WAITING FOR *MAHANOY*: EXAMINING THE STILL-UNSETTLED JURISPRUDENCE OF ONLINE STUDENT SPEECH

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INTRODUCTION

It was 2011, and educators, school boards, civil liberties groups, and federal judges were all wishing that a decade of Internet-related school speech cases had produced brighter lines, clearer judicial tests, and—just maybe—an illuminating ruling from the United States Supreme Court. The Third Circuit had, in fact, agreed to rehear two cases *en banc* in an attempt to achieve more clarity. *Layshock ex rel. Layshock v. Hermitage School District*[1] and *J.S. ex rel. Snyder v. Blue Mountain School District*[2] both concerned the suspensions of students who created fake Myspace accounts mocking their respective principals.[3] In *Layshock*, the Third Circuit ruled unanimously that Justin Layshock's high school did in fact violate his First Amendment rights.[4] The *Snyder* decision, however, fractured along lines that were frustratingly familiar in the federal courts' online, off-campus student speech decisions. *Snyder*'s fake Myspace profile—significantly more disturbing than *Layshock*'s—was created by two eighth graders, one of whom was piqued that her principal had twice punished her for violating the school's dress code.[5] Portraying him as a pedophile and sex addict, and insulting even his wife ("looks like a man") and son ("looks like a gorilla"), it was yet another grievance-fueled Internet creation—a mainstay of student-speech lawsuits since 1998.[6]

The *Snyder* decision resulted in three divergent opinions. The majority opinion, signed by eight judges, found that J.S.'s First Amendment rights, like Justin Layshock's, had been violated.[7] First, it determined that the website—created by J.S. and her friend K.L. at J.S.'s home—only reached campus because the principal asked a student to print it out and deliver it to him.[8] Doing so did not transform this

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[1] 650 F.3d 205 (3d Cir. 2011) (en banc).

[2] 650 F.3d 915 (3d Cir. 2011) (en banc).

[3] *Layshock*, 650 F.3d at 208; *Snyder*, 650 F.3d at 920.

[4] *Layshock*, 650 F.3d at 219. In *Layshock*, the Third Circuit concluded that a parody Myspace profile of a school principal did not threaten to result in substantial disruption to the school. *Id.* Indeed, it did not even qualify as even partially "on-campus." *Id.* at 215 ("The argument equates Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk; and we reject it.").

[5] *Snyder*, 650 F.3d at 920.

[6] The first federal case that addressed online, off-campus speech was *Beussink ex rel. Beussink v. Woodland R-IV School District*, 30 F. Supp. 2d 1175 (1998), in which a high school senior created a website that "used vulgar language to convey his opinion regarding the teachers, the principal and the school's own homepage." *Id.* at 1177.

[7] *Snyder*, 650 F.3d at 925.

[8] *Id.* at 929.

off-campus expression into an *on-campus* one.[9] Second, the majority assumed, without deciding, that the "substantial disruption" standard from the seminal school speech case, *Tinker v. Des Moines*,[10] applied to off-campus speech.[11] Finally, it concluded that the school district could not have reasonably foreseen that the fake profile would create such a disruption.[12] Blue Mountain School District thus failed to make its case for J.S.'s suspension.[13]

The *Snyder* dissent, signed by six judges, took issue with the majority's application of *Tinker*, arguing that its conception of "substantial disruption" dramatically underestimated the impact that the Myspace profile had on the principal and on the school's authority.[14] "In doing so," Judge Fisher wrote, "it allows a student to target a school official and his family with malicious and unfounded accusations about their character in vulgar, obscene, and personal language."[15]

In addition to the dramatic disconnect between the majority and dissent's interpretation of "substantial disruption," the *Snyder* ruling included a concurrence, signed by five judges,[16] which argued that *Tinker* should simply *not* apply to off-campus student expression in any situation: off-campus speech should instead be fully protected under general First Amendment jurisprudence.[17]

In short, *Snyder* represented a decade's worth of judicial fault lines created by (1) the "everything, everywhere" Internet's ability to give voice to teen angst, rage, and terrible decision-making skills and (2) a messy doctrinal landscape attempting to make do with the Supreme Court's twentieth-century in-real-life (IRL) jurisprudence. *Snyder* and *Layshock* were ultimately combined in a petition for certiorari to the United States Supreme Court, presenting legal questions that had increasingly plagued courts and educators.[18] Unlike the Court's most recent school speech ruling—the entertaining but superfluous *Morse v. Frederick*[19] ("BONG HiTS 4 JESUS")—these cases actually reflected the significant and difficult student-speech

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[9] *Id.* at 933.

[10] 393 U.S. 503, 509 (1969) ("Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.").

[11] *Snyder*, 650 F.3d at 939.

[12] *Id.* at 930.

[13] *Id.* at 933.

[14] *Id.* at 941 (Fisher, J., dissenting).

[15] *Id.*

[16] All five judges (McKee, Smith, Sloviter, Fuentes, and Hardiman) had also signed onto the Third Circuit's majority opinion. *Id.* at 936.

[17] *Id.* at 940 (Smith, J., concurring).

[18] *See* Petition for Writ of Certiorari, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915 (2011) (No. 11-502).

[19] 551 U.S. 393 (2007). *Morse* held that a student could be punished for displaying a "BONG HiTS 4 JESUS" banner because the phrase supposedly encouraged drug use at the school. *Id.* at 397, 410.

cases coming before courts. Nevertheless, the Supreme Court declined to grant certiorari, just as it had in previous online, off-campus cases.[20]

It took another eight years for the Supreme Court to finally consider the question of online, off-campus student speech. When the Court granted certiorari in *Mahanoy Area School District v. B.L.*,[21] it generated both relief and concern among supporters of free-speech rights for students. On one hand, *Mahanoy* had the potential to settle a significant circuit split and provide authoritative guidance on public schools' authority to regulate online, off-campus speech by students. On the other hand, there was concern that the Court's conservative majority could further erode student First Amendment rights, as had happened in every case it had decided since *Tinker*,[22] which first recognized in 1969 that neither "students [nor] teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[23] Justice Clarence Thomas, for example, had repeatedly taken the supposedly originalist position that students simply had no First Amendment rights at all against public school officials.[24]

There was some measure of relief, then, when *Mahanoy* at least delivered the correct decision in an easy case: every justice, *sans* Thomas, reconfirmed that students were entitled to some degree of First Amendment rights with their online posts.[25] But the *Mahanoy* majority opinion itself was a doctrinal mess that appeared to have little familiarity with the twenty-plus years of evolving jurisprudence in the federal courts, and little interest in establishing a rigorous or useful approach to such cases. When it came to online, off-campus speech regulation, as First Amendment scholar Mary-Rose Papandrea put it, "the Court resolved this pressing question with a deeply unsatisfying answer: it depends."[26] Beyond the ruling's outcome, she argued, "*Mahanoy* is no victory for students."[27]

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[20] *See* Blue Mountain Sch. Dist. v. J.S., 132 S. Ct. 1097 (2012) (denying certiorari). The Court also denied a petition for writ of certiorari in another 2012 case—*Kowalski v. Berkeley County Schools*, 565 U.S. 1173 (2012) (mem.)—as well as one several years earlier: *Wisniewski v. Board of Education*, 552 U.S. 1296 (2008) (mem.).

[21] 141 S. Ct. 976 (2021) (mem.).

[22] 393 U.S. 503 (1969).

[23] *Id.* at 506.

[24] *See, e.g.*, *Morse*, 551 U.S. at 410–11 (Thomas, J., concurring). For a critique of Thomas's originalist analysis in *Morse*, see generally Matthew D. Bunker & Clay Calvert, *Contrasting Concurrences of Clarence Thomas: Deploying Originalism and Paternalism in Commercial and Student Speech Cases*, 26 GA. ST. U. L. REV. 321 (2010).

[25] 141 S. Ct. 2038, 2045 (2021).

[26] Mary-Rose Papandrea, Mahanoy v. B.L. *& First Amendment "Leeway*,*"* 2021 SUP. CT. REV. 53, 53.

[27] *Id.* at 53–54. For other critiques of *Mahanoy*, see, for example, Jenny Diamond Cheng, *Deciding Not to Decide:* Mahanoy Area School District v. B.L. *and the Supreme Court's Ambivalence Toward Student Speech Rights*, 74 VAND. L. REV. 511, 512–13 (2021) (writing that the "Court's opinion is a notably narrow ruling that seems primarily designed to overturn a Third Circuit holding that was far more broadly protective of student off-campus speech.

Despite the ambiguous legal terrain in the wake of *Mahanoy*, lower courts have had no choice but to move forward and continue deciding cases in this extremely complex area. This Article first explores the constitutional background of student speech rights, beginning with the *Tinker* decision and continuing through early court attempts to analyze online, off-campus cases. Next, it examines *Mahanoy* itself, unpacking the frustratingly murky majority opinion written by Justice Stephen Breyer. The Article then breaks new ground by exploring court decisions in the years since *Mahanoy*, as jurists continue trying to identify First Amendment boundaries in student speech cases involving bullying, threats, and otherwise offensive speech. A concluding section synthesizes the state of the law and offers perspectives on this vital area of constitutional concern.

I. STUDENT SPEECH JURISPRUDENCE IRL

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.
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> —*West Virginia State Board of Education v. Barnette* (1943)[28]

The Supreme Court's first—and broadest to date—ruling on student speech rights was decided during the final term (1968–69) of the Warren Court.[29] That spring, the Court handed down two decisions that seem to share significant jurisprudential DNA: *Tinker v. Des Moines Independent Community School District*[30] and *Brandenburg v. Ohio*.[31] Both cases represent part of the Warren Court's expansion of free speech

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The case implicates a number of genuinely difficult First Amendment issues, precisely zero of which the Court resolved. What's more, the Court's qualified immunity doctrine effectively converts legal ambiguity into government power; given the current framework, even when a court finds that a school official has violated a student's constitutional rights by disciplining her for off-campus speech, the student will almost certainly be unable to recover money damages").

[28] 319 U.S. 624, 637 (1943).

[29] Chief Justice Earl Warren retired at the term's completion. Fred P. Graham, *Warren to Leave Court, Some in GOP Open Fight to Bar Succession in '68*, N.Y. TIMES, June 22, 1968, at 1. His position would be filled by Warren E. Burger, appointed by President Richard Nixon. *Burger Is Sworn in as Chief Justice; Warren Praised*, N.Y. TIMES, June 24, 1969, at 1.

[30] 393 U.S. 503 (1969).

[31] 395 U.S. 444 (1969).

rights,[32] attempting to set clear boundaries between a vast territory of protected speech and the rare instances of speech that can cause, respectively, substantial disruption of a school and violence. And yet, these classic speech-protective judicial tests have both floundered in the face of a marketplace of ideas that increasingly straddles the 'real' world and the digital one.

A. Anti-War Armbands for the Holidays (1969)

The *Tinker* case began on an evening in December 1965, when several students decided to wear black armbands during the holiday season to protest the Vietnam War.[33] Upon hearing of their plan, principals at two schools in the area drafted a policy prohibiting the armbands, which was quickly approved by the Des Moines School Board.[34] Christopher Eckhardt and all four Tinker siblings wore armbands to their respective schools in mid-December.[35] Although the younger Tinkers (age eight and eleven) faced no opposition, Eckhardt and the elder Tinkers were promptly suspended and told to stay home until they were ready to come back *sans* armbands.[36]

The three students sued the school district, arguing that recent decisions from the Fifth Circuit—*Burnside v. Byars*[37] and *Blackwell v. Issaquena County Board of Education*[38]—supported the argument that their peaceful armband protest was protected by the First Amendment.[39] Both of those cases involved students suspended for wearing Student Nonviolent Coordinating Committee (SNCC) "freedom buttons" to school.[40] In *Blackwell*, the Fifth Circuit found that the students wearing buttons behaved in a disruptive manner and thus could not claim First Amendment protection.[41] In *Burnside*, however, the button-wearers did *not* create any disruption and thus prevailed in their First Amendment claim.[42] The district court deciding *Tinker*,[43] however, was not persuaded. "While the decisions of the Court of Appeals for the Fifth Circuit are entitled to respect and should not be brushed aside lightly," wrote

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[32] Any such list must also include the Court's *New York Times Co. v. Sullivan* decision from four years earlier as well, which dramatically broadened the amount of critical speech that citizens and journalists could engage in without fear of being sued by public officials for defamation. 376 U.S. 254, 279–80 (1964).

[33] 393 U.S. at 504.

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

[35] *Id.* at 972 n.1.

[36] The students did not return until after January 1st, at the close of their holiday protest. *Id.*

[37] 363 F.2d 744 (5th Cir. 1966).

[38] 363 F.2d 749 (5th Cir. 1966).

[39] *Tinker*, 258 F. Supp. at 973.

