOSOCIAL RSCH. ON CYBERSPACE, Feb. 21, 2020, at 1; Alexi Cohan, *Social Media Offers 'No Escape' for Bullying Victims*, BOS. HERALD (Jan. 13, 2019, 11:59 PM),

anonymity and access to mass communication via the internet gives students the ability to intimidate others with threats that, if severe enough, can unintentionally lead to police investigation.[17] It is inevitable that these issues will remain in the background for the lower courts to continue to parse through. Justice Thomas's dissenting opinion criticized the majority's vague approach as almost certainly "untethered from anything stable" and warned that schools will be "at a loss as to what exactly the Court's opinion today means."[18]

Meanwhile, lower courts have indicated that general cyberbullying may not be enough of a compelling interest to survive the "exacting demands of strict scrutiny" as applied to criminal law statutes that prevent harassment.[19] This could imply that schools ought not attempt to broadly prohibit this kind of online activity either. At the same time, however, this could also mean that public schools may be the institutions in the *unique* position to discipline this kind of harmful conduct impacting minors, should a remedy for it exist at all. Stories about cyberbullying and its connection to mental illness and teen suicide have sadly become more common,[20] so it seems only natural that more and more parents are looking to the school for answers.[21]

Public schools need clearer guidance on when they can intervene when issues arise that involve online student conduct. *Mahanoy*

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https://www.bostonherald.com/2019/01/13/social-media-offers-no-escape-for-bullying-victims/ [https://perma.cc/PWX8-GL87].

17 Nic Querolo, *Across the U.S., School Shooting Threats on TikTok Prompt Closures and More Police*, BLOOMBERG (Dec. 16, 2021, 5:01 PM), https://www.bloomberg.com/news/articles/2021-12-16/tiktok-school-shooting-threats-prompt-closures-and-more-police/ [https://perma.cc/TF53-EQJP]; Danielle Campoamor, *Schools, Law Enforcement Warn of Dec. 17 School Shooting 'Trend' on TikTok*, TODAY (Dec. 16, 2021, 10:28 PM), https://www.today.com/parents/parents/schools-law-enforcement-warn-dec-17-school-shooting-trend-tiktok-rcna9092/ [https://perma.cc/W9T5-ST6P].

18 *Mahanoy*, 141 S. Ct. at 2063 (Thomas, J., dissenting).

19 State v. Bishop, 787 S.E.2d 814, 816, 821 (N.C. 2016); *see also* People v. Marquan M., 19 N.E.3d 480, 484, 488 (N.Y. 2014) (finding a cyberbullying law that prohibits speech that "harass[es]," "annoy[s]," "taunt[s]," and "humiliate[s]" minors is overbroad).

20 *See, e.g.*, Mary Elizabeth Gillis, *Cyberbullying on Rise in US: 12-Year-Old Was 'All-American Little Girl' Before Suicide*, FOX NEWS (Sept. 21, 2019, 6:00 AM), https://www.foxnews.com/health/cyberbullying-all-american-little-girl-suicide/ [perma.cc/M8VG-6VRE]; Josh Sanburn, *A Florida Tragedy Illustrates Rising Concern About Cyber-Bullying Suicides*, TIME (Oct. 16, 2013), https://nation.time.com/2013/10/16/a-florida-tragedy-illustrates-rising-concern-about-cyber-bullying-suicides/ [perma.cc/M25T-MMNL].

21 *See, e.g.*, *Mom of Teen Suicide Victim Sues Florida School Board*, CBS NEWS MIA. (Aug. 4, 2014, 10:58 AM), https://miami.cbslocal.com/2014/08/04/mom-of-teen-suicide-victim-sues-florida-school-board/ [perma.cc/2CH3-H6A2].

acknowledges that this conduct is regulatable by schools, even if the relatively unforgiving *Tinker* standard is controlling. Thus, carve-outs must exist for severe online student speech which can be supervised by schools. The *Mahanoy* majority opinion drops hints of when schools may be allowed to regulate online student speech, but it does not explore the situations in detail.[22]

This Note proposes a way to approach online student speech in three different contexts: cyberbullying, online threats, and other kinds of incendiary speech. Each approach is informed by a combination of lower court precedent, historical trends, and Supreme Court dicta to piece together when exceptions to online student speech protection may apply. Each analysis provides an explanation of how *Tinker* can and should be used to justify school discretion over particular kinds of online speech. Part I provides the history behind how the First Amendment has been used to protect public school student speech and discusses the unique issues the internet creates for schools. Part II starts by exploring how previous Circuit Court approaches no longer adequately line up with the court's approach in *Mahanoy*. Part II will then distinguish between three different scenarios of potentially harmful online student speech: cyberbullying directed at students, online threats directed at teachers, students, and schools, and other forms of incendiary online speech.

I. HISTORICAL BACKGROUND: TINKER TO TODAY

Schools were not always considered, as Justice Breyer penned it, "the nurseries of democracy."[23] In fact, the Supreme Court's wisdom toward public schools used to be that "the courtroom is not the arena for debating issues of educational policy," fearing that school speech decisions "would in effect make [the Court] the school board for the country."[24]

Conceptions of what the "public school" represents as it relates to the rights of children evolved significantly in the early twentieth century when school became compulsory.[25] A new trend began to suggest that there was some value in diverse demonstrations of

22 *See Mahanoy*, 141 S. Ct. at 2045.

23 *Id.* at 2046.

24 Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 598 (1940).

25 *See* JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 8 (2018).

independence and identity at these institutions. Laws that regulated teaching foreign language[26] were struck down, and a controversial decision which previously allowed schools to punish students for refusing to salute to the national flag was reversed.[27] As the population ballooned, so too did the influence of public schools, which are now responsible for the day-to-day lives of "at least one-sixth of the U.S. population."[28] Court cases arising from public school policies over the past hundred years encompass some of the most doctrinally consequential and hotly contested judicial decisions regarding race, sex, religion, patriotism, and safety.[29] By the 2000s, not only had the barrier between court and school district deteriorated, but schools would be considered by some as "our most significant theaters of constitutional conflict."[30]

A. The School Speech Cases

If the dramatic reconceptualization of the role of the public school in American society could be credited to a single case, it would be *Tinker v. Des Moines Independent Community School District*.[31] On December 9, 1965, Senator Robert F. Kennedy publicly announced his support for an extended truce with the Vietcong over Christmas.[32] Three teenagers, inspired both by Kennedy's proposal and their own sorrow for those who died in the Vietnam War,[33] were "determined to publicize their objections" to the war by wearing black armbands to

26 *See* DRIVER, *supra* note 25, at 30 (first citing Meyer v. Nebraska, 262 U.S. 390, 391–92 (1923) (invalidating a law that prohibited schools from teaching foreign language to students before high school); and then citing Farrington v. Tokushige, 273 U.S. 284, 298 (1927) (striking down Hawaii's regulations on private language academies)).

27 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that public schools may not discipline students for refusing to salute to the flag and overturning *Gobitis*, 310 U.S. 586).

28 DRIVER, *supra* note 25, at 9.

29 *See id.*; *see also, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that segregating schools based on race was unconstitutional); Engel v. Vitale, 370 U.S. 421, 424 (1962) (holding that official school prayers in public schools were unconstitutional); Vorchheimer v. Sch. Dist. of Phila., 532 F.2d 880, 881 (3d Cir. 1976) (holding that regulations establishing admission requirements to a high school based on gender were not unconstitutional), *aff'd*, 430 U.S. 703 (1977); *Barnette*, 319 U.S. at 642.

30 DRIVER, *supra* note 25, at 9.

31 393 U.S. 503 (1969).

32 *Kennedy Urges U.S. Try to Extend Truce Offered by Vietnam*, N.Y. TIMES, Dec. 10, 1965, at 18.

33 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 258 F. Supp. 971, 972 (S.D. Iowa 1966).

school.[34] They did so despite warnings from their schools that wearing the bands would result in suspension.[35] Though the students twice challenged their suspensions in court, the district court dismissed their case, holding that the vehement passions surrounding the war meant the armband demonstration was "likely to disturb" a disciplined classroom.[36]

The Supreme Court disagreed in a landmark decision which held that the students' armband protest was a symbolic act protected by the Free Speech Clause.[37] Justice Fortas famously wrote in the majority opinion that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[38] A school was to be a "marketplace of ideas" that "may not be regarded as closed-circuit recipients of only that which the State chooses."[39] *Tinker* outlined a test requiring actual evidence of harm for student speech to be regulated. Under the *Tinker* test, student speech is generally protected from discipline unless it causes "substantial disruption of or material interference with school activities" or "impinge[s] upon the rights of other students."[40]

For nearly fifteen years, *Tinker* and its substantial disruption test enjoyed status as the preeminent standard for all student speech related cases, as it was the first to expressly uphold student speech as constitutionally protected.[41] However, changes in the Supreme Court's composition coupled with a shifting attitude favoring restoration of authority and discipline made *Tinker* ripe for challenge.[42] Three subsequent school speech cases over the next two decades would return some authority to the schools, with some

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

35 *Id.*

36 *Tinker*, 258 F. Supp. at 973.

37 *Tinker*, 393 U.S. at 505–06.

38 *Id.* at 506.

39 *Id.* at 511–12 (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)).

40 *Id.* at 509, 514. It is worth noting that the first part of this test is the one that courts focus on, even in cases involving bullying. *See, e.g.*, Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 571 (4th Cir. 2011).

41 *See* Scott. A. Moss, *The Overhyped Path from* Tinker *to* Morse*: How the Student Speech Cases Show the Limits of Supreme Court Decisions—for the Law and for the Litigants*, 63 FLA. L. REV. 1407, 1418 (2011).