[40] *Burnside*, 363 F.2d at 746; *Blackwell*, 363 F.2d at 750.

[41] *Blackwell*, 363 F.2d at 753.

[42] *Burnside*, 363 F.2d at 748.

[43] The *Tinker* case was heard in the U.S. Court of Appeals for the Eighth Circuit. 383 F.2d 988 (8th Cir. 1967).

Chief Judge Stephenson, "they are not binding upon this Court."[44] Thus, "it is the view of the Court that actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline."[45] The *Tinker* plaintiffs were thus denied an injunction and damages.[46]

After a divided *en banc* Eighth Circuit affirmed the lower court's ruling, the Supreme Court took up *Tinker*,[47] ultimately ruling eight to one that the armbands were both symbolically expressive[48] and "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."[49]

Justice Abe Fortas, writing for the majority, directly addressed the trial court's stance that the school district's actions were reasonable, as they were "based upon their fear of a disturbance."[50] Justice Fortas rejected that reasoning.[51] The school district's "undifferentiated fear," he wrote, was wholly insufficient to justify punishing the students' "silent, passive expression of opinion."[52] Fortas wrote "[i]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[53] "Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear."[54] He continued:

> [O]ur constitution says we must take that risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.[55]

The *Tinker* armbands were clearly a "departure" from the "regimentation" of supporting American military action in Vietnam.[56] Indeed, in the wake of the

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[44] 258 F. Supp. at 973.

[45] *Id.*

[46] *Id.*

[47] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969).

[48] *Id.* at 505–06.

[49] *Id.*

[50] *Id.* at 501, 508.

[51] *Id.* at 508–09.

[52] *Id.* at 508.

[53] *Id.*

[54] *Id.* These words almost serve as a corollary to Justice Oliver Wendell Holmes's famous claim in *Gitlow v. New York* that "[e]very idea is an incitement." 268 U.S. 652, 673 (1925). And although Justice Fortas wisely avoided using the word "incitement" in this school speech decision, the daring idea that education can help usher students into "our relatively permissive, often disputatious" marketplace of ideas, may seem even bolder today than it did in 1969. *Tinker*, 393 U.S. at 509.

[55] *Tinker*, 393 U.S. at 508–09.

[56] *Id.* at 508.

controversy, the Tinker family faced vitriolic accusations of being Communists; had their house, car, and street vandalized; and received death threats, including an offer from a TV talk show host to lend his gun to anyone offering to shoot the children's father with it.[57] It was against this fraught backdrop that the Supreme Court ruled schools could not punish or restrict student speech merely to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[58] Instead, student expression was, by default, protected by the First Amendment unless it threatened to "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school"[59] or invaded "the rights of other students to be secure and to be let alone."[60]

B. "I know a man who's firm—He's firm in his pants . . . ."[61] (1986)

For fourteen years, *Tinker* remained the singular precedent guiding schools and courts on the narrow exceptions to student speech rights. Then, in quick succession, an increasingly conservative Supreme Court formulated two significant exceptions that granted schools significantly more leeway in controlling student expression. The first, *Bethel School District No. 403 v. Fraser*,[62] began with an end-of-day high school assembly for students to nominate their classmates for student government.[63] Matthew Fraser's brief speech nominating his friend for school office was laced with double entendres ("I know a man who's firm. He's firm in his pants . . . .") and evoked precisely the reaction from students one would expect—hoots, gestures, pelvic thrusts, and, in some cases, bewilderment.[64]

Bethel High School, as it turned out, had a disciplinary rule that began with wording drawn from *Tinker* ("Conduct which materially and substantially interferes

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[57] *See John Tinker on Community Reaction*, CSPAN (Apr. 10, 2018), https://www.c-span.org/video/?444248-4/john-tinker-community-reaction [https://perma.cc/F67Y-CLZR].

[58] *Tinker*, 393 U.S. at 509.

[59] *Id.* at 505 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[60] *Id.* at 508.

[61] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687 (1986) (Brennan, J., concurring).

[62] *Id.*

[63] Fraser v. Bethel Sch. Dist. No. 403, 755 F.2d 1356, 1357, 1360 (9th Cir. 1985). In addition to the fact that the assembly was voluntary and student-run, its timing (the last period of the day) suggests the school knew that student-led speeches, with cheering, etc., would make subsequent scholastic focus difficult. *See id.* at 1259–60. It also made a "material or substantial disruption" argument more challenging. *See id.*

[64] *Id.* at 1357, 1359. One teacher described the reaction:

> There were pockets of loud clapping, hoots and hollering and then there were other students that were sitting there, I guess my best words to describe it is as rather bewildered, not understanding what the kids were clapping about and why there was such a difference in reception to the speech.

Id. at 1360.

with the educational process is prohibited") then added an extra profanity clause: "including the use of obscene, profane language or gestures."[65] The school's application of the rule to the Fraser's speech, however, was dubious, as it was neither obscene nor profane but merely suggestive.[66] Nevertheless, the high school suspended him for three days, and removed him from the list of candidates for graduation speaker.[67] After the school district denied Fraser's grievance petition, a federal court vacated his suspension and enjoined the district from prohibiting Fraser from giving the commencement speech at Bethel High School's graduation ceremony."[68] Bethel School District appealed—and lost again—when the U.S. Court of Appeals for the Ninth Circuit applied *Tinker*, concluding that the school district failed to show that Fraser's speech "substantially disrupted or materially interfered in any way with the educational process."[69]

The Supreme Court disagreed, however, reversing the Ninth Circuit and handing victory to school authorities.[70] Chief Justice Warren Burger, writing for a seven-to-two majority, noted disapprovingly that the appellate court gave "little weight" to the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of respondent's speech in this case."[71]

C. JOURNALISM II: Prior Restraint at Hazelwood H.S. (1988)

The second exception came just two years later, when the Court handed down *Hazelwood School District v. Kuhlmeier*, upholding a school's censorship powers in "school-sponsored expressive activities."[72] Here too, the Supreme Court rejected the appellate court's application of a more speech-protective calculus.[73] The U.S.

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[65] *Id.* at 1357 n.1.

[66] *Cf. id.* at 1357. Later, Justice Brennan, in his *Fraser* concurrence, took issue with the majority's characterization of the speech. 478 U.S. at 687 (Brennan, J., concurring) ("The Court, referring to these remarks as 'obscene,' 'vulgar,' 'lewd,' and 'offensively lewd,' concludes that school officials properly punished respondent for uttering the speech. Having read the full text of respondent's remarks, I find it difficult to believe that it is the same speech the Court describes.").

[67] *Fraser*, 755 F.2d at 1357.

[68] *Id.* at 1358. It appears that the student vote for commencement speaker took place before the district court handed down its ruling. The students nevertheless voted for Fraser with write-in ballots; the court ruled that Bethel could not stop him from giving the speech. He ultimately did so, without incident.

[69] *Id.* at 1360 ("Thus, what the evidence demonstrates is that Fraser's speech evoked a lively and noisy response from the students, including applause, and that a few of the students reacted with sexually suggestive movements. The administration had no difficulty in maintaining order during the assembly and Fraser's speech did not delay the assembly program.").

[70] *Fraser*, 478 U.S. at 685–86 (majority opinion).

[71] *Id.* at 680.

[72] 484 U.S. 260, 273 (1988).

[73] *See id.* at 265–66.

Court of Appeals for the Eighth Circuit had found that *Spectrum,* a high school newspaper produced by the Journalism II class, "was a 'student publication' in every sense."[74]

> The students chose the staff members, determined the articles to be written and printed, and determined the content of those articles. As advisor Stergos testified: "It's a student paper, so that the students, first of all, decided the stories, and, you know, wrote the stories, so they obviously were deciding the content. They were writing them. I would help if there were any matters that they had questions of, legalwise or ethicalwise, but—."[75]

Also noteworthy was the annual tradition of *Spectrum* publishing a Statement of Policy—"tacitly approved each year by school authorities"—announcing that "*Spectrum*, as a student-press publication, accepts all rights implied by the First Amendment . . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited."[76]

As a student publication, the Eighth Circuit concluded, *Spectrum* was essentially a public forum, which prohibited the state from engaging in content-based restrictions.[77] Nevertheless, as this was in a school setting, the court applied a "somewhat lower" standard—*Tinker*—to determine whether the principal's censorship of two articles could stand.[78] Under *Tinker*, the school had to prove that removal of two *Spectrum* pages was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others."[79] It was not, and the student journalists prevailed.[80]

In a five to three ruling, however, the Supreme Court reversed.[81] Where the Eighth Circuit saw a student-run publication, the Court's majority saw students taking a high school class because they were not, after all, real journalists, but merely learning about the craft.[82] Moreover, the newspaper could only be published with the assistance of school facilities and funding.[83] And there was also the indicting tradition of prepublication review by the high school principal—a practice that would

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[74] Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d 1368, 1372 (8th Cir. 1986).
[75] *Id.*
[76] *Kuhlmeier*, 484 U.S. at 277 (Brennan, J., dissenting).
[77] *Kuhlmeier*, 795 F.2d at 1373–74.
[78] *Id.* at 1374.
[79] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969)).
[80] *Id.* at 1375.
[81] *Kuhlmeier*, 484 U.S. at 266 (majority opinion).
[82] *Id.* at 268.
[83] *Id.* at 262–63.

not be found in a true public forum.[84] *Spectrum*, the Court ruled, was a school-sponsored expressive activity, and thus subject to oversight by educators "so long as their actions [were] reasonably related to legitimate pedagogical concerns"—a standard of review that was dramatically lower than *Tinker*'s.[85]

Justice Brennan, joined by two of his liberal brethren, dissented.[86] *Tinker*, he argued, should be the controlling precedent for student journalism, just as it was for individual student expression.[87] In the closing lines of his dissent, Brennan warned that the *Kuhlmeier* ruling undermined the ideals of *Tinker* and the Constitution itself:

> Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," and "that our Constitution is a living reality, not parchment preserved under glass," the Court today "teach[es] youth to discount important principles of our government as mere platitudes." The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.[88]

II. WAITING FOR *MAHANOY*

> Vladimir: (gloomily) It's too much for one man. (Pause. Cheerfully.) On the other hand what's the good of losing heart now, that's what I say. We should have thought of it a million years ago, in the nineties.
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> —*Waiting for Godot: A Tragicomedy in Two Acts* (1955)[89]

A profound technological revolution had occurred between the Court's *Kuhlmeier* decision in 1988 and its supposed "textual analysis" of Joseph Frederick's "BONG HiTS 4 JESUS" banner in 2007.[90] Just five years after *Kuhlmeier*, the hyperlinked, browsable Internet—the backbone of today's digital age—was made available to the

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[84] *Id.* at 263.

[85] *Id.* at 273.

[86] *Id.* at 277 (Brennan, J., dissenting). Justice Brennan was joined by Justice Marshall, the *other* remaining Warren Court liberal, as well as Justice Blackmun, a Nixon appointee who became one of the most liberal justices on the Court.

[87] *Id.* at 282–84.

[88] *Id.* at 290–91 (first quoting Bd. of Educ. v. Pico, 457 U.S. 853, 880 (1982) (Blackmun, J., concurring in part and concurring in judgment); then quoting Shanley v. Ne. Indep. Sch. Dist., 462 F.2d 960, 972 (5th Cir. 1972); and then quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[89] SAMUEL BECKETT, WAITING FOR GODOT: A TRAGICOMEDY IN TWO ACTS 7 (1954).

[90] *See* Morse v. Frederick, 551 U.S. 393, 397 (2007).

public.[91] United States educators, seeing its potential, immediately brought it into the classroom and, by 1997, just four years after its introduction, eighty-nine percent of secondary schools had Internet access.[92] In those early days, the web's potential for drama and distraction in the school setting was mitigated by the large, plug-in computers that housed it. But by the late '90s, there were already serious concerns about online student expression and its ability to complicate the educational setting, as well as disagreements about the limits of school authority to regulate online student speech.[93]

This section will examine an early online student speech case that shows (1) how legal questions raised by the Internet were finding their way into courtrooms and (2) how the most challenging of those questions remained constant during the two decades in which the Supreme Court declined to address online student speech. It will then, against that backdrop, briefly discuss the Court's fourth exception to *Tinker*, as promulgated in *Morse v. Frederick*.[94]

A. Mrs. Fulmer Is a Bitch, in D-Minor (2000)

In the spring of 1998, eighth-grader J.S. created a website called "Teacher Sux," with various pages dedicated to abusing his algebra teacher, Kathleen Fulmer and (although to a much lesser degree) his principal, A. Thomas Kartsotis.[95] J.S.'s site mocked the teacher for her physical appearance, morphed her into Hitler, bloodily beheaded her via an elaborate diagram, and bestowed upon her a song titled "Mrs. Fulmer Is a B[itch], in D Minor."[96] One page was directed to the teacher herself, with the words "Fuck you Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch."