42 *See* DRIVER, *supra* note 25, at 95–96; Moss, *supra* note 41, at 1423.

suggesting that *Tinker* was effectively overturned long before the *Mahanoy* opinion in 2021.[43]

The first of these cases is *Bethel School District No. 403 v. Fraser*.[44] In *Fraser*, a student was disciplined when he gave a speech at a school assembly endorsing a candidate for student council using sexual innuendos.[45] The Supreme Court upheld the student's suspension, and the Court briefly distinguished the case from *Tinker* by noting that the speech in *Fraser* was unique in its sexual content, and not expressive of an actual political viewpoint.[46] The student's speech further implicated the school's educational role by taking place at a school assembly.[47] By deferring to the school's conclusion that the speech did "substantially interfere[] with the educational process,"[48] the court pacified *Tinker* without expressly reversing it. But the dicta of the opinion sits in stark contrast to the spirit of *Tinker*, with the Court clarifying that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[49]

The second case to weaken the *Tinker* test was *Hazelwood School District v. Kuhlmeier*, in which the court held that a school's decision to censor two pages of a student newspaper was not a violation of student speech rights.[50] *Hazelwood* rejects the argument that a school sanctioned newspaper is a public forum, because the newspaper's existence was primarily to play a role in the school's educational

43 *See* Thomas J. Flygare, *Is* Tinker *Dead?*, 68 PHI DELTA KAPPAN 165, 165 (1986); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of* Tinker*?*, 48 DRAKE L. REV. 527, 541 (2000); Perry A. Zirkel, *The Rocket's Red Glare: The Largely Errant and Deflected Flight of* Tinker, 38 J. L. & EDUC. 593, 597 (2009).

44 478 U.S. 675 (1986).

45 *Fraser*, 478 U.S. at 687 (Brennan, J., concurring in the judgment) ("I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm . . . . Jeff Kuhlman is a man who takes his point and pounds it in." (quoting Joint Appendix at 47, *Fraser*, 478 U.S. 675 (No. 84-1667))).

46 *Fraser*, 478 U.S. at 685; *see* Moss, *supra* note 41, at 1424–25.

47 *Fraser*, 478 U.S. at 685; *see* Moss, *supra* note 41, at 1424–25.

48 *Fraser*, 478 U.S. at 693 (quoting Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357 n.1 (9th Cir. 1985)).

49 *Id.* at 682. *Compare id.* ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket." (quoting Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979))), *with* Cohen v. California, 403 U.S. 15, 16, 26 (1971) (holding in a landmark free speech case that an adult wearing a jacket that said "Fuck the Draft" in public was constitutionally protected speech (quoting People v. Cohen, 81 Cal. Rptr. 503, 505 (Cal. Ct. App. 1969))).

50 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).

curriculum.[51] The *Hazelwood* opinion adopts a broad interpretation of *Fraser* that allow schools to broadly control the content of any "school-sponsored" speech such as student newspapers and theater productions.[52] Thus, the Court in *Hazelwood* reasoned that "school-sponsored" speech evades the *Tinker* test, while suggesting that *Tinker* only "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises."[53]

The third case to reign in *Tinker* is *Morse v. Frederick*,[54] a 2008 case that might have the most in common with *Mahanoy*. As students gathered to watch the Olympic Torch Relay pass by Juneau-Douglas High School, Joseph Frederick and his friends "unfurled a 14-foot banner" across the street that said "BONG HiTS 4 JESUS."[55] Frederick was not on school property, but the Supreme Court still considered his banner "school speech" within the authority of the school to regulate because it was displayed at a "school-sanctioned activity."[56] The Court again created an exception to *Tinker's* speech protection, holding that the school was justified in prohibiting speech that could reasonably be interpreted to advocate for illegal drug use.[57] Chief Justice Roberts's emphasis on the issue of drug use could suggest that the case was limited to its facts.[58] Nonetheless, the opinion still demonstrated a strong deference to school authorities and notably sides with the sentiment of *Fraser* over that of *Tinker*, even while acknowledging that *Fraser's* mode of analysis was "not entirely clear."[59]

By the time *Mahanoy* worked its way up to the Supreme Court, it was not clear whether *Fraser*, *Hazelwood*, or *Morse* had essentially nullified *Tinker* by generously deferring to school administrations on student speech issues or if these cases merely created carveouts to the *Tinker* test which otherwise protects most student speech.[60] The trend

51 *Id.* at 267–69.

52 *Id.* at 271–72.

53 *Id.* at 270–71.

54 551 U.S. 393 (2007).

55 *Id.* at 397 (quoting Appendix to Petition for Writ of Certiorari at 70a, *Morse*, 551 U.S. 393 (No. 06-278)).

56 *Id.* at 401.

57 *Id.* at 397.

58 *Id.* at 407–08.

59 *Id.* at 404.

60 *See* Robert Barnes, *A Cheerleader's Snapchat Rant Leads to 'Momentous' Supreme Court Case on Student Speech*, WASH. POST. (Apr. 25, 2021, 7:34 PM), https://www.washingtonpost.com/politics/courts_law/supreme-court-cheerleader-first-

from these three cases might suggest that the latter conclusion was less likely. However, in the lower courts, the *Tinker* test was still routinely applied in school speech cases even after *Morse*.[61] In his 2018 book *The Schoolhouse Gate*, Yale Law School Professor Justin Driver wrote that *Tinker's* influence on school speech cases was still obvious: "Reports of *Tinker's* demise have . . . been greatly exaggerated. . . . To the contrary, today's . . . [l]ower courts often issue decisions permitting students to express themselves, even over the objections of school administrators."[62]

Despite *Fraser*, *Hazelwood*, and *Morse* lending strength to a school's authority over student speech, *Tinker's* shadow lingered over the speech at issue in *Mahanoy*. Though B.L.'s primary argument was that discipline of off-campus or online speech should be categorically prohibited, the Appellee Brief still wrestled with *Tinker's* substantial disruption test, asserting that B.L.'s speech caused no such disruption.[63] B.L.'s counsel took aim at *Fraser*, asserting that no carveout for disciplining profanity should apply to online speech.[64] B.L.'s counsel also sought to cabin the *Morse* decision to speech within "school-sanctioned and school-supervised" activities, while in essence limiting the *Hazelwood* exception to its facts.[65] In the Supreme Court's final decision, the arguments to limit *Fraser*, *Hazelwood*, and *Morse* prevailed.[66]

Mahanoy clarifies that what diminishes *Tinker* in *Fraser*, *Hazelwood*, and *Morse* does not carry over into cyberspace, where *Tinker* predominates without exceptions for profanity. But what constitutes substantial and material disruption of the work and discipline of a school in the context of the internet is not entirely clear. *Mahanoy*

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amendment/2021/04/25/9d2ac1e2-9eb7-11eb-b7a8-014b14aeb9e4_story.html [perma.cc/Y2PC-QW2T].

61 *See e.g.*, Gillman v. Sch. Bd., 567 F. Supp. 2d 1359, 1375 (N.D. Fla. 2008) (applying the *Tinker* substantial disruption test and finding that a ban on gay pride t-shirts at school violated the First Amendment); B.H. v. Easton Area Sch. Dist., 725 F.3d 293, 298 (3d Cir. 2013) (en banc) (holding that a ban on breast cancer awareness bracelets that say "I <3 Boobies" was a violation of free speech rights because it failed the *Tinker* substantial disruption test).

62 DRIVER, *supra* note 25, at 125.

63 Brief of Appellee at 14–15, B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020) (No. 19-1842).

64 *Id.* at 15.

65 *See id.* at 15, 47 (quoting Morse v. Frederick, 551 U.S. 393, 396 (2007)).

66 *Mahanoy* distinguishes *Morse* and *Fraser* by their in-school context and environment. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2050 (2021).

emphasizes that the school should rarely stand *in loco parentis*[67] outside the normal school day, as freely allowing the school to do so would place a permanent and indefinite limit on a student's free speech twenty-four hours a day.[68] And yet, in many ways, the impact that content on the internet can have on a student's life and education would seem far more severe than vulgar speech at a school assembly.

B. Students and Bullying in the Digital Age

On September 7, 2012, fifteen-year-old Amanda Todd posted a video to YouTube titled *My Story: Struggling, Bullying, Suicide, Self Harm*.[69] In the nine-minute black-and-white video, Amanda sat in front of an empty wall, holding up a series of handwritten flashcards, her face partially obscured by her hair, and the top of her eyes are just out of frame.[70] The flashcards told a story chronicling sextortion,[71] a suicide attempt, assault, and relentless cyberbullying that followed her between schools. For over six months, she wrote, her peers would "tag" her in pictures of bleach, mocking her previous suicide attempt and provoking her to try it again.[72] The video description read, "I'm struggling to stay in this world, because everything just touches me so deeply. I'm not doing this for attention. I'm doing this to be an inspiration and to show that I can be strong."[73] A month after posting the video, Amanda took her own life.[74] Her video posthumously went viral, and currently sits at nearly fifteen million views.[75]

Amanda was Canadian, but her famous struggle with online harassment echoes several other cases in the United States that

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67 *In loco parentis* means "in the place of a parent." *In Loco Parentis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

68 *Mahanoy*, 141 S. Ct at 2046–47.

69 Amanda Todd, *My Story: Struggling, Bullying, Suicide, Self Harm*, YOUTUBE (Sept. 7, 2012), https://www.youtube.com/watch?v=M5kVwW92bqQ [https://perma.cc/5QRN-KFT7].

70 *Id.*

71 Sextortion refers to "when someone threatens to distribute your private and sensitive material if you don't provide them images of a sexual nature." *What is Sextortion?*, FBI, https://www.fbi.gov/video-repository/newss-what-is-sextortion/view/ [https://perma.cc/9L6L-JXEW].

72 Todd, *supra* note 69, at 07:15.

73 *Id.* (click on video description).

74 Michelle Dean, *The Story of Amanda Todd*, NEW YORKER (Oct. 18, 2012), https://www.newyorker.com/culture/culture-desk/the-story-of-amanda-todd/ [https://perma.cc/7UNP-WK3J].

75 Todd, *supra* note 69.

prompted a push for cyberbullying awareness and legislation.[76] Some movements saw success; thirteen-year-old Ryan Halligan's suicide sparked the passage of the Vermont Bully Prevention Bill.[77] Other efforts, like the proposed Megan Meier Cyberbullying Prevention Act named for another deceased thirteen-year-old cyberbullying victim, were met with chillier reception and free speech concerns from both the political Left and Right.[78]

As Justice Alito points out in his *Mahanoy* concurrence, bullying is nothing new. But the Department of Education and the Department of Health and Human Services have identified three unique features of cyberbullying that suggest a comparison to other forms of bullying is flawed: cyberbullying is uniquely persistent, permanent, and harder to notice.[79] Studies show that victims of cyberbullying are at a greater risk of self-harm and suicidal behaviors,[80] perhaps, even more so than victims of "school bullying."[81] Suicide is just the most severe outcome.