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[91] In its "world wide web" version, the internet has been available to the public since April 30, 1993. *See* Julian Ring, *30 Years Ago, One Decision Altered the Course of Our Connected World*, NPR (Apr. 30, 2023, 7:00 AM), https://www.npr.org/2023/04/30/1172276538/world-wide-web-internet-anniversary [https://perma.cc/NH3Y-39RC].

[92] ANNE KLEINER ET AL., INTERNET ACCESS IN U.S. PUBLIC SCHOOLS AND CLASSROOMS: 1994–2002, at 18 (2003), https://nces.ed.gov/pubs2004/2004011.pdf [https://perma.cc/7XRR-47PH].

[93] *See, e.g.*, Terry McManus, *Internet Raises New Rights Issues for Students*, CHI. TRIB., Apr. 21, 1998, at 1; Greg Hamilton, *Internet Has Become a New Means for Old Evils*, ST. PETERSBURG TIMES, May 25, 1997; Anemona Hartocollis, *Joke Brings Suspension and Reversal: Student Was Disciplined for Parody of Colorado School Shooting*, N.Y. TIMES, May 28, 1999, at B3; Sandy Coleman, *Battling the Web's Dark Side: Schools Balance Student Rights, Rules in Incidents on Net*, BOS. GLOBE, Mar. 27, 2000, at B1; David L. Stader, *Responding to Student Threats: Legal and Procedural Guidelines for High School Principals*, 74 THE CLEARINGHOUSE, 221–24 (2001).

[94] 551 U.S. 393 (2007).

[95] *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 415 (Pa. Commw. Ct. 2000).

[96] *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 851 (Pa. 2002).

typed out 136 times.[97] On another page—"Why Should She Die?"—J.S. made a case for Fulmer's murder and invited supporters to donate twenty dollars for a hit man.[98] On this website, "students were invited to, and did, interject their own derogatory comments" about the algebra teacher.[99] One visitor, however, must have been put off by the site and anonymously sent the link to a teacher, who then forwarded it to Kartsotis.[100]

Taking the threats seriously, the principal showed Fulmer and reported the site to local police and the FBI; both agencies identified J.S. but declined to pursue charges.[101] Fulmer, who had taught at the school for twenty-six years, was both terrified and demoralized by the site, ultimately taking leave for the remainder of the school year.[102] Kartsotis reported that the school's morale in general was the lowest ever in his forty-year career.[103] Oddly enough, however, J.S. finished the term without any confrontation, psychological referral, or punishment from the school.[104] He did take down the site once he learned the school knew about it but was not informed of any repercussions until after the school year ended.[105] By the time the school district set an expulsion hearing date in August, the parents of J.S had—likely seeing the writing on the wall—already enrolled their son in an out-of-state high school.[106] Once the school district formally expelled him, J.S., through his parents, appealed the expulsion as a violation of his First Amendment rights.[107]

The school district prevailed at both trial and appellate levels, and the case ended up, in 2002, before Pennsylvania's high court.[108] In *J.S. ex rel. H.S. v. Bethlehem Area School District*, the Pennsylvania Supreme Court produced a thoughtful analysis of this new legal issue by extrapolating principles from various areas of IRL jurisprudence.[109] It also formulated the "sufficient nexus" test, which a number of courts have continued to apply over the years.[110]

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[97] *See J.S. ex rel. H.S.*, 757 A.2d at 416.

[98] *See id.*

[99] *Id.* at 421.

[100] *See id.* at 415.

[101] *See id.* at 415 & n.2, 416.

[102] *See id.* at 416–17.

[103] *Id.* at 417.

[104] J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 852 (Pa. 2002). There was no explanation for the school's bizarre lack of action in the court opinions, but the Pennsylvania Supreme Court found that this passivity severely undermined the school's argument that it viewed the website as a true threat. *See id.* at 859–60.

[105] *See id.* at 852, 859–60.

[106] *See id.* at 853.

[107] *Id.*

[108] *Id.*

[109] *Id.* at 859–60.

[110] This seems to be the first appearance of "sufficient nexus" in a student speech case. *See id.* at 865.

First, the Pennsylvania high court considered the school district's argument that J.S.'s website constituted a true threat.[111] Applying a totality of the circumstances analysis, Justice Ralph Cappy, writing for the court, found it significant that the website itself was never intended to be seen by the algebra teacher and that J.S. had never made similar statements to her in person.[112] He also found it problematic that the school never confronted J.S. or even acknowledged the website's existence until several months later.[113] This significantly delayed response did not seem logical, he concluded, if the school believed J.S. presented a true threat.[114]

Next, the court turned to the Supreme Court's student-speech cases. After considering each one, Justice Cappy noted that the Court's IRL precedents provided little guidance in grappling with this new online, off-campus phenomenon:

> Unfortunately, the United States Supreme Court has not revisited this area for fifteen years. Thus, the breadth and contour of these cases and their application to differing circumstances continues to evolve. Moreover, the advent of the Internet has complicated analysis of restrictions on speech . . . . Indeed, *Tinker*'s simple armband, worn silently and brought into a Des Moines, Iowa classroom, has been replaced by J.S.'s complex multi-media web site, accessible to fellow students, teachers, and the world.[115]

By 2002, the Pennsylvania high court was able to consider three cases weighing whether off-campus emails or websites constituted "on-campus or off-campus speech."[116] It turned out, however, that each of the three had reached a different conclusion. One found a student's website to have an "out-of-school nature."[117] Another found a student's website was on-campus speech because it could be accessed on the school computers.[118] And a third ruled that *Tinker* should apply to a student's website regardless of whether on-or-off campus.[119] So Justice Cappy

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[111] *Id.* at 856. As of 2002, the only Supreme Court ruling on true threats—in which the speech was determined to be protected political hyperbole—concerned an eighteen-year-old who, while in a discussion group with *other* teenagers at a rally, expressed his opposition to getting drafted into the Vietnam War, claiming: "If they ever make me carry a rifle, the first man I want to get in my sights is L.B.J." Watts v. United States, 394 U.S. 705, 706 (1969).

[112] *See J.S. ex rel. H.S.*, 807 A.2d at 858–59.

[113] *See id.* at 859–60.

[114] *See id.* at 860.

[115] *Id.* at 863–64.

[116] *See id.* at 864–65.

[117] *Id.* at 864 (quoting Emmett v. Kent Sch. Dist. No. 415, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000)).

[118] *Id.* at 864–65 (citing Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998)).

[119] *See id.* at 864 (citing Killion v. Franklin Reg'l Sch. Dist., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001)).

turned to case law reaching back to 1969 in which courts applied student-speech law to lawsuits in which students distributed student-produced newspapers on or near campus.[120] Extrapolating from the variations of "distribution" and "on-campus" in these cases, Justice Cappy concluded that, in the case now before the court, there was ultimately "a sufficient nexus between the web site and the school campus to consider the speech as occurring on-campus."[121]

This new "sufficient nexus" test became one of several analytical frameworks that courts have since employed when attempting to navigate this murky area of law for the past twenty-five years. In *Bethlehem*, Justice Cappy argued that four factors created this nexus between the online speech and the school: J.S. had (1) created a website aimed at a "specific audience" of fellow students; (2) made Fulmer and Kartsotis the subjects of the website; (3) informed other students about the site; and (4) accessed his website at school, showing it to a fellow student.[122]

Having arrived at this "on-campus" classification, the Pennsylvania high court had to determine which of the Supreme Court's student speech precedents was most analogous—a challenge, Justice Cappy wrote, because "the type of speech at issue in this case straddles the political speech in *Tinker*, and the lewd and offensive speech . . . in *Fraser*."[123] After attempting to glean insight from the handful of available lower court cases, Cappy noted, again, that "[t]he United States Supreme Court has not spoken in any case involving facts that are analogous to this case,"[124] and so he applied both *Tinker* and *Fraser*—ultimately finding that *Tinker* seemed the better fit.[125] "[T]he web site," he concluded, "created disorder and significantly and adversely impacted the delivery of instruction. Indeed, it was specifically aimed at this particular school district and seemed designed to create precisely this sort of upheaval."[126] Thus, the school's discipline of J.S. did not violate his First Amendment rights.[127]

The *Bethlehem* decision demonstrates how, by 2002, (1) educators were already having to navigate the sometimes disruptive presence of a new technology alongside a growing level of school violence,[128] and (2) courts were attempting to patch together a means to determine how far schools could go in addressing these concerns

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[120] *See id.* at 865.

[121] *Id.*

[122] *See id.* at 865.

[123] *Id.* at 866.

[124] *Id.* at 867.

[125] *See id.* at 867–68.

[126] *Id.* at 869.

[127] *See id.*

[128] Both courts in this case recognized the significance of the combination. *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 757 A.2d 412, 422 (Pa. Commw. Ct. 2000) ("Regrettably, in this day and age where school violence is becoming more commonplace, school officials are justified in taking very seriously threats against faculty and other students."); *see also J.S. ex rel. H.S.*, 807 A.2d at 860 ("We too appreciate that in schools today violence is unfortunately too common and the horrific events at Columbine High School, Colorado remain fresh in the country's mind.").

without violating students' First Amendment rights. In short, if there was a significant First Amendment question in student speech law, this was it.

B. Bong Hits 4 Jesus (2007)

Nevertheless, when the Supreme Court did finally decide to take up its next student speech case—nearly twenty years after *Kuhlmeier*—it had nothing to do with the Internet. *Morse v. Frederick*[129] instead presented the question of whether a high school student's banner declaring "BONG HiTS 4 JESUS" at a school event would churn out yet another categorical exception to *Tinker*.[130] It will remain a mystery why the Court found this *sui generis* case to present a significant legal question. The Court's majority opinion, written by Chief Justice John Roberts, was clearly not interested in doing a postmodern interrogation of the intriguing juxtaposition of marijuana and Christianity in the slogan.[131] Rather, in a five to one decision,[132] the Court's conservatives concluded that the "reasonable" interpretation of Joe Frederick's sign was that it "advocated the use of illegal drugs."[133] Although there is no evidence that *advocacy* of illegal drug use has ever been a serious concern in

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[129] 551 U.S. 393 (2007).

[130] *Id.* at 396–97.

[131] Joseph Frederick, the student, has stated that the slogan

> was never meant to have any substantive meaning. It was certainly not intended as a drug or religious message. I conveyed this to the principal by explaining that it was intended to be funny, subjectively interpreted by the reader, and most importantly as an exercise of my inalienable right to free speech.

Student in Supreme Court Free Speech Case Speaks About Suspension Over "Bong Hits for Jesus" Banner, ACLU (Mar. 2, 2007, 12:00 AM), https://www.aclu.org/press-releases/student-supreme-court-free-speech-case-speaks-about-suspension-over-bong-hits-4-jesus [https://perma.cc/YK4L-ZMYH].

[132] Justice Breyer argued in his partial concurrence, partial dissent that the Court only had to rule on the question of whether Principal Deborah Morse could claim qualified immunity against Frederick's lawsuit—and ruled for the school on this basis. *See Morse*, 551 U.S. at 425, 428 (Breyer, J., concurring in part and dissenting in part). Justice Stevens, joined by Justices Ginsberg and Souter, also agreed with the qualified immunity claim but strongly opposed the categorical label slapped on the banner. *See id.* at 434 (Stevens, J., dissenting). In punishing "[t]his nonsense banner," Stevens wrote, and "upholding—indeed, lauding—a school's decision to punish Frederick for expressing a view with which it disagreed," the Court "does serious violence to the First Amendment." *Id.* at 435.

[133] *Id.* at 401–02. The majority's emphatic insistence upon this singular interpretation of Joe Frederick's sign presented a fascinating contrast to its keen ability to glean many potentially *legitimate* meanings from "fake issue ads"—a strategy of circumventing campaign finance law that the Bipartisan Campaign Reform Act had prohibited. *See generally* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 476 (2007). The Court published both *Morse* and *Wisconsin Right to Life, Inc.*, 551 U.S. at 476—striking down that BCRA provision—on the same day: June 25, 2007.

schools, the *Morse* majority argued that deterring drug use by schoolchildren is "an 'important—indeed, perhaps compelling' interest."[134] In any case, it became the third *Tinker* exception. And the long wait for guidance on students' online expression continued.

In the fourteen years between *Morse* and *Mahanoy*, the courts continued to decide online, off-campus student speech cases.[135] Many scholars have done excellent work parsing the conflicting approaches taken by various lower courts over the years,[136] but there are, loosely, some recurring themes and analytical approaches to note before examining the *Mahanoy* decision. First, many courts, interpreting *dicta* from *Fraser* and *Morse*, came to agree that *Fraser*, *Morse*, and *Kuhlmeier* were not appropriate precedents to apply in online, off-campus cases.[137] In his *Fraser* concurrence, for instance, Justice Brennan, citing *Cohen v. California*,[138] noted that Fraser's speech "could not have been penalized" if it were expressed "outside of the school environment."[139] Chief Justice Roberts, in his *Morse* opinion, may or may not have indicated that the same principle applied to Joe Frederick's banner by quoting Brennan.[140] In any case, neither he nor the other justices objected to the claim in Justice Stevens's dissent that Joe Frederick's banner would be "unquestionably" protected if it were unfurled outside the school setting.[141]

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[134] 551 U.S. at 407 (quoting Bd. of Educ. v. Earls, 536 U.S. 822, 829–30 (2002)).

[135] *See, e.g.*, Bell v. Itawamba Cnty. Sch. Bd., 799 F.3d 379, 383, 391 (5th Cir. 2015), *cert. denied*, 577 U.S. 1181 (2016) (applying the *Morse* exception and the Fifth Circuit's expansion of the *Morse* exception to a student's assertion of First Amendment rights against school board disciplinary action for a rap filmed off campus and posted online).

[136] *See, e.g.*, David L. Hudson, Jr., *Unsettled Questions in Student Speech Law*, 22 U. PA. J. CONST. L. 1113, 1118–20 (2020); Clay Calvert, Tinker*'s Midlife Crisis: Tattered and Transgressed but Still Standing*, 58 AM. U. L. REV. 1167, 1169–71 (2009); Rita J. Verga, *Policing Their Space: The First Amendment Parameters of School Discipline of Student Cyberspeech*, 23 SANTA CLARA COMPUT. & HIGH TECH. L.J. 727, 740–42 (2007).

[137] *E.g.*, J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926 (3d Cir. 2011) (Smith, J., concurring) ("Courts agree that *Fraser*, *Kuhlmeier*, and *Morse* apply solely to on-campus speech (I use the phrase 'on-campus speech' as shorthand for speech communicated at school or, though not on school grounds, at a school-sanctioned event . . .).").

[138] 403 U.S. 15 (1971).

[139] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring) (citing *Cohen*, 403 U.S. 15). Justice Brennan then added: "The Court's opinion does not suggest otherwise." *Id.*

[140] The Chief Justice wrote that

> Two basic principles may be distilled from *Fraser*. First, it demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, he would have been protected.

Morse v. Frederick, 551 U.S. 393, 394 (2007).

[141] *Id.* at 434 (Stevens, J., dissenting).

With at least some consensus, pre-*Mahanoy*, that *Tinker* was the only student speech precedent that could apply to off-campus student expression, courts have focused on determining (1) whether to apply *Tinker* in a given case and, if so, (2) whether the school can prove *Tinker*'s substantial disruption standard.[142] The two most common ways of answering the first question are the "reasonable foreseeability" and "sufficient nexus" tests.[143] Both have been criticized for their malleability and deference to schools.[144] The first asks whether the student (or a reasonable adult) could have reasonably foreseen that their online expression would find its way to campus.[145] The second—first used in the *Bethlehem* case—asks whether there is a sufficient nexus between the student expression and the school.[146] Both queries make it quite easy to find any online speech that criticizes, comments on, or targets the school or individuals at the school to be recategorized from *off-campus* to *on-campus* expression. Then, once *Tinker* is applied, courts have focused almost exclusively on the "substantial disruption" prong rather than the "invading the rights of others" prong.[147] Here too there are problems with trying to wrangle the IRL concept of substantial disruption into an allegedly causal link between an online posting and real-world repercussions on campus. In short, legal scholars have found a disturbing lack of rigor and a great deal of inconsistency in the frameworks used to analyze the First Amendment implications for online, off-campus student speech, which is why calls for Supreme Court clarification increased over the years as the Court's silence continued.[148]

Thus, in retrospect, it should have been obvious that the Supreme Court had no interest in wading into this doctrinal quagmire when it took up *Mahanoy Area School District v. B.L.*[149] *Mahanoy* was an extraordinarily easy case. There was no frightening or mean-spirited abuse of teachers, principals, or students. It was just two pithy "snaps" of teen defiance that disappeared a day later.[150] The district court had found in favor of the student, and the Third Circuit's panel of judges had unanimously affirmed that ruling.[151] Indeed, the outcome would have likely been the same in any circuit. But in *Mahanoy*, the Third Circuit returned to the challenge it

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[142] *See, e.g.*, Verga, *supra* note 136, at 738–43.

[143] For a thorough typology of various approaches developed in the lower courts, see Hudson, *supra* note 136, at 1129.

[144] *See, e.g.*, Sean R. Nuttall, *Rethinking the Narrative on Judicial Deference in Student Speech Cases*, 83 N.Y.U. L. REV. 1282, 1293–97 (2008).

[145] *See, e.g.*, Hudson, *supra* note 136, at 1130–31.

[146] *See id.* at 1130; J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002).

[147] *See, e.g.*, Hudson, *supra* note 136, at 1117–18.

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

[149] 141 S. Ct. 2038 (2021).

[150] *See id.* at 2043.

[151] *See* B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020).

raised in its *Snyder* concurrence and now ruled that *Tinker* did not apply to off-campus speech.[152] By creating a circuit split on the *Tinker* question, *Mahanoy* threw down a gauntlet and the Supreme Court picked it up.

III. *MAHANOY*, WWTF? (WHAT'S WITH THESE "FEATURES"?)

> Over 45 years ago, when Tinker was decided, the Internet, cell-phones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations.
>
> —*Bell v. Itawamba County School Board* (2015)[153]

Brandi Levy and a friend were at the local Cocoa Hut[154] when Levy posted a "Snap" of the two, their middle fingers extended, with the profanity-laced, punctuation-deficient *cri de coeur*: "fuck softball fuck cheer fuck everything."[155] This was followed by a more specific lament: "love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?"[156] Levy, it turns out, was indignant that a freshman made the high school's varsity cheerleading squad—especially as she, a sophomore, had not done well enough in tryouts to make varsity herself.[157]

Levy's two posts, although originally disseminated to her private Snapchat friends (not all of whom were fellow students), quickly spread to other members of the school community.[158] The posts apparently upset some students, who complained to the cheerleading coaches.[159] As the Supreme Court put it, "[q]uestions about the posts persisted during an Algebra class taught by one of the two coaches."[160] Levy was subsequently suspended from the junior varsity cheerleading squad for that school year.[161]

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[152] *See id.* at 189. One member of the panel, Judge Ambro, argued in a concurrence that this represented a failure to exercise judicial restraint. *See id.* at 194–95 (Ambro, J., concurring).

[153] 799 F.3d 379, 392 (5th Cir. 2015).

[154] The Cocoa Hut was a local convenience store. *See Mahanoy*, 141 S. Ct. at 2043.

[155] *Id.*

[156] *Id.* The comment was followed by an upside-down smiley-face emoji, signifying "sarcasm, irony, humor, and silliness. It is frequently used as a playful indication of awkwardness, frustration, ambivalence, or bemused resignation." John M. Kelly, *Emojiology:* 🙃 Upside-Down Face, EMOJIPEDIA (June 13, 2019), https://blog.emojipedia.org/emojiology-upside-down-face/ [https://perma.cc/V3EU-XLHK].

[157] *See Mahanoy*, 141 S. Ct. at 2043.

[158] *See id.*

[159] *See id.*

[160] *See id.*

[161] *See id.*

After filing suit through her parents, Levy prevailed in court, winning both a preliminary injunction reinstating her to the squad as well as a motion for summary judgment on her First Amendment claim against the school.[162] The trial court found that her speech had not caused any substantial disruption and thus was protected speech.[163] Levy's victory was affirmed by the U.S. Court of Appeals for the Third Circuit, which, again, took the opportunity to issue an expansive ruling that *Tinker* was simply not applicable to most off-campus speech.[164] The court defined off-campus speech as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[165] The Third Circuit's approach—despite a threats and harassment caveat—was a dramatic departure from other courts of appeal that had considered that question, all of which had crafted narrower rules.[166]

The Supreme Court affirmed the Third Circuit's ruling but rejected its attempt to eject *Tinker* from off-campus student speech decisions.[167] "Unlike the Third Circuit," Justice Stephen Breyer wrote for the eight-justice majority, "we do not believe the special characteristics that give schools additional license to regulate always disappear when a school regulates speech that takes place off campus."[168]

Having reinstated *Tinker*'s potential applicability, however, the Court was elusive about which circumstances were likely to require its application. The opinion quoted arguments from the school district that it should be able to regulate

> serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers,[169]

even if occurring off campus. But the Court did not give its imprimatur to this list, just as it withheld its approval of a similar list offered by Levy's counsel.[170] "We are

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[162] *Id.* at 2043–44.

[163] *See id.*

[164] *See id.* The court did withhold judgment on scenarios involving threats or harassment directed toward particular students or teachers. *See id.* at 2045.

[165] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 189 (3d Cir. 2020).

[166] For discussion of other circuits' approaches, see *id.* at 186–89.

[167] *See Mahanoy*, 141 S. Ct. at 2045.

[168] *Id.*

[169] *Id.*

[170] *See id.* One recent district court opinion supports this reading of *Mahanoy*. In *Wang v. Bethlehem Central School District*, No. 1:21-CV-1023 (LEK/DJS), 2022 WL 3154142 (N.D.N.Y. Aug. 8, 2022), the court rejected the assertion that severe bullying or harassment is not governed by the *Tinker* standard, calling this a "subtly mistaken interpretation" of the

uncertain as to the length or content of any such list of appropriate exceptions or carveouts to the Third Circuit majority's rule," Breyer wrote.[171]

Then, without any reference to, or acknowledgment of, nearly a quarter century of tests and standards used by the lower courts in online, off-campus student speech cases, he presented a list of "three features of off-campus speech that often, even if not always, distinguish schools' efforts to regulate that speech from their efforts to regulate on-campus speech. Those features diminish the strength of the unique educational characteristics that might call for special First Amendment leeway."[172]

The Court's first "feature" was that the doctrine of *in loco parentis* is rather dubious when dealing with off-campus speech, as this is the province of parents rather than educators.[173] The second feature was a caution against placing schools in a constant position of power over their students.[174] Exercising such power should require a "heavy burden to justify intervention" by school authorities.[175] And the third "feature" was the fact that unpopular speech in particular should be protected when it takes place off campus.[176] "America's public schools are the nurseries of democracy" Breyer wrote; "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'"[177]

These three features, while identifying important justifications for protecting student expression, do not translate into any kind of methodology for deciding online student speech cases—as was starkly illustrated by the Court's actual analysis of Levy's speech. *Ad hoc* and impressionistic, it is challenging to even try mapping the Court's "features" onto its loose discussion of the case.

First the Court noted that Levy's post did not constitute fighting words, obscenity, or other traditionally unprotected types of speech.[178] Indeed, her Snaps were arguably "the kind of pure speech to which, were she an adult, the First Amendment would provide strong protection."[179] The Court's citations to the latter point suggested,

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Mahanoy opinion. *Id.* at *20. "There," the court wrote, the Supreme Court

> describes a list of exceptions *provided by the defendant* where that school argued a school should maintain a regulatory interest in off-campus speech. . . . However, the court declined to adopt such a list, stating it was 'uncertain as to the length or content of any such list of appropriate exceptions or carveouts,' and instead relied on application of the general *Tinker* standard.

Id. (citing *Mahanoy*, 141 S. Ct. at 2045).

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

172 *Id.* at 2046.

173 *See id.*

174 *See id.*

175 *Id.*

176 *See id.*

177 *Id.* at 2041, 2046.

178 *Id.* at 2046.