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76 *See, e.g.*, *Cyber Bullying Stories: The Ryan Halligan Case (1989–2003)*, HUDSON, CASTLE & INKELL, LLC (Oct. 5, 2020), https://hcilaw.com/cyber-bullying-stories-the-ryan-halligan-case-1989-2003/ [https://perma.cc/5Z6V-SKJ4]; Steve Pokin, *'My Space' Hoax Ends with Suicide of Dardenne Prairie Teen*, ST. LOUIS POST-DISPATCH, (Nov. 11, 2007), https://www.stltoday.com/suburban-journals/stcharles/news/stevepokin/my-space-hoax-ends-with-suicide-of-dardenne-prairie-teen/article_0304c09a-ab32–5931–9bb3–210a5d5dbd58.html [https://perma.cc/BCZ3-39R4]; Neyda Borges, *The Rise of Cyberbullying: The Case of Rebecca Sedwick*, WLRN (Oct. 15, 2013, 2:03 PM), https://www.wlrn.org/education/2013-10-15/the-rise-of-cyberbullying-the-case-of-rebecca-sedwick/ [https://perma.cc/4J5H-GWET].

77 VT. STAT. ANN. tit. 16, § 570 (2021); *About John Halligan*, RYAN'S STORY PRESENTATION LLC, https://www.ryanpatrickhalligan.org/about/ [https://perma.cc/JUZ5-XF2P].

78 Megan Meier Cyberbullying Prevention Act, H.R. 1966, 111th Congress (2009); 156 CONG. REC. 3062 (2010) (showing no action was taken after a subcommittee hearing was held on the Act); David Kravets, *Cyberbullying Bill Gets Chilly Reception*, WIRED (Sept. 30, 2009, 6:37 PM), https://www.wired.com/2009/09/cyberbullyingbill/ [https://perma.cc/5QLT-TQFC]; *see also States Pushing for Laws to Curb Cyberbullying*, FOX NEWS (Feb. 21, 2007), https://www.foxnews.com/story/states-pushing-for-laws-to-curb-cyberbullying/ [https://perma.cc/QY9D-RWVL] ("Steven Brown, executive director of the Rhode Island branch of the American Civil Liberties Union, said it will be difficult to draft a cyberbullying law that doesn't infringe on free-speech rights.").

79 *What Is Cyberbullying*, STOPBULLYING.GOV, https://www.stopbullying.gov/cyberbullying/what-is-it/ [https://perma.cc/HK2C-TQEY].

80 Ann John, Alexander Charles Glendenning, Amanda Marchant, Paul Montgomery, Anne Stewart, Sophie Wood, Keith Lloyd & Keith Hawton, *Self-Harm, Suicidal Behaviours, and Cyberbullying in Children and Young People: Systematic Review*, J. MED. INTERNET RSCH., Apr. 19, 2018, at 1, 1.

81 *See* Erick Messias, Kristi Kindrick & Juan Castro, *School Bullying, Cyberbullying, or Both: Correlates of Teen Suicidality in the 2011 CDC Youth Risk Behavior Survey*, 55 COMPREHENSIVE PSYCHIATRY 1063, 1066 (2014).

Other studies suggest that cyberbullying has an impact on students' academic, social, and emotional development distinct from other forms of bullying.[82] As children spend more time in front of a screen than ever before (especially after the COVID-19 pandemic) cyberbullying remains a widespread problem.[83]

Severe forms of cyberbullying can also indicate that a real and dangerous threat is on the horizon. Excessively violent messages and social media activity can impact both students and teachers who may feel unsafe at school as a result.[84] Sometimes, disturbing online activity can be a warning of something far more sinister.[85] Some school administrators have even suggested that paying closer attention to what students post online could help protect students against potential school shootings.[86]

A majority of states have developed laws over the past twenty years that address cyberbullying in schools, but only some of those laws implicate off-campus conduct, while others are either unclear or do

82 *See* Yehuda Peled, *Cyberbullying and Its Influence on Academic, Social, and Emotional Development of Undergraduate Students*, HELIYON, Mar. 22, 2019, at 1, 2; Abdul Qodir, Ahmad Muhammad Diponegoro & Triantoro Safaria, *Cyberbullying, Happiness, and Style of Humor Among Perpetrators: Is There a Relationship?*, 7 HUMANS. & SOC. SCIS. REVS. 200, 201 (2019) ("Previous studies have described the undesirable effects of cyberbullying, such as higher levels of symptoms of anxiety, and suicide attempts, lower school performance, low involvement in schools, an increase in depressive symptoms, ideation suicide, self-harm, and attempted suicide, a decrease in concentration, increased school absences, and decreased school performance, increase aggression reactive, aggression instrumental, depression and somatic symptoms, have more mental health problems and drug abuse, trigger suicide attempts, and low self-esteem on both victims and perpetrators of cyberbullying, also increase school refusal, symptoms of depression and suicide.").

83 *See Cyberbullying During COVID-19*, STOMP OUT BULLYING, https://www.stompoutbullying.org/blog/Cyberbullying-During-COVID-19/ [https://perma.cc/38H3-ZYMQ].

84 *See, e.g.*, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396–97 (5th Cir. 2015); D.J.M. v. Hannibal Pub. Sch. Dist. # 60, 647 F.3d 754, 758 (8th Cir. 2011); Wynar v. Douglas Cnty. Sch. Dist., 728 F.3d 1062, 1064–65 (9th Cir. 2013); Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 36 (2d Cir. 2007).

85 *See* Silvia Foster-Frau, Cat Zakrzewski, Drew Harwell & Naomi Nix, *Before Massacre, Uvalde Gunman Frequently Threatened Teen Girls Online*, TEX. TRIBUNE (May 28, 2022, 9:00 AM), https://www.texastribune.org/2022/05/28/uvalde-shooting-gunmen-teen-girls/ [https://perma.cc/5643-95UH]; Kelly House & Ron French, *Bloody Drawings, a Cry for Help and Oxford's Choice Before School Shooting*, BRIDGE MICH. (Dec. 7, 2021), https://www.bridgemi.com/michigan-government/bloody-drawings-cry-help-and-oxfords-choice-school-shooting/ [https://perma.cc/P4N6-YWGE].

86 *See* Aaron Leibowitz, *Could Monitoring Students on Social Media Stop the Next School Shooting?*, N.Y. TIMES (Sept. 6, 2018), https://www.nytimes.com/2018/09/06/us/social-media-monitoring-school-shootings.html [https://perma.cc/N6YW-UHF9].

not.[87] Of those that do, many essentially codify the first prong of the *Tinker* test, typically by using language like "substantial disruption" or "interference" without providing much guidance on what kind of analysis such a standard involves.[88]

Some states have enacted criminal statutes for cyberharassment of varying severity.[89] However, the constitutionality of these criminal statutes is disputed. In New York, a criminal cyberharassment law that prohibited electronic communication that "annoy[s]," "taunts," or "humiliate[s]" was considered overbroad and unconstitutional by the state court, in part because it was applicable to adults and corporate entities when the law was primarily justified on the grounds of protecting "school-aged children."[90] Furthermore, the extent to which *criminal* sanctions for even the most severe kinds of cyberbullying should apply to minors is particularly controversial. Michelle Carter was a minor when she encouraged her boyfriend through text and over the phone to kill himself by "get[ting] back in" his truck to complete his suicide, where he died of carbon monoxide poisoning.[91] Michelle's subsequent manslaughter conviction in Massachusetts drew nationwide attention and concern from legal

87 According to the government website *Stop Cyberbullying*, twenty-eight states have school cyberbullying laws that address off-campus conduct (Ala., Ark., Cal., Conn., Del., Fla., Ga., Haw., Ill., Ind., La., Me., Md., Mass., Minn., Mo., Mont., N.H., N.J., N.Y., N.C., Penn., R.I., S.D., Tenn., Tex., Ut., Vt.) while twenty-one states have laws that are either unclear on the issue or do not cover off-campus conduct (Alaska, Ariz., Colo., Idaho, Iowa, Kan., Ken., Miss., Neb., Nev., N.J., N.M., N.D., Ohio, Okla., Or., S.C., Va., W. Va., Wash., Wis., Wyo). *Laws, Policies & Regulations*, STOPBULLYING.GOV., https://www.stopbullying.gov/resources/laws/ [https://perma.cc/AR5Q-QZHX] (scroll to "State Anti-Bullying Laws & Policies" and click on any state and scroll to the subheading that asks whether the state's laws apply to "cyberbullying that occurs off-campus").

88 *See, e.g.*, ARK. CODE ANN. § 6-18-514 (2022); CONN. GEN. STAT. § 10-222d (2022); MICH. COMP. LAWS § 380.1310b (2022); TEX. EDUC. CODE ANN. § 37.0832 (West 2022). Notably, New York appears to have codified the "foreseeable risk" test in an approach to online student speech that will be explored in Part II. N.Y. EDUC. LAW § 11 (McKinney 2019) ("'Harassment' and 'bullying' shall mean the creation of a hostile environment by conduct or by threats, intimidation or abuse, including cyberbullying, that . . . occurs off school property and creates or would *foreseeably* create *a risk* of substantial disruption within the school environment . . . ." (emphasis added)).

89 *Bullying Laws Across America*, CYBERBULLYING RSCH. CTR., https://cyberbullying.org/bullying-laws/ [https://perma.cc/J4U7-PJGX].

90 People v. Marquan M., 19 N.E.3d 480, 485 (N.Y. 2014).

91 Tasneem Nashrulla, *Michelle Carter, Who Encouraged Her Boyfriend to Kill Himself, Was Released from Prison Early*, BUZZFEED NEWS (Jan. 23, 2020, 10:25 AM), https://www.buzzfeednews.com/article/tasneemnashrulla/michelle-carter-prison-release-texting-suicide/ [https://perma.cc/ZLG7-NBQ5].

experts and free speech advocates, including the American Civil Liberties Union, who criticized the conviction as setting "a dangerous example" that risks "abandon[ing] the protections of our constitution."[92] In the case of twelve-year-old Rebecca Sedwick's suicide, criminal charges were dropped against two minors who were alleged to have contributed to her death through cyberbullying, and one of the alleged perpetrator's families retaliated by suing the sheriff's office, calling these arrests a "witch hunt."[93] It should be noted, again, that instances of suicide only touch the *severest* forms of cyberbullying. In North Carolina, the court conceded that "[t]he protection of minors' mental well-being may be a compelling governmental interest," but it ultimately struck down another anticyberbullying criminal statute, saying "it is hardly clear that teenagers require protection via the criminal law from online annoyance."[94]

The prevention of cyberbullying, harassment, and potential threats directed toward minors is a strong interest, but these criticisms of using the criminal law to discipline minors seem to suggest that the issue of cyberbullying between minors should primarily be addressed, not by law enforcement, but by the schools. That is what Rebecca Sedwick's mother likely believed when she filed a lawsuit against the Polk County School Board alleging that the school did not properly supervise the cyberbullying that allegedly drove her daughter to suicide.[95] But in light of *Mahanoy*, is it so hard to understand why a school would be wary of policing this off-campus conduct?

The substantial evidence test developed from *Tinker* does not give us a clear prescription for cyberbullying between students at school, and responses to *Mahanoy* indicate that schools will be warier about

92 Melanie Eversley, *Girlfriend Suicide Texting Case Sets Wrong Precedent, Legal Experts Say*, USA TODAY (Aug. 4, 2017, 8:43 AM), https://www.usatoday.com/story/news/2017/08/03/michelle-carter-texting-suicide-case-sets-bad-precedent-experts-say/538794001/ [https://perma.cc/37UB-VKUV].

93 Desiree Stennett, *Lawsuit: Polk Investigation into Rebecca Sedwick's Suicide Was 'Witch Hunt, Publicity Stunt,'* ORLANDO SENTINEL (Apr. 8, 2015, 6:31 PM), https://www.orlandosentinel.com/news/breaking-news/os-rebecca-sedwick-suicide-lawsuit-20150408-story.html [https://perma.cc/PHE9-67FC].

94 State v. Bishop, 787 S.E.2d 814, 821 (N.C. 2016).

95 *See Mom of Teen Suicide Victim Sues Florida School Board*, CBS NEWS MIA. (Aug. 4, 2014, 10:58 AM), https://miami.cbslocal.com/2014/08/04/mom-of-teen-suicide-victim-sues-florida-school-board/ [https://perma.cc/2CH3-H6A2]

disciplining off-campus speech moving forward.[96] But real evidence of risk to a young person's mental health and well-being would suggest that it would be against students' best interest—if not negligence—for a school to avoid addressing the issue of severe cyberbullying, harassment, or online threats altogether.

II. TINKERING WITH CYBERSPACE: UPDATING THE STANDARD FOR ONLINE STUDENT SPEECH IN THREE DISTINCT CONTEXTS

Mahanoy highlights three features of off-campus school speech that "diminish the strength of the unique educational characteristics that might call for First Amendment leeway."[97] The first feature is the limitation on the doctrine of *in loco parentis*[98] which provides that a school administration should act in the place of parents in situations only where the parents cannot discipline them.[99] The second feature is the limitless access to a student's entire twenty-four-hour day that off-campus speech encompasses.[100] The third feature stems from a public school's own "interest in protecting a student's unpopular expression" because "America's public schools are the nurseries of democracy."[101]

A. Rejected Approaches to Online Student Speech

1. Blanket Protection of All Online Student Speech

Issues like cyberbullying and online threats are the reason the Supreme Court rejected the Third Circuit's categorical protection of online student speech in *Mahanoy*.[102] The Court recognized that "several types of off-campus behavior . . . may call for school regulation."[103] The Court laid out the following four exceptional scenarios that may call for school regulation: (1) "serious or severe bullying or harassment targeting particular individuals," (2) "threats

96 *See Supreme Court Offers Clarification on Protection for off Campus Speech: Implications for School Boards & First Amendment*, NAT'L L. REV. (June 25, 2021), https://www.natlawreview.com/article/supreme-court-offers-clarification-protection-campus-speech-implications-school/ [https://perma.cc/4WRM-5ACA].

97 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

98 BLACK'S LAW DICTIONARY, *supra* note 67.

99 *Mahanoy*, 141 S. Ct. at 2046.

100 *Id.*

101 *Id.*

102 *Id.* at 2045.

103 *Id.*

aimed at teachers or other students," (3) "the failure to follow rules concerning lessons," and (4) "breaches of school security devices."[104] The last two of these scenarios are straightforward, while the first two situations directly implicate cyberbullying and cyberharassment without providing a clear scope. The qualifiers "serious" and "severe" seem to indicate minor annoyances, arguments, or even insults may not be regulated. But the *context* of online speech is always critically important, making line-drawing efforts difficult.

2. The Sufficient Nexus Test

Before *Mahanoy*, states were not using the same standards to determine whether off-campus threats or harassment would qualify for the *Tinker* test. Some states applied a "sufficient nexus" test to determine how closely connected the off-campus speech was to a school's pedagogical interests, and this would become the *Mahanoy* Court's focus for applying the *Tinker* substantial disruption test.[105] Other states applied *Tinker* by focusing on the "foreseeable risk" of substantial disruption.[106] Neither test alone can remain appropriate as a standard for the regulation of online school speech after *Mahanoy*.

The "sufficient nexus" test asked whether the connection between online speech and the operations of the school is clear enough to justify its regulation.[107] The test was criticized by some as impermissibly broad and too easy to satisfy. As applied, it could justify student speech regulation so long as the speech is merely "aimed at . . . someone at the school and then reaches the school or is accessed at school in some form."[108] Before *Mahanoy*, a sufficient nexus was used to justify treating off-campus digital or electronic communication as "on-campus" speech in order for the restrictions under *Fraser* and *Hazelwood* to broadly allow regulation of student speech.[109]

In *J.S. v. Bethlehem Area School District*,[110] an eighth-grade student created a website called "Teacher Sux" that made "derogatory,

104 *Id.*

105 *See* Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of off-Campus Student Speech*, 2011 BYU L. REV. 501, 514–15; *Mahanoy*, 141 S. Ct. at 2045.

106 Belnap, *supra* note 105, at 516.

107 *Id.* at 513–14.

108 *Id.* at 513–14.

109 *Id.* at 514.

110 807 A.2d 847 (Pa. 2002).

profane, offensive and threatening comments" about an algebra teacher and offered twenty dollars to "help pay for the hitman."[111] A drawing of the teacher appeared on the website with the teacher's head cut off of her body.[112] The court upheld the student's expulsion on the grounds that—because the website was about a teacher and advertised to students—it was the equivalent of unprotected on-campus speech.[113] The court then used the vulgarity carveout in *Fraser*, with an appeal to "substantial disruption" in *Tinker*, to uphold the student's expulsion.[114]

But a recent case in Pennsylvania demonstrates how *Mahanoy* considerably changed the influence of this sufficient nexus test. In fall of 2021, *J.S. v. Manheim Township School District* considered a conversation between two students that occurred over a social media messenger app.[115] The plaintiff student created two memes[116] making fun of a third student who "looked like a school shooter."[117] One of the memes the plaintiff made involved an image of the third student saying he was planning to shoot up the school. The plaintiff's friend posted the plaintiff's meme on his Snapchat story [118] without permission, where it was viewed by "20 to 40 other students" before it was removed after approximately five minutes.[119] The plaintiff was suspended for ten days for violating the school's cyberbullying policy.[120] The school argued that the meme satisfied the *Tinker* test because it created a substantial disruption within the school. [121] Notable facts weighing in the school's favor included that the meme was a topic of conversation at school, that it was disseminated only two

111 *Id.* at 851.
112 *Id.* at 858.
113 *Id.* at 865, 869.
114 *Id.* at 867–68.
115 J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 298–99 (Pa. 2021).
116 "Meme" refers to "an amusing or interesting item (such as a captioned picture or video) . . . that is spread widely online especially through social media." *Meme*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/meme/ [https://perma.cc/3932-5F7V].
117 *Manheim*, 263 A.3d at 299.
118 Snapchat "stories" are a collection of images available for friends to view for twenty-four hours or until the images are removed. *See How Do I View a Friend's Story on Snapchat?*, SNAPCHAT, https://support.snapchat.com/en-US/a/about-stories/ [https://perma.cc/A7GA-A8L8].
119 *Manheim*, 263 A.3d at 299.
120 *Id.* at 300.
121 *Id.* at 306.

months after the Parkland shooting in Florida, that the two students investigated by police missed out on some class time, and that police presence at the school was increased in response to the panic.[122]

The court ultimately found, however, that the *Manheim* plaintiff engaged in protected speech, even though a sufficient nexus to the school could be established:

> [D]iminishing the School District's interest in punishing J.S. is that he communicated his speech via a personal cell phone, through Snapchat, to an intended audience of one. . . . While the School District certainly has an interest in preventing bullying or targeting of a fellow student, such interest is weakened by the fact that J.S. communicated off campus and on his own time. . . . Moreover, when J.S. spoke, the school did not stand *in loco parentis*, and there is no suggestion that J.S.'s parents delegated such authority to the school to regulate J.S.'s behavior in their home.[123]

The court used a totality of the circumstances test and determined that these "diminishing" factors outweighed the concerns of the school to regulate the student's off-campus speech.[124]

Contrasting *Manheim* with *Bethlehem* provides early insight into the impact *Mahanoy* had on the lower courts' treatment of online threats. However, it should be noted that some facts of *Bethlehem* and *Manheim* differ in important ways. *Bethlehem* involved a public website that all students could access, [125] while *Manheim* started as a private conversation. [126] The targets of the alleged threats of violence in *Bethlehem* were specific teachers[127], while *Manheim* involved a joke that pretended a student was making violent threats directed at the school and unnamed students generally.[128]

Nevertheless, *Manheim* demonstrates why the sufficient nexus test is no longer a useful tool to determine whether online speech is protected. Assuming a sufficient nexus carries with it the carveouts of unprotected speech supplied by *Fraser*, *Hazelwood*, or *Morse*, it would be much more impactful to simply establish a connection between the speech and the school in determining the protection of the speech. By removing these carveouts, a sufficient nexus provides little

122 *Id.*
123 *Id.* at 320.
124 *Id.*
125 J.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 850 (Pa. 2002).
126 *Manheim*, 263 A.3d at 298.
127 *Bethlehem*, 807 A.2d at 851.
128 *Manheim*, 263 A.3d at 299.

guidance. *Mahanoy* required the *Manheim* court to employ a totality of the circumstances test with a significant focus on the intent of the speaker to determine whether a substantial disruption occurred independent of the vulgarity of the speech itself.[129] This does not mean the sufficient nexus requirement in school speech cases is dead. But while a connection to the school may be a factor that a school should be required to satisfy, it should no longer function as the focus of school speech analysis.