179 *Id.* at 2047.

without explicitly saying so, that Levy's speech might fall within the "matter of public concern" category that receives elevated protection under the First Amendment.[180]

In the next brief paragraph, the Court conducted what may have intended to serve as a precursor to its "features" analysis. It looks strikingly similar, however, to the well-worn "sufficient nexus" test that has been used by lower courts for decades: Levy's speech was (1) sent from off-campus, (2) from her own cell phone, (3) to a private friend circle, and (4) did not identify or target the school or any individual teachers or students with abusive or vulgar language.[181] "These features of her speech," Justice Breyer concluded, "diminish the school's interest in punishing [Levy's] utterance."[182]

Next, the Court, citing Justice Brennan's *Fraser* concurrence, found that the school's interest in "teaching good manners" and "punishing the use of vulgar language" was also "weakened considerably" by the fact that Levy was off-campus.[183] Moreover, the school did not stand *in loco parentis* to Levy since off-campus vulgar utterances were presumably the bailiwick of Levy's parents rather than that of the school.[184] Therefore the school's interest in mitigating vulgarity failed.[185]

As to the substantial disruption question—which is, of course, the central inquiry under *Tinker*—the Court was similarly underwhelmed.[186] A few upset students and a ten-minute discussion in an algebra class did not a substantial disruption make, the majority reasoned: "The alleged disturbance here does meet *Tinker*'s demanding standard."[187]

Finally, it considered the school's argument that Levy's Snaps hurt "team morale," concluding that there was little evidence to suggest any serious impact on the cheerleading team's long-term cohesion.[188] Quoting *Tinker*, the Court pointed out that "undifferentiated fear or apprehension . . . is not enough to overcome the right to freedom of expression."[189]

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[180] *Id.* (citing, for example, Snyder v. Phelps, 562 U.S. 443, 461 (2011)). For an extended analysis of the category of "public concern" speech, both in the First Amendment realm and in the statutory context of anti-SLAPP legislation, see generally Matthew D. Bunker & Emily Erickson, *The Jurisprudence of Public Concern in Anti-SLAPP Law: Shifting Boundaries in State Statutory Protection of Free Expression*, 44 HASTINGS COMMC'NS & ENT. L.J. 133 (2022). *See also, e.g.*, Clay Calvert, *Defining Public Concern After* Snyder v. Phelps*: A Pliable Standard Mingles with News Media Complexity*, 19 JEFFREY S. MOORAD SPORTS L.J. 38 (2012) (analyzing the evolution of the public concern concept).

[181] *See* 141 S. Ct. at 2047.

[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.*

[186] *Id.* at 2047–48.

[187] *Id.* at 2048.

[188] *See id.*

[189] *Id.* (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969)). Strangely, the Court did not cite any authority even suggesting that the team morale interest

At the end of this oddly specific and not particularly rigorous roundup of various interests, the Court declared Levy the winner, although with a notably passive-aggressive tone: "It might be tempting to dismiss [Levy's] words as unworthy of the robust First Amendment protections discussed herein. But sometimes it is necessary to protect the superfluous in order to preserve the necessary."[190] The Court thus affirmed the Third Circuit's decision, while refuting the lower court's argument that online, off-campus speech lay outside of *Tinker*'s purview—which was, almost certainly, the primary reason for taking up *Mahanoy* in the first place.[191]

What is striking about the Court's analysis is that its *Mahanoy* analysis provides very little in the way of generalizable principles for lower courts deciding school speech cases.[192] There are "features" and there are school "interests," but there is no clear rule for weighing all these nebulous elements in sight. The majority's discussion of this confounding array of considerations—tweaked in some imprecise manner according to the facts of the individual case, with no overall organizing principle or standard—led directly to an inscrutable and undertheorized decision. This is, of course, entirely consistent with Justice Breyer's known proclivities in deciding First Amendment cases.[193] As one scholarly analysis of Breyer's free speech oeuvre (the main title of which is, tellingly, "An Elastic First Amendment") put it,

> Breyer's opinions demonstrate a tendency to seek the narrowest possible judgment in a free speech decision. More than many of the other justices, Breyer seems likely to specifically limit his holding in a free speech case to the facts of that specific dispute, reducing the precedential effect of his opinions. . . . Whether this represents maddening indecision on Breyer's part, or whether this trend honors a tradition of deciding cases on the narrowest possible grounds, is a question for other commentators to debate.[194]

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was entitled to any constitutional solicitude whatsoever. Instead, it was simply thrown into the analysis willy nilly.

[190] *Id.*

[191] *See id.*

[192] For a big-picture critique of the Court's recent First Amendment jurisprudence for, among other things, its minimalism and failure to establish clear analytical standards in speech cases, see generally Clay Calvert & Matthew D. Bunker, *Fissures, Fractures & Doctrinal Drifts: Paying the Price in First Amendment Jurisprudence for a Half Decade of Avoidance, Minimalism & Partisanship*, 24 WM. & MARY BILL RTS. J. 943 (2016).

[193] *See, e.g.*, Erwin Chemerinsky, *Keynote Address: Justice Breyer and the First Amendment*, 21 FIRST AMEND. L. REV. 291, 302 (2023) ("In many ways, I think [*Mahanoy*] is a quintessential Breyer opinion. It deals with many important factors but offers little guidance to lower courts.").

[194] Benjamin Pomerance, *An Elastic First Amendment: Justice Stephen G. Breyer's Fluid Conceptions of Free Speech*, 79 ALB. L. REV. 403, 486 (2016).

At least as to *Mahanoy* and its impact on school speech jurisprudence, we tend to come down on the side of "maddening."

IV. STUDENT SPEECH IN A POST-*MAHANOY* WORLD

Again, *Mahanoy* was actually a fairly easy call for an online, off-campus student speech case. From the trial court to the Supreme Court, there was a solid consensus (Justice Thomas notwithstanding) that Brandi Levy's Snaps qualified for full First Amendment protection. In contrast, a survey of *Mahanoy*'s "progeny" looks very much like the landscape of cases that preceded it, which is to say, very few of these cases can boast the obvious First Amendment protection granted to Levy's generalized "fuck everything" sentiment. Instead, the dozen or so cases decided since *Mahanoy* have generally required courts to analyze student expression that comes much closer threats of violence,[195] harassment/bullying,[196] or hate speech.[197]

It is cases like these that continue to pose the same challenges schools faced back in 1998, when J.S. made a website that rhetorically (or not?) crowdfunded a hitman for his algebra teacher[198]—or in 2005, when a high school senior created a Myspace discussion page titled "S.A.S.H." (Students Against Shay's Herpes), on which two dozen students gleefully posted comments and photos in the service of deriding their classmate and her supposed sexually transmitted infection.[199] These are the tougher cases in which courts must continue trying to pin down what qualifies as "substantial disruption"—an IRL concept that is all the trickier when the causal agent is online expression. Brandi Levy's speech clearly did not result in substantial disruption. But when online speech looks closer to being a threat of violence, bullying, or hate speech, it is a significantly more difficult question to answer.

Our examination of this post-*Mahanoy* landscape confirms that its precedential value lies almost entirely in its confirmation that schools *may* punish off-campus

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[195] *See, e.g.*, J.S. *ex rel.* M.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295 (Pa. 2021); A.F. *ex rel.* Fultz v. Ambridge Area Sch. Dist., No. 2:21-cv-1051, 2021 WL 3855900 (W.D. Pa. Aug. 27, 2021); DeBenedetto v. Lacey Twp. Bd. of Educ., Civil Action No. 21-8050 (MAS) (DEA), 2022 WL 939388 (D.N.J. Mar. 29, 2022); G.S. *ex rel.* Snyder, 269 A.3d 718 (Pa. Commw. Ct. 2022); McClelland v. Katy Indep. Sch. Dist., No. 4:21-CV-00520, 2021 WL 5055053 (S.D. Tex. Nov. 1, 2021).

[196] *See, e.g.*, Chen v. Albany Unified Sch. Dist., 56 F.4th 708 (9th Cir. 2022); Doe v. Hopkinton Pub. Schs., 19 F.4th 493 (1st Cir. 2021); Kutchinski *ex rel.* H.K. v. Freeland Cmty. Sch. Dist., 69 F.4th 350 (6th Cir. 2023); A.V. v. Plano Indep. Sch. Dist., 585 F. Supp. 3d 881 (E.D. Tex. 2022).

[197] *See, e.g.*, C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270 (10th Cir. 2022); Plaintiff A *ex rel.* Parent A v. Park Hill Sch. Dist., No. 21-cv-6153-SRB, 2022 WL 390836 (W.D. Mo. Feb. 8, 2022); Wang v. Bethlehem Cent. Sch. Dist., No. 1:21-CV-1023 (LEK/DJS), 2022 WL 3154142 (N.D.N.Y. 2022); R.H. v. Sayreville Bd. of Educ., No. CV2119835 (ZNQ) (DEA), 2023 WL 3431214 (D.N.J. May 12, 2023).

[198] *See* J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 853 (Pa. 2002).

[199] *See* Kowalski v. Berkeley Cnty. Schs., 652 F.3d 565, 567 (4th Cir. 2011).

speech in *some* situations. What it means to apply *Mahanoy* analytically is far less clear, as the post-*Mahanoy* cases will illustrate. Before *Mahanoy*, analysis by lower courts generally included some type of sufficient-nexus analysis, then—if there *was* determined to be a sufficient nexus between the speech and the school—they applied *Tinker*'s substantial disruption standard. Now "applying" *Mahanoy* suggests the addition of Justice Breyer's "features" to guard against overzealous punishments of off-campus speech. Is this meant to be supplementary? Or are courts supposed to abandon the formulations they spent decades developing in favor of the *Mahanoy* features? The cases below suggest that *Mahanoy* has offered very little in the way of analytical assistance, and it rarely appears to have a significant effect on the outcome.

In the second half of this Article, we will do a deep dive into five of these decisions. But first we will offer a brief snapshot of how *Mahanoy* itself—beyond simply confirming that *Tinker* may apply to off-campus speech—has been handled by jurists over the last several years.

A. Threats of Violence

1. *J.S. ex rel. M.S. v. Manheim Township School District*

Pennsylvania's Supreme Court applied its own analytical rubric for threats of violence:

> As is apparent from the above, the high Court has yet to develop a comprehensive test detailing what constitutes a true threat, and what speech may be regulated by a school when it occurs off-campus. While such a test is elusive, lower federal courts and state courts, including our Court, have attempted to formulate more definite factors to fill the jurisprudential void in this area, and we continue to do so today.[200]

2. Appeal of *G.S. ex rel. Snyder*[201]

Pennsylvania Judge Ellen Ceisler found the two-part test applied by the Pennsylvania Supreme Court in *Manheim* (above) was the best method of analyzing a school's punishment of a Snap of ominous lyrics from a death metal song.[202] Of *Mahanoy*'s impact, she noted without enthusiasm that "*Tinker*'s substantial disruption test may apply to off-campus speech, but additional factors—such as consideration of the reduced role of *in loco parentis* authority, the 24/7 nature of off-campus

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[200] 263 A.3d at 316.
[201] G.S. *ex rel.* Snyder, 269 A.3d 718.
[202] *See id.* at 720, 732.

speech regulation, and the school's interest in protecting unpopular expression—have seemingly become part of the substantial disruption calculus."[203]

3. *A.F. ex rel. Fultz v. Ambridge Area School District*[204]

District Judge William Stickman IV found little need for *Mahanoy*'s "features," having determined that the student expression was a *true threat* under traditional First Amendment law:

> Rather than a generic "fuck school fuck softball fuck cheer fuck everything," A.F. threatened to "show up at practice to beat yo ass bitch," to "grab a fucking bottle and bash that shit on your face till I see your brain bitch," to "send you bitch ass to the father," and further stated, "it ain't gib be stupid when yo ass dead" and "I sincerely wish death upon your soul."[205]

4. *DeBenedetto v. Lacey Township Board of Education*[206]

District Judge Michael A. Shipp declined to apply *Mahanoy*, noting that it was "not binding law in this District at the time the purported constitutional violation occurred."[207] He continued: "Absent explanation from the parties, the Court does not consider these cases [the Third Circuit and Supreme Court rulings on *Mahanoy*] relevant. It also notes, however, that even considering these decisions, neither alters the outcome the Court reaches today."[208]

5. *McClelland v. Katy Independent School District*[209]

In this case, District Judge Keith Ellison had to navigate the tricky question of whether a school's punishment of threatening Snapchat "flexing" between students from rival high schools was egregious enough to support a school district's qualified immunity defense.[210] Key to that determination was the level of clarity regarding "the limits of school discipline of off-campus speech."[211] Judge Ellison found that, even

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[203] *Id.* at 732–33 (citing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021)).
[204] No. 2:21-cv-1051, 2021 WL 3855900 (W.D. Pa. Aug. 27, 2021).
[205] *See id.* at *6.
[206] No. 21-8050 (MAS) (DEA), 2022 WL 939388 (D.N.J. Mar. 29, 2022).
[207] *Id.* at *2 n.3.
[208] *Id.*
[209] No. 4:21-CV-00520, 2021 WL 5055053 (S.D. Tex. Nov. 1, 2021).
[210] *See id.* at *1, *7–9.
[211] *See id.* at *8 (quoting Longoria *ex rel.* M.L. v. San Benito Indep. Consol. Sch. Dist., 942 F.3d 258, 267 (5th Cir. 2019)).

though the Supreme Court had recently addressed the issue in *Mahanoy*, the ruling "has still fallen short" because the Court "declined to provide any definitive criteria."[212]

B. Harassment, Intimidation or Bullying

1. *Chen v. Albany Unified School District*[213]

The Ninth Circuit, pointing out that the *Mahanoy* decision "declined to articulate 'a broad, highly general First Amendment rule stating just what counts as "off campus" speech' or identifying when . . . *Tinker* might justify regulating such speech," offered the assurance that "*our caselaw* has set forth additional standards that address that issue."[214] Then, after acknowledging *Mahanoy*'s "features," the court applied its own version of the sufficient-nexus test.[215] "Nothing in *Mahanoy* is inconsistent with our sufficient-nexus test, much less 'clearly irreconcilable' with it," Judge Daniel Collins wrote.[216] "Moreover, the additional specific considerations that the Court identified . . . all fit comfortably within the three-factor framework we articulated in *McNeil* . . . . We therefore must apply the *McNeil* sufficient-nexus test to the speech at issue here, keeping in mind the additional considerations identified in *Mahanoy*."[217]

2. *Doe v. Hopkinton Public Schools*[218]

Handing down a ruling just months after the *Mahanoy* decision, District Judge William Young only briefly mentioned the new precedent, and only to distinguish it because "much of the conduct and expression [in *Doe*] occurred on campus."[219] A year later, First Circuit Judge Sandra Lynch distinguished *Doe* with the same reasoning.[220] Along the way, however, the judge erroneously cited the court's authority under *Mahanoy* to specifically apply *Tinker* to off-campus *bullying*[221]—which the Supreme Court did not explicitly endorse.[222]

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[212] *Id.* (noting (like Judge Shipp in *DeBenedetto*, above) that the action took place before *Mahanoy* and could not apply in any case).