3. A Broadly Applied Foreseeable Risk of Disruption Test

A test for the foreseeable risk of disruption, particularly in the context of threats, may seem more appropriate as an outcome-determinative factor for speech regulation, but its broadness overextends the school's discretion in some circumstances. In *Wisniewski ex rel. Wisniewski v. Board of Education of Weedsport*, a student was suspended for one semester after creating an icon on his AOL Instant Messaging Account consisting of a small drawing of a pistol firing a bullet at a person's head.[130] Above the head were dots representing splattered blood, and beneath it were the words "Kill Mr. VanderMolen."[131] The icon was visible to at least fifteen of the student's instant messaging friends, "at least some of whom" went to the same middle school as the student.[132] Mr. VanderMolen was distressed when he learned of the icon and reported it to the school administration.[133] The student was subsequently suspended.[134] The school justified its response by asserting that the icon required "special attention from school officials, replacement of the threatened teacher, and interviewing pupils during class time."[135] The *Tinker* test was characterized as a "foreseeable risk of substantial disruption within a school."[136] This reasoning was used to justify punishing the student even if the threat did not contain the mens rea needed for a "true threat" because it should have been "foreseeable" that the icon would

129 *Id.* at 320.
130 Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 35–37 (2d Cir. 2007).
131 *Id.* at 36–37.
132 *Id.* at 36.
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* at 39.

cause trouble at school.[137] It is not clear that *Wisniewski* would come out differently after *Mahanoy*, despite its similarities to *Manheim*. In *Wisniewski*, the target of the threat was a specific person who felt threatened as a direct response to the speech in question,[138] while the speech in *Manheim* and *Mahanoy* is characterized as less emotionally impactful.[139]

This foreseeable risk test, however, is too broad to justify school speech regulation in contexts outside of serious threats. To rely on a mere "foreseeable risk" of disruption to justify punishing student speech cuts against the holding in *Mahanoy* when used outside of the context of serious violent threats. An example of this friction with *Mahanoy* can be gleaned from an analysis of how the foreseeable risk test was broadly applied in *Doninger ex rel. Doninger v. Niehoff*.[140] In *Doninger*, a student in the student council made a blog post wherein she complained of the "douchebags in central office" who had cancelled the school's annual battle-of-the-bands concert.[141] The student had urged those reading her blog to contact the superintendent to "piss her off more."[142] The court used *Wisniewski*'s foreseeable risk test to justify the student's subsequent ban from student council.[143] Specifically, the court noted that the profanity used and the misleading way information about the cancellation of the concert was disseminated by the student would foreseeably create a risk of substantial disruption at school.[144] *Doninger*'s factual similarities to *Mahanoy* alone indicate that it would probably be decided differently today. The Supreme Court has made clear that the profanity online should not have been an issue. While the court was not necessarily wrong to think that a student using her online platform to organize students against administrators would create a "foreseeable risk" that

137 *Id.* at 37, 39–40.

138 *Id.* at 36.

139 *See* J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 321 (Pa. 2021) (finding that reactions to the school shooter meme consisted of relatively minor concern and apprehension); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021) (noting that one of the coaches on B.L.'s cheer team testified that B.L. was not suspended "because of any specific negative impact upon a particular member of the school community").

140 527 F.3d 41 (2d Cir. 2008).

141 *Id.* at 45.

142 *Id.*

143 *See id.* at 48–50.

144 *Id.* at 50–51.

the "posting would reach school property,"[145] this analysis fails to consider the unique protections afforded to political speech as opposed to "purely hurtful speech."[146] It also flies in the face of a factor that distinguished the protected online speech outlined by Justice Breyer in *Mahanoy*; there is a particular constitutional interest in protecting unpopular speech that a school disagrees with because schools function as "nurseries of democracy."[147]

Neither the sufficient nexus test nor the foreseeable risk test can function as the primary standard for when or how school speech can be regulated. The former fades into the background as it no longer carries the full weight of the restrictions applicable to on-campus speech. The latter is too broad and easy for school districts to abuse.

B. Approaching Three Student Speech Scenarios After Mahanoy

Although *Manheim* offers an updated approach and is one of the first online school speech cases to come down after *Mahanoy*, its reasoning, also, cannot and should not serve as the beacon for other courts to follow. *Manheim* does discuss *Mahanoy*, but *Manheim* avoided exploring the full potential of Breyer's suggested exceptions for cyberbullying and cyber threats.[148] This might be because, ex post facto, the speech in *Manheim* was inconsequential. It was a private joke at a student's expense, evidently satirical in nature, and shared publicly without the original speakers' permission for only five minutes before it was removed from social media.[149] There was no evidence of any students feeling severely frightened by the school shooting meme, nor did the court discuss whether the student who was "meme'd" as the school shooter was emotionally distressed, if not threatened, by the meme.[150]

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145 *Id.* at 50.

146 Naomi Harlin Goodno, *How Public Schools Can Constitutionally Halt Cyberbullying: A Model Cyberbullying Policy that Considers First Amendment, Due Process, and Fourth Amendment Challenges*, 46 WAKE FOREST L. REV. 641, 665 (2011). The Supreme Court is especially hesitant to ever uphold any restrictions that may impede upon speech that serves a political purpose. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310 (2010); Snyder v. Phelps, 562 U.S. 443 (2011).

147 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

148 J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 314 (Pa. 2021).

149 *Id.* at 298–99.

150 *Id.* at 299, 318 (showing that "Student Two" did not initially see the content, and concluding that the meme was "not perceived as threatening").

Manheim suggests that school speech ought to be evaluated using a totality of the circumstances test that continues to focus on the first prong of *Tinker* and considers factors such as the severity of the speech, the intent behind the speech, and its detrimental impact on the broader school system. These considerations tie together some elements of online student speech precedent, but they are not well suited to address when the exceptions to online speech protection outlined by Breyer in *Mahanoy* should actually apply. The following sections will explore three kinds of online student speech in detail and offer a more precise way to evaluate Breyer's exceptions for online speech regulation: "serious or severe bullying or harassment targeting particular individuals," and "threats aimed at teachers or other students."[151]

1. Cyberbullying Directed at Another Student

The cyberbullying phenomenon has been acknowledged as a serious disciplinary issue for schools for the better part of the twenty-first century.[152] Schools also have a significant interest in combating the cyberbullying of students. Studies show that children who are cyberbullied are more likely to skip school, receive poorer grades, have lower self-esteem, develop health problems, and develop drug problems.[153] But if only *severe* cyberbullying or harassment may be regulated by a school district, where does the line begin, and how can

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

152 In the early 2010s, cyberbullying sparked informal campaigns in schools which, in practice, were not unlike the Drug Abuse Resistance Education (D.A.R.E.) program. *Compare* Caralee Adams, *Cyberbullying: What Teachers and Schools Can Do*, SCHOLASTIC, https://www.scholastic.com/teachers/articles/teaching-content/cyberbullying-what-teachers-and-schools-can-do/ [https://perma.cc/U4X3-BP5F] ("The emphasis needs to be on creating a culture of responsibility online. Kids need to think about the content they create and post."), *with* National D.A.R.E. Day, 2005, 70 Fed. Reg. 17885 (Apr. 7, 2005) ("[T]hese soldiers in the armies of compassion are fostering a culture of responsibility among young people."). The 2011 movie *Cyberbully* (ABC Family television broadcast July 17, 2011), for example, is available for teachers to use in the classroom. *See, e.g.*, *Results for Cyberbully Movie*, TEACHERS PAY TEACHERS, https://www.teacherspayteachers.com/Browse/Search:cyberbully%20movie [https://perma.cc/8WMB-Q88J]; *see also Cyberbullying Videos to Use in Presentations*, CYBERBULLYING RSCH. CTR., https://cyberbullying.org/videos/ [https://perma.cc/2TW2-LZQR] (providing a list of short films for teachers to use in anticyberbullying presentations).

153 *The Effects of Cyberbullying*, AM. SOC'Y FOR THE POSITIVE CARE OF CHILD., https://americanspcc.org/impact-of-cyberbullying/ [https://perma.cc/UL2T-XRJW].

the high standard of *Tinker* be used to justify disciplining cyberbullying?

The "substantial disruption" test from *Tinker* has been repeatedly explored and developed by lower courts, and it has been employed using various kinds of reasoning to justify or strike down school decisions.[154] But no matter how this test is construed—either through a sufficient nexus test, foreseeable risk test, or totality of the circumstances test—the substantial disruption standard is not an especially good standard upon which to evaluate cyberbullying. After all, even if one individual student is horribly bullied with such severity that they can no longer bring themselves to attend school, it would be a stretch to suggest that this would create a "substantial disruption of or material interference with school activities."[155] But it should not be overlooked that *Tinker* actually sets forth a two-prong standard.[156] The full version of the *Tinker* test provides that speech may be regulated if it either (1) materially and substantially interferes with the operation of the school, *or* (2) "impinge[s] upon the rights of other students."[157] The second prong has received significantly less attention by courts, despite the fact that it was mentioned nine times in *Tinker* and further described as a right "to be secure and to be let alone,"[158] and could be the key to a school's ability to discipline cyberbullying.[159]

In *Kowalski v. Berkley County Schools*,[160] a student created a MySpace page called "Students Against Sluts Herpes" for the purpose of bullying a classmate.[161] Kowalski invited approximately 100 people from her friends list to join the group.[162] Notably, at least one of the students responded to their invitation to join from a school computer.[163] Comments on the page would disparage the targeted classmate who was accused of having herpes, and students would interact with the page by creating their own doctored photos of the targeted student.[164] The targeted student's parents filed a harassment

154 *See supra* notes 10–12 and accompanying text.
155 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
156 Goodno, *supra* note 146, at 665.
157 *See Tinker*, 393 U.S. at 509.
158 *Id.* at 508.
159 Goodno, *supra* 146, at 665.
160 652 F.3d 565 (4th Cir. 2011).
161 *Id.* at 567.
162 *Id.*
163 *Id.* at 568.
164 *Id.*

complaint with the vice principal, who initiated an investigation that ultimately found the page to be a "hate website."[165] Kowalski received a five-day suspension from school and a ninety-day suspension from school social events.[166] The *Kowalski* court carefully considered the language of *Tinker* beyond "material[] and substantial[] disrupt[ion]."[167] The court relied on the second prong of the test, emphasizing a student's right to "be secure and to be let alone."[168]

The reasoning in *Kowalski* remains solid after *Mahanoy* and demonstrates how courts in the future can continue to uphold anti-cyberbullying policies in schools. By applying the *Tinker* test, *Kowalski* addresses why the speech at issue was both disruptive in school and impinged upon the right of another student to be secure and left alone. Even if *Kowalski*'s interpretation of the substantial disruption test is too broad, only one of the *Tinker* prongs needs to be shown to justify disciplining the speech. While *Mahanoy* lays out the potential dangers of allowing regulation of online student speech, the following language in *Kowalski* provides a sensible response:

> This argument . . . raises the metaphysical question of where her speech occurred when she used the Internet as the medium. Kowalski indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment. She also knew that the dialogue would and did take place among Musselman High School students whom she invited to join the "S.A.S.H." group and that the fallout from her conduct and the speech within the group would be felt in the school itself.[169]

The "right[] of other students to be secure and to be let alone"[170] is the next frontier of the *Tinker* test. To date, it is less studied and less discussed than the substantial disruption test, though it was always just as accessible.[171]

Returning to *Manheim* begs the question of whether the court's decision may have come out differently had there been more focus on the harm experienced by the student who was "meme'd" as a school

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165 *Id.*

166 *Id.* at 569.