[213] 56 F.4th 708 (9th Cir. 2022).

[214] *Id.* at 719–20 (emphasis added).

[215] *Id.* at 719–23.

[216] *Id.* at 720.

[217] *Id.*

[218] *See* Doe *ex rel.* Doe v. Hopkinton Pub. Schs., 490 F. Supp. 3d 448 (D. Mass. 2020); Doe v. Hopkinton Pub. Schs., 19 F.4th 493 (1st Cir. 2021).

[219] *See Doe*, 490 F. Supp. 3d at 463.

[220] *See Doe*, 19 F.4th at 506 & n.11.

[221] *See id.* ("Instead, the Supreme Court held that '[t]he school's regulatory interests remain significant in some off-campus circumstances. . . . These include serious or severe bullying or harassment targeting particular individuals.'").

[222] *Supra* notes 169–71 and accompanying text.

3. *Kutchinski v. Freeland Community School District*[223]

Both the trial and appellate courts in *Kutchinski* announced that they were applying *Mahanoy* to determine whether the school had authority to discipline a student who created a fake Instagram account deriding his biology teacher.[224] District Judge Sean Cox described Breyer's features, but his "Balancing Test under *Mahanoy* was essentially a sufficient nexus test."[225] Judge Andre Mathis, writing for the Sixth Circuit, also proclaimed that "*Mahanoy* guides our analysis," then recounted Breyer's features and mused about a "spectrum" of schools' abilities to regulate off-campus speech—an idea floated in Justice Alito's *Mahanoy* concurrence.[226]

4. *A.V. v. Plano Independent School District*[227]

District Judge Amos L. Mazzant's analysis of a case that began with a slumber party video and ended with protests is unique in this pool of cases.[228] Judge Mazzant casually cited *Mahanoy* twice in his opinion but never actually engaged with it.[229]

C. Hate Speech

1. *C1.G ex rel. C.G. v. Siegfried*[230]

Although the district court ruling on this case appears to have been decided before *Mahanoy*,[231] in the Tenth Circuit appeal, the court determined that *Mahanoy* "controls our analysis here."[232] However, the court's analysis, much like Justice Breyer's, did not actually map "features" considerations any more than Breyer's did. Instead, Judge Paul Kelly laid out a sufficient nexus test, then addressed just one of the features, noting that "the school cannot stand *in loco parentis* here."[233]

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[223] *See* Kutchinski v. Freeland Cmty. Sch. Dist., No. 1:19-cv-13810, 2022 WL 3130218 (E.D. Mich. Aug. 4, 2022); Kutchinski v. Freeland Cmty. Sch. Dist., 69 F.4th 350 (6th Cir. 2023).

[224] *Kutchinski*, 2022 WL 3130218, at *2, *8; *Kutchinski*, 69 F.4th at 357.

[225] *See Kutchinski*, 2022 WL 3130218, at *8–9.

[226] *See Kutchinski*, 69 F.4th at 357.

[227] 585 F. Supp. 3d 881 (E.D. Tex. 2022).

[228] *See id.* at 888–89.

[229] *See id.* at 892, 900.

[230] *See generally* C1.G *ex rel.* C.G. v. Siegfried, 477 F. Supp. 3d 1194 (D. Colo. 2020); C1.G *ex rel.* C.G. v. Siegfried, 38 F.4th 1270 (10th Cir. 2022).

[231] *See generally Siegfried*, 477 F. Supp. 3d 1194.

[232] 38 F.4th at 1277.

[233] *See id.* at 1277–79.

2. *R.H. ex rel. A.H. v. Borough of Sayreville Board of Education*[234]

In a case that shares many qualities similar to *Mahanoy* (think Brandi Levy's Snap if it were racially insensitive), District Judge Zahid Quraishi applied the substantive reasoning from *Mahanoy*—finding that the student posted the Instagram picture outside of the school setting, from a "finstagram" account with no school affiliation.[235] Moreover, the post did not target anyone.[236] Like other jurists, Judge Quraishi dutifully gave lip service to the "features," but in this case, with such similar circumstances to *Mahanoy*, only highlights how superfluous those features are.[237] Also notable is another example of confusion that *Mahanoy*'s impressionistic analysis has rendered: Judge Quraishi is the second in these post-*Mahanoy* cases to link conflating the features with substantial disruption.[238]

As the title of this Article suggests, the lower courts have yet to see meaningful guidance from the Supreme Court. And while *Mahanoy* may be cited assiduously in the years ahead, it changes very little in this area of law, and it certainly does not add insight into how courts ought to grapple with the most problematic forms of online student speech.

D. The Categorical First Amendment

It is important to note that, outside of special contexts like schools, much of the speech for which students are routinely punished is fully protected speech that the government could not regulate if uttered by adults. In a trio of cases beginning in 2010,[239] the Supreme Court solidified the distinctions between protected and unprotected categories of speech and ruled that new unprotected categories could not be created absent an unambiguous historical tradition.

For example, in *United States v. Stevens*, the Court held that depictions of animal cruelty could not be criminalized because such depictions did not fall into a traditionally unprotected category of speech.[240] *Stevens* relied partly on a list enumerated somewhat casually in 1942's *Chaplinsky v. New Hampshire*,[241] in which the Court noted "certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and

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[234] No. 21-19835, 2023 WL 3431214 (D.N.J. May 12, 2023).

[235] *See id.* at *2 n.2, *7.

[236] *Id.* at *7.

[237] *See id.* at *6–7.

[238] *See id.* at *7.

[239] United States v. Stevens, 559 U.S. 460 (2010); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786 (2011); United States v. Alvarez, 567 U.S. 709 (2012).

[240] 559 U.S. at 469.

[241] *See* 315 U.S. 568, 571–72 (1942).

the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate beach of the peace."[242] Later cases included traditionally unprotected categories such as obscenity[243] and true threats of violence.[244] The Court has since defined true threats as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."[245]

In 2023, the Court further explicated the true threats doctrine by holding that criminal prosecutions for threats must at least demonstrate that the defendant had some subjective awareness of the threatening nature of the statements.[246] In *Counterman v. Colorado*,[247] the Court overturned the conviction of a Colorado stalker in which the trial court had used an objective, reasonable person standard for determining whether his statements to his victim were genuine threats.[248] Reasoning that, without some mens rea requirement, otherwise protected speech might be chilled, the Court surveyed possible options for a subjective mental state requirement.[249] After finding that a "purposefully" or "knowingly" standard set the bar too high, the Court settled on a recklessness standard requiring that the defendant "consciously disregard[s] a substantial [and unjustifiable] risk that the conduct will cause harm to another."[250] The *Counterman* Court justified this recklessness standard in part by analogy to a similar standard in libel law derived from *New York Times Co. v. Sullivan*, which requires public officials and public figures to prove false statements about them were made with "knowledge that it was false or with *reckless disregard* of whether it was false or not."[251]

The *Counterman* majority acknowledged that requiring proof of a defendant's subjective mental state (that is, recklessness) could make prosecutions of dangerous speech more difficult.[252] Nonetheless, "the ban on an objective standard remains the same, lest true-threats prosecutions chill too much protected, non-threatening expression."[253]

Because the new *Counterman* mens rea requirement arose in a criminal prosecution, one could argue that the standard need not be coextensive with that used in

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[242] *Id.*

[243] *See generally* Roth v. United States, 354 U.S. 476 (1957).

[244] *See generally* Watts v. United States, 394 U.S. 705 (1969).

[245] Virginia v. Black, 538 U.S. 343, 359 (2003).

[246] Counterman v. Colorado, 143 S. Ct. 2106, 2111 (2023).

[247] *Id.* For a thorough scholarly analysis of *Counterman*, see Clay Calvert, Counterman v. Colorado*: Defining True Threats of Violence under the First Amendment*, 2022 CATO SUP. CT. REV. 113 (2023).

[248] *Counterman*, 143 S. Ct. at 2112, 2119.

[249] *Id.* at 2114–17.

[250] *Id.* at 2117 (quoting Voisine v. United States, 579 U.S. 686, 691 (2016)).

[251] *Id.* at 2115 (emphasis added) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)).

[252] *Id.* at 2118.

[253] *Id.* at 2117.

school disciplinary proceedings involving true threats, considering their lower stakes. Although the *Counterman* majority did not speak to that distinction, Justice Barrett, joined in dissent by Justice Thomas, directly addressed the issue.[254] After noting that the majority's recklessness requirement "seems driven in no small part by the heavy hammer of criminal punishment,"[255] the dissent pointed out that civil enforcement actions, including school disciplinary proceedings, would henceforth also be required to meet the high bar of recklessness.[256] Justice Barrett pointedly cited cases involving threats by students against specific students or against the school.[257] The dissent noted that the new recklessness standard broadens the rule:

> That can make all the difference in some cases. A delusional speaker may lack awareness of the threatening nature of her speech; a devious speaker may strategically disclaim such awareness; and a lucky speaker may leave behind no evidence of mental state for the government to use against her. The Court's decision thus sweeps much further than it lets on.[258]

The Court's unprotected category approach leaves different types of speech regulated by schools in significantly different postures. As noted, true threats are in the unprotected zone and thus have no protection under the First Amendment whether the speaker is a student or an adult, although *Counterman* now requires explicit proof of the speaker's mental state. However, other frequent types of speech regulated by schools, such as bullying, harassment, hate speech, and the like, are generally not part of the historically unprotected zone and thus are required to be treated quite differently. When it comes to these largely protected forms of speech, courts typically apply the *Tinker* analysis to determine whether the speech caused substantial disruption or invasion of the rights of others.

E. True Threats

Several lower court decisions post-*Mahanoy* have dealt with whether alleged off-campus threats to other students may constitutionally be punished. For example, in *J.S. v. Manheim Township School District*,[259] the Supreme Court of Pennsylvania in late 2021 conducted a nuanced analysis of how online threat claims interact with

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[254] *See id.* at 2140–41 (Barrett, J., dissenting).

[255] *Id.* at 2140.

[256] *Id.* at 2141.

[257] *Id.*

[258] *Id.* It is worth noting that since the majority did not explicitly address the school setting but only decided how First Amendment doctrine applied in a criminal prosecution, the law is still potentially unsettled here despite the confident pronouncements of the dissent.

[259] 263 A.3d 295 (Pa. 2021).

the post-*Mahanoy* paradigm.[260] In *Manheim*, the school district expelled student J.S. after he made what it considered to be threats that were shared with a friend (referred to as "Student One" by the court) using their own cell phones while at home.[261]

The conversation between J.S. and Student One focused on Student Two, a classmate who favored long hair and Cannibal Corpse (a death metal band) tee shirts.[262] J.S. and Student One made the mocking assessment that Student Two "looked like a school shooter."[263] J.S. took the joke further by creating two Snapchat memes that he sent to Student One as part of their private conversation.[264] One meme "contained a still photograph of Student Two singing into a microphone and was captioned as follows: 'I'm shooting up the school this week. I can't take it anymore I'm DONE!'"[265] The first meme also featured an image of J.S. "wearing large 'Elton John' glasses, seemingly watching Student Two's performance."[266] Student One's online reaction to this meme consisted of the acronym LOL.[267]

The second meme was a short video of Student Two playing guitar into a microphone, with the caption: "IM READY [Student One] AND MANY MORE WILL PERISH IN THIS STORM. I WILL TRY TO TAKE [Student One] ALIVE AND TIE HIM UP AND EAT HIM."[268] The "eat him" language was apparently an allusion to Cannibal Corpse lyrics that contained references to eating children.[269]

Although both memes were exchanged privately, Student One subsequently shared the first meme with his larger Snapchat friend group where it was viewed by twenty to forty friends during the five minutes it remained online.[270] J.S. then requested the Student One take the meme down, which he did, with the explanation that it was a "[p]robable false alarm, just something [J.S.] sent me."[271]

The shared meme, short lived though it was, was reported by another student to his parent, who worked for the school district and shared it with the high school principal.[272] The school district ultimately called the police, who interviewed J.S. and his parents, concluding that there was no threat to the school.[273] Despite this all clear from law enforcement, the school superintendent sent an email to parents and

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260 *See id.* at 313–19.
261 *Id.* at 298.
262 *Id.* at 298–99.
263 *Id.* at 299.
264 *Id.* at 298.
265 *Id.* at 299.
266 *Id.*
267 *Id.*
268 *Id.*
269 *Id.*
270 *Id.*
271 *Id.*
272 *Id.*
273 *Id.*

teachers "stating that there had been a threat posted on social media, but that, after investigation, the school and campus were deemed safe."[274]

During a follow-up investigation, the district also obtained the second meme, which it treated as a cyberbullying attack on Student One.[275] Ultimately, the district permanently expelled J.S. on the grounds of both making terroristic threats and cyberbullying.[276] Student One supposedly informed high school administrators that he had felt terrorized by J.S.'s memes, although he never reported any concerns at the time to his parents or to police or school authorities.[277]

J.S. challenged the expulsion in state court, where one of the key issues was whether J.S.'s due process rights had been violated because Student One was not compelled to testify at the expulsion proceedings.[278] On appeal to the Supreme Court of Pennsylvania, however, that court focused exclusively on the First Amendment question of whether J.S. could be expelled consistent with *Mahanoy* and related principles.[279]

The *Manheim* court's analysis first considered whether J.S.'s speech was unprotected by the First Amendment because it was a true threat, a category of speech, as discussed earlier, long excluded from free speech protection.[280] Although the school district argued that the true threat analysis should focus on a so-called objective standard—asking whether a reasonable person would regard the statements as a genuine threat—the court instead ruled that a subjective standard was called for.[281] That is, "whether the speaker intended the communication to be a serious expression of an intent to inflict harm, i.e., intended to intimidate or threaten the recipient."[282] Such a subjective standard was necessary so that student speech was not unnecessarily limited, the court reasoned.[283] Although this standard differs somewhat from that which the Supreme Court recently propounded in *Counterman*, it seems likely the result would be similar under either standard. Along with the subjective inquiry, the state high court considered the totality of the circumstances,

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[274] *Id.* at 300.

[275] *Id.*

[276] *Id.* at 301.

[277] *Id.* at 300–01.

[278] *Id.* at 301.

[279] *Id.* at 305.

[280] *Id.* at 316. The court further noted that although the true threat doctrine was created in the context of criminal law, it also applied in the school setting. *Id.* For another post-*Mahanoy* case concluding that ostensibly threatening speech by a student was not in fact a true threat, see *G.S. ex rel. Snyder*, 269 A.3d 718, 734–36 (Pa. Commw. Ct. 2022) (holding that a threatening online post by a student actually consisted of verbatim song lyrics by a death metal band and thus did not in fact threaten anyone; moreover, any disruption that did occur in school could not properly be attributed to the student).

[281] *Manheim*, 263 A.3d at 316.

[282] *Id.* at 316–17.

[283] *Id.* at 317.

"including the student's age, maturity, and lack of judgment."[284] This approach was particularly important, the court reasoned (alluding to *Mahanoy*), in cases involving off-campus speech, since there, the school's authority over the student was diminished and the role of parental supervision amplified.[285]

In any event, the *Manheim* court embraced a two-part standard, focusing first on the content of the speech, and then analyzing relevant contextual factors that could include the following:

> (1) the language employed by the speaker; (2) whether the statement constituted political hyperbole, jest, or satire; (3) whether the speech was of the type that often involves inexact and abusive language; (4) whether the threat was conditional; (5) whether it was communicated directly to the victim; (6) whether the victim had reason to believe the speaker had a propensity to engage in violence; and (7) how the listeners reacted to the speech.[286]

Deploying this two-part analysis, the court easily concluded that J.S.'s speech was not a true threat.[287] As to the content of the speech itself, the court noted the obvious fact that it was not construed as a message from J.S., but as a "fictional message of a third party threatening violence."[288] This message, while ostensibly suggesting a threat of school violence, actually merely communicated J.S.'s mocking opinion that Student Two was potentially a school shooter because of his affection for the band Cannibal Corpse.[289]

As to the contextual factors, the court pointed out, among other things, that the statements were part of an ongoing conversation between J.S. and Student One on a private Snapchat channel that erased all messages shortly after they were sent.[290] Moreover, on learning that Student One had shared one meme with his friends, J.S. immediately asked that it be taken down.[291] The memes were not political hyperbole,[292] but they were a form of humor ridiculing Student Two.[293] Nor were the

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[284] *Id.*
[285] *Id.*
[286] *Id.*
[287] *Id.* at 318.
[288] *Id.* at 317.
[289] *Id.* at 317–18.
[290] *Id.* at 318.
[291] *Id.*
[292] The political hyperbole factor stems from the Supreme Court's opinion in *Watts v. United States*, 379 U.S. 709 (1969), which created the true threat concept and concluded in that case that a statement by a Vietnam War opponent about shooting President Lyndon B. Johnson was mere political hyperbole rather than a genuine threat. *Id.* at 708.
[293] *Manheim*, 263 A.2d at 318.

statements communicated to any potential victim.[294] The court reasoned that "the full circumstances surrounding the memes render the contention that the 'victim' was Student One pure sophistry."[295] Student One's online reaction of "LOL" also suggested the statements were not taken seriously by their audience as in any way threatening.[296]

After considering this two-part analysis, the state high court concluded that the memes simply did not constitute a true threat:

> While mean-spirited, sophomoric, inartful, misguided, and crude, in our view, J.S.'s memes were plainly not intended to threaten Student One, Student Two, or any other person, and they certainly were not perceived as threatening by Student One, whose mild reactions to the communication further support the conclusion that there was a lack of any intent on the part of J.S. to threaten.[297]

Holding that J.S.'s speech was not a true threat was not the end of the analysis, however. Next, the court considered whether the speech, although not *unprotected* as a true threat, nevertheless could be regulated by the school district under the *Tinker* standard.[298] *Tinker* allowed for school restrictions on speech if it substantially interfered with necessary school discipline or the rights of others.[299] The *Manheim* court noted that the *Tinker* standard could be applied to off-campus speech as long as that regulation was consistent with *Mahanoy*.[300]

As part of this analysis, the court applied *Mahanoy*'s "when, where, and how" test to J.S.'s posts.[301] In a balancing posture, the court found that J.S.'s speech had some connection to the school in that it mocked a classmate and discussed a possible shooting at the school.[302] "This nexus counsels strongly in favor of school regulation," the court wrote.[303] However, the fact that the speech took place at J.S.'s home, on his private cellphone, to an audience of one, and without the school standing *in loco parentis*, tended to reduce the school's interest in regulation under *Mahanoy*.[304]

On the substantial disruption prong of *Tinker*, the court reasoned that although the school argued the speech was "alarming" and that the school was "abuzz" with news of J.S.'s memes, "[it] do[es] not believe that they rose to the level of a substantial

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[294] *Id.*
[295] *Id.*
[296] *Id.*
[297] *Id.*
[298] *Id.* at 319.
[299] Tinker v. Des Moines Indep. Cmty Sch. Dist., 393 U.S. 503, 513 (1968).
[300] 263 A.2d at 320.
[301] *Id.*
[302] *Id.*
[303] *Id.*
[304] *Id.*

disruption required by *Tinker*."[305] In fact, the district's own email to parents about the threat—sent after a police investigation concluded that there was indeed no cause for alarm—created the disruption that occurred.[306] Even then, the court concluded, the interruption of educational activities was "relatively minor."[307] Classes continued, and the school continued to function more or less normally.[308] Thus, the *Manheim* court concluded that the school district had not successfully met *Tinker*'s "demanding standard . . . that J.S.'s speech caused a substantial disruption, or impacted the rights of others, so as to permit the School District to punish J.S. for his non-threatening off-campus speech."[309]

The *Manheim* court certainly engaged in a meticulous and nuanced analysis of the facts before it, ultimately reaching what appears to be the correct result in the case of J.S. However, much as in *Mahanoy*, the dizzying array of factors and counterbalancing contextual cues that infuse the analysis do not exactly create a sound recipe for replicable judicial reasoning beyond the particular facts of this case.

While J.S.'s posts in *Manheim* were not held to be true threats, other post-*Mahanoy* cases properly continue to deny First Amendment protection to speech that is genuinely threatening. For example, in 2021's *A.F. v. Ambridge Area School District*, a federal district court rejected the First Amendment claims of a high school freshman who threatened a teammate in graphic terms.[310] A.F., after disputes with teammates and a coach about his participation in team practices, sent a number of disturbing messages to teammate R.G., including threatening that he would: "show up at practice to beat yo ass bitch"; "grab a fucking bottle and bash that shit on your face till I see your brain bitch"; and "send you bitch ass to the father."[311] A.F. also posted a picture of himself with a gun.[312]

The court easily determined that *Mahanoy* did not "disturb the established caselaw that free speech protections do not extend to [unprotected speech]."[313] Thus, the court held that A.F. was unlikely to prevail on his First Amendment claims.[314] Of course, the case was decided prior to the *Counterman* decision, so the court did not consider *Counterman*'s mens rea standard.

F. Harassment, Intimidation & Bullying

Although courts in true threat cases after *Mahanoy* seem to have generally solid, if impressionistic, approaches, cases involving harassment, bullying and hate speech

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[305] *Id.*
[306] *Id.* at 320–21.
[307] *Id.* at 321.
[308] *Id.*
[309] *Id.*
[310] No. 2:21-cv-1051, 2021 WL 3855900, at *1 (W.D. Pa. Aug. 27, 2021).
[311] *Id.* at *6.
[312] *Id.*
[313] *Id.*
[314] *Id.*

have considerably more uncertainty, both as to the necessary severity of the communication and the involvement of particular students in creating the expression. As well, harassment, bullying, or hate speech that is only communicated to its target after a private conversation has been leaked creates interesting and unresolved questions.

There has long been some confusion about the First Amendment status of such speech. For example, a Third Circuit case, cited by Justice Alito in his concurrence in *Mahanoy*, raises questions about the constitutional status of "harassment" or "disparaging speech."[315] In *Saxe v. State College Area School District*, the Third Circuit (in an opinion by then-Judge Alito) pointed out that "there is no categorical 'harassment exception' to the First Amendment's free speech clause."[316] Thus, this is unquestionably an area that could benefit from illumination from the Supreme Court.

A 2021 decision by the First Circuit raises several intriguing questions about bullying claims post-*Mahanoy*. In *Doe v. Hopkinton Public Schools*, two high school students (identified by the pseudonyms John Doe and Ben Bloggs) were accused of bullying fellow hockey team member Robert Roe.[317] Another student—identified only as Student 1—took photos and video of Roe, including in the locker room, and circulated them online in a group chat.[318] The bullying also extended to in-person attempts to get Roe to make inappropriate statements and to isolating Roe from the rest of the team on the team bus and at team events.[319]

Critically, Doe and Bloggs took no part in the direct, in-person bullying of Roe.[320] However, they did make derogatory statements about Roe on the group Snapchat including statements about Roe's and his family members' physical appearances.[321] Since Roe was not a member of this online group, he did not have access to view the demeaning messages.[322] The court specifically noted that Roe never saw these derogatory posts.[323] Doe and Bloggs argued that merely participating the Snapchat group, without directly harassing Roe, was not sufficiently culpable and that their online statements were protected by the First Amendment.[324] As well, they argued that their online messages were not sufficiently causally connected with the direct, in-person bullying by other team members.[325] The district court had

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[315] Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 210 (3d Cir. 2001); *see* Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2057 (2021) (Alito, J., concurring) (citing *Saxe*, 240 F.3d at 210).

[316] 240 F.3d at 204.

[317] 19 F.4th 493, 497 (1st Cir. 2021).

[318] *Id.* at 498.

[319] *Id.* at 499, 506–07.

[320] *Id.* at 506–07.

[321] *Id.* at 507.

[322] *Id.* at 501.

[323] *Id.* at 508.

[324] *Id.* at 506.