167 *Id.* at 573–74.

168 *Id.* at 574 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)).

169 *Id.* at 573.

170 *Tinker*, 393 U.S. at 508.

171 Goodno, *supra* 146, at 665–66.

shooter.[172] The court's opinion briefly mentions the student, noting that they "lost educational time due to . . . being interviewed"[173] by police and school officials, but the court does not further explore the impact that being branded a school shooter to other classmates might have on this student's ability to feel secure at school. How might the court have approached the issue if the bullied student came forward with evidence of emotional distress and social anxiety created by the plaintiff student's post? Would it matter more that the post was only left up for five minutes and quickly removed? Would it be resolved the same way based purely upon the unintended dissemination of the meme? *Manheim* briefly addresses the "rights of others" argument by asserting that mere apprehension resulting from local police involvement is not sufficient to prove that the student's speech impeded upon anyone else's rights.[174] But the *Manheim* court missed an opportunity to shape the second prong of *Tinker* for future school speech cases.

Breyer clarified that a school may regulate "serious or severe bullying or harassment targeting particular individuals."[175] In conjunction with *Tinker*, this means that cyberbullying must be objectively more severe and targeted than remarks that anyone could find offensive.[176] The court in *Saxe v. State College Area School District* set a reasonable limitation to the second prong of *Tinker* when it evaluated the constitutionality of a school's hate speech policy. *Saxe* held that remarks that merely create "unpleasantness" or "discomfort" do not impinge upon the rights of others, but the opinion stops short of holding that infringing upon the rights of others requires tortious speech.[177] The school policy implicated in *Kowalski* defined bullying as

172 *See* J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 317–18 (Pa. 2021).

173 *Id.* at 320.

174 *Id.* at 320–21.

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

176 *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001).

177 *Id.* at 212 (quoting West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358, 1366 (10th Cir. 2000)). *Saxe* notes that *Slotterback v. Interboro School District* Has interpreted footnote five and Brennan's dissent in *Hazelwood* to provide that speech must be tortious. *Id.* at 217 (citing *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991) (first citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 n.5 (1988); and then citing *id.* at 289–90 (Brennan, J., dissenting))). However, *Hazelwood* was decided in the context of a student publication, where a tort claim for defamation would be one way to justify the school's decision to censor the paper, an interpretation of *Tinker* that the court said it "need not decide" that given its holding the school has broader power to control a student paper. *Hazelwood*, 484 U.S at 273 n.5. It was never expressly stated by the majority or the dissent

"any intentional gesture, or any intentional written, verbal or physical act that . . . [i]s sufficiently inappropriate, *severe*, persistent, or pervasive that it creates an intimidating, threatening or abusive educational environment for a student."[178]

Cyberbullying, if severe enough, may implicate the second prong of *Tinker*. A four-factor test can be used to determine whether a school can intervene in cases of cyberbullying without infringing upon a student's limited First Amendment rights. The factors to be considered should include: (1) whether a specific student was targeted, (2) the intent behind the speech, (3) the severity of the speech, and (4) where and to whom the speech was disseminated. Each of these four factors derive from the key differences between the constitutionally disciplined bullying in *Kowalski* and the protected speech in both *Manheim* and *Mahanoy*. These four factors used to define the second prong of *Tinker* are better suited to tackle cyberbullying than broad interpretations of the substantial impact test, which, as *Doninger*'s outcome demonstrates, can cut against speech *Mahanoy* sought to protect. The right of a student to be secure and to be left alone is not limited to physical security. It includes freedom from "psychological attacks that cause young people to question their self-worth and their rightful place in society."[179] *Mahanoy* assures students the freedom to express their controversial opinions, but it should not be construed to condone speech that targets and harasses other students. Therefore, schools should not be discouraged from addressing the prevalent issue of cyberbullying.

2. Online Threats Directed at Teachers, Students, and Schools

Online threats present a second situation where online student speech can be regulated. Another problem with deferring to the court's reasoning in *Manheim* is that it might create doubt in the discretion of a school to punish students for online threats of violence when appropriate. *Mahanoy* is explicit that "threats aimed at teachers or other students" may give schools a special license to regulate online

that speech must always rise to the level of tort liability, and the court avoids affirming such interpretation. *Saxe*, 240 F.3d at 217.

178 Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 569 (4th Cir. 2011) (emphasis added).

179 T.K. v. N.Y.C. Dep't of Educ., 779 F. Supp. 2d 289, 308 (E.D.N.Y. 2011) (quoting Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007)).

student speech. However, not all threats are the same, and several underlying factors must be weighed to determine whether the speech can be disciplined.

A "true threat" is categorically unprotected speech that requires a showing of "willfulness" or "intent to commit an act of unlawful violence to a particular individual or group of individuals."[180] It seems logical that a school would be able to discipline this speech when it bears some connection to the school. Though *Manheim* does not specifically say that the only kinds of "threats" punishable by a school are "true threats," *Manheim* does say that "the primary focus [of a school threat analysis] must be on the subjective intent of the speaker."[181] The subjective intent of the speaker in *Manheim* outweighs the subjective belief by both students and administrators that a true threat might have existed.[182]

Courts have found, however, that if the speech is sufficiently connected to a school situation, the *Tinker* standard for when a supposed "threat" can be disciplined might be lower than the true threat doctrine and less reliant on the mens rea of the speaker.[183] *Manheim* makes note of this lower threshold for school threats, stating that "[c]onsideration of additional circumstances surrounding the speech at issue accounts for the special role that schools play in educating our youth in a productive school environment."[184]

Factually speaking, the impact of the protected speech on the school in *Manheim* is not much different from the impact of the unprotected speech presented in the "Teacher Sux" website in *Wisniewski*. Both situations consisted of depictions of violence involving someone from the school disseminated in a relatively private context where the speech was leaked without the speaker's intention. Both were scenarios in which police were called to investigate whether a true threat existed. In both instances, the intent of the speaker was not to harm anyone, and the police did not make any charges. However, the unintended "threat" in *Manheim* was directed at no particular student or teacher.[185] The *Manheim* opinion notes that

180 Virginia v. Black, 538 U.S. 343, 359 (2003); Watts v. United States, 394 U.S. 705, 708–09 (1969).

181 J.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 316–17 (Pa. 2021).

182 *Id.* at 316–17.

183 Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 37–38 (2d Cir. 2007).

184 *Manheim*, 263 A.3d at 317.

185 *Id.* at 317–18.

"[i]mportantly, there is no allegation that school was missed, classes or instruction [were] interrupted, or the operation of the school was compromised."[186]

Suppose the meme in *Manheim* had actually depicted one student planning to kill another identifiable student.. Should the school really be barred from relying on its anti-cyberbullying policy to correct the issues that would arise? Or suppose, perhaps, there were students who had felt strongly enough about the content of the Snapchat story that they were too afraid to come to school. Would this not satisfy the substantial disruption test? Should the intent of the speaker to do actual violence, as opposed to merely intimidate or joke, really change the analysis when another student's sense of security at school is still threatened?

Breyer wrote in *Mahanoy* that "threats aimed at teachers or other students" online could constitute an exception to the general rule that students cannot be punished for most off-campus speech.[187] But there would be no point in acknowledging this exception if it were merely another form of speech already unprotected by criminal laws in a public forum, let alone a public school. Lower courts suggest that, where student speech is involved, there are instances of threats where the willful intent of the speaker to commit violence, though important, is not dispositive when the school sees threatening speech online. Thus, the outcomes in *Wisniewski* and *Manheim* could coexist.

A totality of the circumstances test for online threats that considers the impact of the speech on the emotional wellbeing of others as a factor would be consistent with online school threat cases decided pre-*Mahanoy*. Both *Burge v. Colton School District 53* and *Emmett v. Kent School District 415* present situations where the speech that was subsequently protected by courts did not gravely concern or frighten the alleged threat's targets.[188] In *Burge*, a student made comments on his Facebook page that said his health teacher, Ms. Bouck, "needs to be shot."[189] The post was simple text, not accompanied by any graphic imagery, and followed an assertion that the teacher should be fired.[190] The court found the speech should be protected, noting: "Bouck did

186 *Id.* at 321.

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

188 Burge v. Colton Sch. Dist. 53, 100 F. Supp. 3d 1057 (D. Or. 2015); Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

189 *Burge*, 100 F. Supp. 3d at 1060.

190 *Id.*

not take off any time from work as a result of Braeden's Facebook posts and did not discuss the Facebook posts with Braeden or any other students or teachers at CMS."[191] Similarly, in *Emmett*, a student created a website that posted mock obituaries of his friends and included a poll asking who should be killed next.[192] Facing emergency expulsion, the student successfully moved for a temporary restraining order against the school district, which did "not present[] any evidence that any student actually felt threatened by the web site, although it stated at oral argument that it believes that some students did feel intimidated."[193]

By contrast, in *Bell v. Itawamba County School Board* an offensive online rap video that did not reach the level of posing a true threat but did provoke a disturbed reaction from others was still found punishable under the *Tinker* test.[194] In *Bell*, a student made a rap that accused two high school coaches of sexual misconduct. The rap made violent suggestions including "I'm going to hit you with my rueger . . . going to get a pistol down your mouth."[195] The school board found unanimously that the student's rap had "threatened, harassed and intimidated school employees."[196] The coaches referenced in the rap testified that the rap had "adversely affected their work" and made them "scared" of the reaction the rap would provoke.[197]

Wynar v. Douglas County School District[198] and *D.J.M. v. Hannibal Public School District No. 60*[199] present two more instances where online speech was constitutionally punishable because of its impact on others, regardless of the speaker's intent. In *Wynar*, a student's "increasingly violent and threatening instant messages"[200] to his friends violated an administrative statute without an intent requirement.[201] The student's friends were the ones who had reported him, saying his messages made them alarmed and concerned.[202] The court upheld the student's

191 *Id.* at 1066; *see id.* at 1063–64.
192 *Emmett*, 92 F. Supp. 2d at 1089.
193 *Id.*
194 Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 396–97 (5th Cir. 2015).
195 *Id.* at 384.
196 *Id.* at 387.
197 *Id.* at 388.
198 728 F.3d 1062 (9th Cir. 2013).
199 647 F.3d 754, 764–65 (8th Cir. 2011).
200 *Wynar*, 728 F.3d at 1064–65.
201 *Id.* at 1074.
202 *See id.* at 1066.

suspension, finding that "the messages presented a real risk of significant disruption to school activities and interfered with the rights of other students."[203] *D.J.M.* involved speech that satisfied both a "true threat" analysis and a *Tinker* analysis, though it should be noted that subjective speaker intent was not necessarily determinative in that case either.[204] A student messaged a friend about the list of students he would like to kill.[205] He followed up by suggesting he would take a gun to school to shoot other students and then himself.[206] But the interactions between the classmates contained hints that the threat was not intended to be serious. The student's friend responded to the "threats" by conveying laughter with "lol" and "haha," and after the student was later asked if he were actually planning to shoot anyone the student said he "[was] not going to do that[.] [N]ot anytime soon[.]"[207] Nevertheless, the conversations began making the other students feel "kinda scared" and the school district found the student's comments created "significant disruption and fear."[208]

Taken together, these cases suggest that when perceived threats made online generate genuine and reasonable fear among students and teachers, then it remains within the school's discretion to regulate that speech under the *Tinker* test. The totality of the circumstances can determine whether the fear is reasonable based on the severity of the speech, its graphic nature, and where it is disseminated. But unlike the analysis for cyberbullying and other forms of offensive online speech, this test should also include a foreseeable risk component when the threat is general but severe, like a school shooting threat. There are grave and practical concerns that come with applying an approach to mass threats the same way as particular threats or cyberbullying. To do away with the foreseeable risk component completely would suggest that the school's first action in cases of online threats should be to wait for a response. In the context of threats of mass violence, the potential cost may be simply too great to wait.

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203 *Id.* at 1065.
204 *D.J.M.*, 647 F.3d at 764–66.
205 *Id.* at 758.
206 *Id.*
207 *Id.* at 758, 762.
208 *Id.* at 759, 765.

A school shooting at Oxford High School in November of 2021 resulted in the deaths of four students and left seven others injured.[209] In light of this shooting, more than 150 Michigan schools closed the following Friday out of an abundance of caution after discovering online threats from potential copycats.[210] "Michigan School Closings," a service that tracks school closings of districts, remarked on Twitter that it had "never seen this many closings, due to online threats."[211] The Oxford School District, meanwhile, faced criticism for not doing all it could have done to investigate and stop the shooter before the attack.[212] The shooter left a trail of breadcrumbs on his "social media accounts, cell and other documents."[213] One teacher had spotted the shooter scrolling online for ammunition while at school in the days leading up to the tragedy.[214] The shooter's parents were notified of the school's concerns, but refused to take action.[215]

Concern about the school's lack of intervention before the Oxford shooting presents a challenge to the general embrace of student and parental autonomy from school investigation and discipline in *Mahanoy*. In a reality where parents do not always monitor their children, where a single online threat of mass violence has the potential to instill fear strong enough to shut down entire schools,

209 John Wisely, Clara Hendrickson, Jennifer Dixon, Georgea Kovanis & Jeff Seidel, *Oxford Shooting Deaths Include Honor Student, Athletes and Artist*, DET. FREE PRESS (Dec. 2, 2021, 7:48 AM), https://www.freep.com/story/news/local/michigan/oakland/2021/12/01/oxford-shooting-victims-honor-student-athletes-artist/8826375002/ [https://perma.cc/4EPX-DFH2].

210 Ron French, *Scores of Michigan Schools Close amid Threats Following Oxford Shootings*, BRIDGE MICH. (Dec. 3, 2021), https://www.bridgemi.com/talent-education/scores-michigan-schools-close-amid-threats-following-oxford-shootings/ [https://perma.cc/3ESY-CR7Y].

211 *Id.*

212 Jim Kiertzner, *Oxford School Officials Could Have Legally Stopped Ethan Crumbley Before Shooting, Experts Say*, WXYZ DET. (Dec. 15, 2021, 8:22 PM), https://www.wxyz.com/news/oxford-school-shooting/oxford-school-officials-could-have-legally-stopped-ethan-crumbley-before-shooting-experts-say/ [https://perma.cc/C3XB-6P3G].

213 Christine MacDonald, Elisha Anderson, Gina Kaufman & Niraj Warikoo, *Authorities: Oxford School Shooting Suspect Talked in Video About Killing Students Before Rampage*, DET. FREE PRESS (Dec. 1, 2021, 11:30 PM), https://www.freep.com/story/news/local/michigan/oakland/2021/12/01/oxford-high-school-shooting-suspect-charges/8824130002/ [https://perma.cc/2H4T-98V2].

214 House & French, *supra* note 85. By contrast, the Uvalde high school was not aware of some of the shooter's more disturbing online activity before the tragic 2022 shooting at Robb Elementary School. *See* Foster-Frau et al., *supra* note 85 ("[T]hese threats hadn't been discovered by parents, friends or teachers.").

215 House & French, *supra* note 85.

regardless of intent, it is not wise or practical to insist that a school should not have the discretion it needs to discourage these threats by disciplining students. It is for this precise and special circumstance that the broader "foreseeability" consideration within the *Tinker* test emphasized by the Second Circuit[216] before *Mahanoy* may remain a component of the legal analysis used in the context of general online threats of violence. Once a student crosses the threshold of creating legitimate fear of serious mass violence, even if unintended, the school should be able to take action to stop the student and address the issue accordingly. Without the flexibility of a foreseeability consideration, a school that discovers a threat will more likely be inclined to wait for consequences to act. A foreseeability component for threats of mass violence frees the school to take instinctive action necessary under this one exceptional category of online student speech.

3. Other Forms of Incendiary Online Speech

Ultimately, severe cyberbullying and cyberthreats are the exceptions to the general assumption that schools may not typically regulate any online content posted by students.[217] If a school seeks to regulate online student conduct that is not cyberbullying directed at a particular student or a serious potential threat, the school faces an uphill battle to defend punishing the student that it is likely to lose.

What about highly offensive, even potentially racist online speech? Schools still must tread cautiously. School policies that generally prohibit offensive remarks that could be classified as "hate speech" are unlikely to survive post-*Mahanoy* litigation.

Though there appears to be a more explicit carveout for speech regulation in instances of cyberbullying that targets individual students derived from *Mahanoy*'s dicta, it is less clear that cyberbullying which targets groups of people can be safely regulated by schools after *Mahanoy*. *Mahanoy*'s facts suggest the Court is less sympathetic to instances of potential cyberbullying directed at groups. The school district had asserted that B.L.'s comments "upset" members of the cheerleading squad, as their group could be seen as a target of the speech, but the Court evidently found this argument unpersuasive.[218]

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216 *See* Wisniewski *ex rel.* Wisniewski v. Bd. of Educ., 494 F.3d 34, 40 (2d Cir. 2007); Doninger *ex rel.* Doninger v. Niehoff, 527 F.3d 41, 48 (2d Cir. 2008).

217 *See supra* Section I.A.

218 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021).

On the contrary, the Court emphasized that B.L.'s comments "did not identify the school in her posts or target any member of the school community with vulgar or abusive language."[219] Justice Alito added in his concurrence that "[s]peech cannot be suppressed just because it expresses thoughts or sentiments that others find upsetting."[220]

Punishment of a student who harasses or annoys a group or general class of students might risk resembling a "heckler's veto." The "heckler's veto" refers to actions taken by government to restrict speech because of the potential it creates for hostile reactions.[221] In First Amendment cases, the Supreme Court is wary of heckler's vetoes, first, because of the veto's potential to suppress ideas that contribute value to public debate, and second, because the veto is based in fear of a crowd's reaction to speech, rather than the speaker themselves.[222] Several school speech cases outside of an online context expressly reject the notion that an interpretation of the *Tinker* "substantial disruption" test permits a functional heckler's veto by the school administration.[223] In *Mahanoy*, Breyer rejects the heckler's veto in schools by invoking the "marketplace of ideas" analogy often used as the direct rebuttal to arguments in favor of speech regulation for practical purposes of reducing hostility.[224] Future generations, Breyer writes, ought to understand the "well-known aphorism: 'I disapprove of what you say, but I will defend to the death your right to say it.'"[225]

Outside the school context, the Supreme Court has been reluctant to support any rule that carves out "hate speech" as a potential kind of unprotected, controllable form of speech.[226] This

219 *Id.* at 2047.

220 *Id.* at 2058 (Alito, J., concurring).

221 Patrick Schmidt, *Heckler's Veto*, THE FIRST AMEND. ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto/ [https://perma.cc/P24X-BUHR].

222 *Id.*

223 DRIVER, *supra* note 25, at 125. *See* Holloman *ex rel.* Holloman v. Harland, 370 F.3d 1252, 1275–76 (11th Cir. 2004) ("If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom . . . and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob."); Fricke v. Lynch, 491 F. Supp. 381, 387 (D.R.I. 1980) (holding that it was unconstitutional for a school to prohibit two men from attending prom together for fear of their safety in part because the prohibition "grant[ed] other students a 'heckler's veto'").

224 *See Mahanoy.*, 141 S. Ct. at 2046.

225 *Id.*

226 *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (holding that a hate speech law was unconstitutional because it only punished a subset of hate speech, thus

hesitation bleeds into lower court decisions on school speech. In *Saxe v. State College Area School District*, a school's anti-harassment policy was criticized as a "hate speech code" that was likewise scrutinized by courts.[227] The policy prohibited "harassment" that "offends, denigrates or belittles" someone based on "religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[228] The Third Circuit Court of Appeals remarked that there was "no categorical 'harassment exception'" to the First Amendment.[229]

Saxe was one of the rare school speech cases before *Mahanoy* that explored the strength of *Tinker's* second prong, speech that "intrudes upon . . . the rights of other students."[230] The *Saxe* court adopted a narrow interpretation of the prong that would not necessarily protect speech in instances of individual cyberbullying, but would protect unpopular, or even incendiary, "core" political speech.[231] The school district's anti-harassment policy, without "requir[ing] any threshold showing of severity or pervasiveness," then, was overbroad.[232] It should be noted that this hate speech rule was not even expressly applicable to off-campus online speech.[233]

Courts are particularly opposed to actions by schools that regulate speech resembling core political speech.[234] In *Bowler v. Town of Hudson*,[235] high school students formed a "Conservative Club" with the self-proclaimed mission to provide students a place to engage in what they considered "pro-American, pro-conservative dialogue and

discriminating against certain kinds of content within a category of equally unprotected speech).

227 Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 204 (3d Cir. 2001).

228 *Id.* at 202–03.

229 *Id.* at 204.

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

231 *Saxe*, 240 F.3d at 217.

232 *Id.* The court in *Saxe* repeatedly contrasts the school's policy with a Tenth Circuit case, *West v. Derby Unified School District No. 260*, that upheld the banning of Confederate flags on campus because that school could point to a "well-founded expectation of disruption." *Id.* at 212 (citing *West*, 206 F.3d 1358, 1366 (2000)). That case, however, was particularly concerned only with on-campus expression. *West*, 206 F.3d at 1361–62.

233 *Id.* at 216, n.11.

234 This reflects the Supreme Court's particular hesitation to condone any law that infringes upon political speech. *See supra* note 146 and accompanying text.

235 514 F. Supp. 2d 168 (D. Mass. 2007).

speech."[236] To advertise their club's first meeting, the students hung posters that included a link to the website of their national affiliate, High School Conservative Clubs of America.[237] The website contained still shots from videos of real beheadings and executions by terrorist groups beneath a banner that read "Islam: A Religion of Peace?"[238] Links to the actual killings were provided so students could watch them.[239] When the high school technology director discovered what the site featured, she quickly blocked access to the site on the school computers and removed the posters.[240] When the student took legal action, the court denied summary judgment to the school, concluding that the website did not create a substantial disruption, nor did it "impinge on the rights of other students."[241] The *Bowler* court reasoned that the content of a website, even a website advertised at the school, did not pose a serious risk to student wellbeing because they were not a "captive audience," and, thus could freely turn away from the offensive content if they wished.[242] The court ruled against the school despite the fact that the website expressly targeted the religion of Islam and could be considered the cyberbullying of a particular group of students.

Another kind of online speech that has been at least implicitly more protected by lower courts is content that pokes fun at, insults, or even outright cyberbullies a *teacher* rather than a student.[243] In *Evans v. Bayer*, a student started a Facebook page for the express purpose of venting about a particular teacher.[244] Even though the speech, like the degrading MySpace page in *Kowalski*, was clearly connected to the school and directed at a particular individual, the court said the speech was protected, as it was not severe enough to cause disruption, and, at most, created mere unpleasantness or discomfort.[245] "[I]f school

236 *Id.* at 172.
237 *Id.* at 172–73.
238 *Id.* at 173.
239 *Id.*
240 *Id.*
241 *Id.* at 177–79.
242 *Id.* at 177–78.
243 *See, e.g.*, Evans v. Bayer, 684 F. Supp. 2d 1365 (S.D. Fla. 2010); Layshock v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011) (holding that a student's MySpace parody profile of a school principal was constitutionally protected speech); J.S. v. Blue Mountain Sch. Dist., 650 F.3d 915 (3d Cir. 2011) (holding, again, that a student's MySpace parody profile of a school principal was constitutionally protected speech).
244 *Evans*, 684 F. Supp. 2d at 1367.
245 *Id.* at 1373.

administrators were able to restrict speech based upon a concern for the potential of defamation," the court writes, "students everywhere would be prohibited from the slightest criticism of their teachers, whether inside or outside of the classroom."[246]

Evans touches upon the core reason the potential online harassment of teachers should require more justification to regulate than the online harassment of other students. Teachers, as authority figures, should expect some disapproval from students. If schools are to function as "nurseries of democracy,"[247] then a healthy amount of criticism of authority can be considered a sign of a healthy democracy.[248] The other obvious reason the cyberbullying of teachers should be treated differently is, of course, because teachers and other adults are less vulnerable to the remarks of students online.[249] Even *Tinker* itself implies that there should be special consideration given to other students who may be affected by offensive speech as opposed to adults. Specifically, the first time *Tinker* outlines its two-prong test in the opinion, it refers to "the rights of other *students* to be secure and to be let alone."[250]

Finally, because the Supreme Court refused to extend *Fraser* or *Morse* in *Mahanoy*, any precedent that would justify the regulation of online student speech based on its offensiveness, vulgarity, or even advocacy for illegal activities such as drug use, is inapplicable to off-campus online school speech cases. This revitalization of the *Tinker* test carries with it the expectation that even the dirtiest, most mean-

246 *Id.*

247 Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021).

248 Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[D]iscussion affords ordinarily adequate protection against the dissemination of noxious doctrine . . . . [I]t is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones."), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).

249 *See* Meng-Jie Wang, Kumar Yogeeswaran, Nadia P. Andrews, Diala R. Hawi & Chris G. Sibley, *How Common Is Cyberbullying Among Adults? Exploring Gender, Ethnic, and Age Differences in the Prevalence of Cyberbullying*, 22 CYBERPSYCHOLOGY, BEHAV., & SOC. NETWORKING 736, 736 (2019). Several studies specifically refer to cyberbullying's impact on the psychology of *children* and *teens*. *See, e.g.*, Sherri Gordon, *The Real-Life Effects of Cyberbullying on Children*, VERYWELL FAMILY (July 22, 2022), https://www.verywellfamily.com/what-are-the-effects-of-cyberbullying-460558/ [https://perma.cc/HVE5-K9N9]; John et al., *supra* note 80; Messias et al., *supra* note 81.

250 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969) (emphasis added).

spirited, or ignorant speech cannot be regulated by a school unless it rises to such a degree that it might invoke a severe physical or emotional response, such as a threat, or a comment targeted toward a particular student. However, legal scholars have long noted that vulnerable populations including "women, people of color, religious minorities, gays, and lesbians" are disproportionately the targets of online harassment.[251] It could be argued that generally sexist, homophobic, or racist speech could make a student feel as insecure or threatened regardless of whether the speech targets that student as an individual. *Mahanoy* may embolden parents of disciplined students to legally act in the future, forcing courts to directly address this concern.[252] But without being able to reference an instance where a particular person is being targeted, schools that attempt to prohibit this kind of generally offensive content face overbreadth arguments that will likely lead to such policies being struck down, especially when *Mahanoy* stops short of suggesting a special exception for generally offensive, even prejudiced or hateful online content. Though the *Tinker* test can and should be extended to encompass cyberbullying that targets a student and severe online threats, it is unlikely that the test can be stretched further to prohibit generally offensive online speech, even if that speech is specifically intended to offend.

CONCLUSION

If schools are to foster a learning environment where students feel secure, then it is imperative that schools be able to address cyberbullying and online threats in some capacity. One of the earliest cases to come down from other courts after *Mahanoy* suggests that the Supreme Court's most recent school speech decision may have a chilling effect on when schools choose to exercise discipline toward students for any kind of online speech. But far from obstructing a school's power to take control over serious issues, *Mahanoy* explicitly

251 *See* Danielle Keats Citron, *Cyber Civil Rights*, 89 B.U. L. REV. 61, 63–64 (2009).

252 A lawsuit was filed in Missouri by parents of students who started a "[s]tart slavery again" Change.org petition. Gabrielle Hays, *Students Who Launched Pro-Slavery Petition at Missouri High School Sue After Suspensions, Expulsion*, PBS (Nov. 24, 2021, 3:20 PM), https://www.pbs.org/newshour/education/students-who-launched-pro-slavery-petition-at-missouri-high-school-sue-after-suspensions-expulsion/ [https://perma.cc/XXM9-EH5A]; KCTV5 News, *Park Hill School District Fires Back Against Lawsuit*, YOUTUBE (Nov. 24, 2021), https://www.youtube.com/watch?v=ZJzeX2wN9oc/. Notably, the school's response appears to be looking to evade *Mahanoy* applicability by asserting that the students "were on a bus with the football team when the petition was created." *Id.* at 00:26.

empowers schools to address severe bullying and online threats by applying the *Tinker* test. *Tinker* allows schools to regulate student speech not only when it creates a substantial disruption, but when it impinges upon the right of other students to be secure and left alone.

To determine whether cyberbullying crosses the threshold into the unprotected severe bullying distinguished in *Mahanoy*, schools and courts should consider four inquiries: Was a specific student targeted? What was the speaker's intent? How severe or offensive was the speech? Where and to whom was the speech disseminated? When evaluating online threats, courts should employ a totality of the circumstances test with consideration toward the subjective response to speech as it relates to the security of other students and the foreseeable risk of disruption created by the speech. The foreseeability element should not be expanded to regulate contexts outside of school threats, but the element serves to give a school administration the appropriate level of discretion needed to address threats that rise to the level of mass violence like a school shooting. Other forms of offensive online speech are typically considered protected by most lower court precedent and are not separately distinguished in *Mahanoy*. Consequently, these other forms of incendiary online speech will likely be considered protected in the future and will remain unregulated by schools.

Balancing a school's need to foster a secure learning environment with an individual student's free speech interests, particularly where the vast nature of the internet is involved, is no easy task. For many lower court decisions involving online student speech, context is key. It is unsurprising, then, that the Supreme Court stopped short of prescribing a sweeping set of standards for when a school may regulate online student speech. But this does not change the fact that schools are constantly challenged with different scenarios where students are harming each other and creating friction in the learning environment through new means. Identifying consistent considerations by courts in these situations is crucial for public schools to continue to take reasonable steps to protect minors.