[325] *Id.* at 507.

found—and the First Circuit did not dispute—that there was no evidence "of any non-speech conduct by Bloggs or Doe directed at Roe, except for their failure to intervene when other students mistreated him, which is certainly insufficient alone to constitute bullying."[326]

The First Circuit, affirming the district court, rejected Doe's and Bloggs's arguments.[327] The court adopted the district court's reasoning as follows: "Children often bully as a group. The children who stand on the sidewalk and cheer as one of their friends shakes down a smaller student for his lunch money may not be as culpable, but they are not entirely blameless."[328] Clearly, "not entirely blameless" is a disturbingly weak standard when speech interests are implicated. Because Doe and Bloggs were fully aware of the direct bullying taking place, the court found that that school had "reasonably concluded that Doe's and Bloggs's messages and participation in the group fostered an environment that emboldened the bullies and encouraged others in the invasion of Roe's rights. . . . The School reasonably concluded that this speech and conduct itself constituted, contributed to, and encouraged the bullying."[329]

The *Doe* court acknowledged that there were certainly cases in which "encouragement is so minimal or ambiguous, the chain of communication so attenuated, or knowledge of direct bullying so lacking" that a school could not constitutionally punish it.[330] However, in this case, the court found the participation of Doe and Bloggs to be clearly sufficient to support the punishment.[331] Specifically, the court stated (without citation) that "speech that actively encourages such direct or face-to-face bullying conduct is not constitutionally protected."[332] This claim appears to be supported solely by reference to the "invasion of the rights of others" prong of *Tinker*.

The First Circuit's analysis appears to be woefully underdeveloped.[333] Setting aside the obvious bullying that actually took place in this case, Doe's and Bloggs's messages, in isolation, certainly did not constitute any recognized form of unprotected speech under the First Amendment. They were clearly not true threats. Merely insulting someone's appearance is also not defamatory, nor does it fall into any other unprotected category under *Chaplinsky* and its progeny. Moreover, the *Doe* court misinterpreted *Mahanoy* when it claimed that the Supreme Court had made clear "that schools have a significant interest in regulating 'severe or serious bullying or

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[326] *Id.* at 508.
[327] *Id.* at 512.
[328] *Id.* at 507.
[329] *Id.* at 508.
[330] *Id.*
[331] *Id.*
[332] *Id.*
[333] For a more positive take on the reasoning in *Doe*, see generally Rebecca Brownell, *Constitutional Law—Strengthening Schools' Abilities to Combat Cyberbullying in Denying Students' First Amendment Challenge*—Doe v. Hopkinton Pub. Schs., *19 F.4th 493 (1st Cir. 2021)*, 28 SUFFOLK J. TRIAL & APP. ADVOC. 99 (2022).

harassment . . . .'"[334] As noted earlier in this work, that reading of *Mahanoy* simply ignores that the fact that the quoted statement was an argument by the school district that was not explicitly adopted by the High Court.[335] None of this is to suggest that genuine bullying is anything other than deplorable—but punishing Doe and Bloggs is dubious given the nebulous standard seemingly at work in the case.

The First Circuit's reasoning in *Doe* also raises an interesting question, coming as it did before the Supreme Court's decision in *Counterman*. The court rejected an argument from Doe and Bloggs that they did not intend their messages to be read by Roe.[336] The court reasoned that "there is no intent requirement under *Tinker*. The test under *Tinker* is objective, focusing on the reasonableness of the school's response, not the intent of the student."[337] But, of course, after *Counterman*, there is now a mens rea requirement under the true threats doctrine that may well apply in school disciplinary settings. Thus, the *Doe* decision creates the odd situation that completely unprotected speech in the form of true threats requires a showing of the defendant's subjective state of mind (recklessness), while the arguably protected speech in *Doe* can be punished based merely on an objective reasonableness test. That seems to turn the constitutional categories involved upside down.

Of course, the *Doe* court's conclusion that Doe's and Bloggs's speech was unprotected flowed from the *Tinker* "invasion of the interests of others" prong. But this seemed to be simply assumed by the Second Circuit, rather than supported through any sort of rigorous analysis. The unexamined notion that the actual bullying was all of a piece rather than discrete actions by different individuals hovers over the entire analysis. A banal quote from the lower court about children egging on bullies seems a rather undercooked rationale for dispensing with student free speech rights, particularly in a case in which none of the statements of Doe and Bloggs ever reached the bullied student. The causation question creates difficulty as well: it would seem nearly impossible to show that the actual, real-world bullying would have proceeded any differently absent Doe's and Bloggs's juvenile messages.

Another recent case employing the "egging on" theory is *Chen v. Albany Unified School District*, decided by the Ninth Circuit in 2022.[338] In *Chen*, high school student Cedric Epple created a private Instagram account with thirteen friends that distributed horrific racist speech about his Black classmates.[339] The account featured such images as Black students and coaches with nooses around their necks; a photo depicting violent discipline of enslaved people juxtaposed with a photo of a Black classmate; a photo of a lynched man; and other deeply disturbing images.[340]

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[334] Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 506 (1st Cir. 2021) (citing *Mahanoy*, 141 S. Ct. at 2045).

[335] *See supra* note 170 and accompanying text.

[336] *Id.* at 509.

[337] *Id.*

[338] Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 723 (9th Cir. 2022).

[339] *Id.* at 711.

[340] *Id.* at 711–12.

One post contained "a screenshot of texts in which [Epple] and a Black classmate were arguing, and he added the caption 'Holy shit I'm on the edge of bringing my rope to school on Monday.'"[341]

Kevin Chen was one of the members of Epple's private Instagram group.[342] Although Chen contributed limited original content to the group (including one photograph of a Black classmate with the comment "She's eating a fucking carrot"[343]), he liked and commented on a number of Epple's posts, using racist language that included the N-word.[344]

After both Epple and Chen were expelled, they challenged that discipline in a federal district court on, *inter alia*, First Amendment grounds.[345] On appeal, the Ninth Circuit affirmed the district court's finding that discipline did not violate the First Amendment.[346] The Ninth Circuit noted that the off-campus nature of the speech implicated *Mahanoy*, although the court proceeded to largely ignore the *Mahanoy* "features of off-campus speech" analysis and instead substituted its own previously established "sufficient-nexus test."[347] This test, which predated *Mahanoy*, was an acceptable standard, the court claimed, because "[n]othing in *Mahanoy* is inconsistent with our sufficient-nexus test, much less 'clearly irreconcilable' with it."[348]

The Ninth Circuit sufficient-nexus test analyzes "(1) the degree and likelihood of harm to the school caused or augured by the speech, (2) whether it was reasonably foreseeable that the speech would reach and impact the school, and (3) the relation between the content and context of the speech and the school."[349] The court maintained that this test mirrored many of the considerations mentioned in *Mahanoy* and that the three features the Supreme Court was particularly concerned about in off-campus situations (the school's *in loco parentis* status in a particular case, the chance that off-campus regulation could entirely shut down certain speech, and the "marketplace" concerns about protecting unpopular ideas) "all fit comfortably within the three-factor framework" the Ninth Circuit had already constructed.[350] While acknowledging *Mahanoy*'s somewhat vague and abstract conceptual structure, it is a significant intellectual stretch for the Ninth Circuit to claim that its preexisting framework adequately encompasses the particular concerns raised by Justice Breyer's three *Mahanoy* "features." Notably, the Ninth Circuit test does not appear to evince the strong tilt toward protecting off-campus student speech that

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[341] *Id.* at 712.
[342] *Id.* at 711.
[343] *Id.* at 712.
[344] *Id.*
[345] *Id.* at 715.
[346] *Id.* at 726.
[347] *Id.* at 719–20.
[348] *Id.* at 720. Since *Mahanoy* is a concoction with very little substance, many possible tests would presumably not be irreconcilable with it.
[349] *Id.*
[350] *Id.*

Mahanoy suggests. Thus, the justification for the Ninth Circuit's reversion to its pre-*Mahanoy* jurisprudence is not particularly convincing.

In any event, the court easily found that Epple was appropriately disciplined under its sufficient-nexus test.[351] Although Epple argued that he did not intend the private messages he shared among friends to reach their targets, the court concluded it was foreseeable that the messages would ultimately come to light within the broader school community.[352] "Given the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting impacts to those individual students and to the school as a whole," the court wrote.[353] Moreover, the court found that the evidence showed that the highly disturbing messages had significant ill effects on students in the school, some of whom felt "'devastated,' 'scared,' and 'bullied,'" with one targeted students ultimately withdrawing from the school.[354]

Epple argued that the students' reactions to his speech were akin to a heckler's veto that allowed the reaction of hearers to facilitate government sanction of unpopular speech.[355] The court rejected this argument, noting that the school had a duty not only to protect unpopular expression, but also to protect "*other students* from being maltreated by their classmates. Epple's conduct here strongly implicated that 'significant' interest of the school."[356] The court also pointed out that Epple's racist insults were not presented as part of some sort of social theory of the racial inferiority of certain groups, which, although odious, could qualify for enhanced protection under the First Amendment.[357] Because Epple's messages lacked any sort of political or social ideology, his claim that the school was "censoring the promotion of a disfavored ideological message r[ang] hollow" to the court.[358] Further, the court concluded,

> even assuming *arguendo* that Epple's posts did not amount to "fighting words" or true threats, they were enough of a near-miss

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[351] *Id.* at 723.

[352] *See id.* at 720.

[353] *Id.*

[354] *Id.* at 713.

[355] *See id.* at 721.

[356] *Id.* at 722 (citing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2045 (2021)). Of course, as noted earlier, this is a misreading of the *Mahanoy* majority opinion. *See supra* note 170 and accompanying text.

[357] *Id.* For an explanation of the relevant First Amendment doctrine, see, for example, Zachary S. Price, *Hate Crime v. Hate Speech: Exploring the First Amendment*, 20 U. PA. J. CONST. L. 817, 824–25 (2018) ("The doctrine . . . balances its near-absolute protection for expression of ideas with near-absence of protection for concrete criminal or discriminatory actions. Accordingly, although abstract expression of bigoted views is protected, the government is free to impose enhanced sentences on bias-motivated crimes, to proscribe various forms of discrimination in employment and commercial dealings, and to punish criminal conspiracies motivated by political beliefs.").

[358] *Chen*, 56 F.4th at 722.

> that, in the context of minors in a secondary school environment, they are nonetheless fairly viewed as "a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey."[359]

Although the "near-miss" theory of unprotected speech is, as far as can be determined, not an actual constitutional theory of any known provenance, Epple's expression certainly seems sufficient to justify punishment by the school.

The analysis of minor participant Chen's responsibility, however, is particularly unconvincing. The court pointed out that:

> Although Chen's participation in the targeted abuse of particular students was much less than Epple's, he affirmatively liked two posts and denounced, in vulgar terms, another follower who criticized one such post. At the very least, Chen is akin to a student who eggs on a bully who torments classmates.[360]

Once again, as in *Doe*, the "egging on" trope does a great deal of work without providing any demonstration of concrete harm from Chen's speech, which was minimal at best in the context of the abusive expression launched by Epple. The Ninth Circuit seemed remarkably unconcerned with the relatively remote connection between Chen's actual participation and any ensuing harms, devoting only a terse paragraph to considering Chen's status. As one insightful commentator pointed out: "Saying that Chen 'egged on a bully' treats him as part of a cybermob, which mushes together Epple's and Chen's content/conduct. The court should have been more precise about exactly what Chen did wrong and how it was reasonably foreseeable that Chen's behavior would impact the school community."[361]

Yet another case deploying a version of the "egging on" trope is a 2023 opinion by the Sixth Circuit in *Kutchinski v. Freeland Community School District*.[362] In this case, the attenuated nature of the punished student's involvement is, if anything, even more pronounced. The genesis of the *Kutchinski* case was a fake Instagram account attributed to a high school teacher, Steven Schmidt, but actually created by one of his students, identified by the court only as H.K.[363] This fake account was, in the word of the Sixth Circuit, "benign at first, but soon became graphic, harassing,

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[359] *Id.* (quoting R.A.V. v. City of St. Paul, 505 U.S. 377, 393 (1992)).

[360] *Id.* at 723.

[361] Eric Goldman, *High School Student Can Be Disciplined for Racist Private Instagram Account*—Chen v. Albany School District, TECH. & MKTG. L. BLOG (Dec. 29, 2022), https://blog.ericgoldman.org/archives/2022/12/high-school-students-can-be-disciplined-for-racist-private-instagram-account-chen-v-albany-school-district.htm [https://perma.cc/5EG5-YJ78].

[362] 69 F.4th 350 (6th Cir. 2023).

[363] *Id.* at 354.

and threatening when two of his friends added their own posts to the account."[364] The disturbing posts added by H.K.'s friends referred to Schmidt, as well as to another teacher, Chelsea Howson, substitute teacher and football coach Trey Anderson, and a disabled student who was not named.[365]

The posts created by H.K.'s friends incorporated unquestionably disturbing sexual and threatening imagery, including the following:

- "A photo of Schmidt and his wife and child with the caption '[j]ust #gangbanged my wife with 4 other men in the back of an Arby's #notmykid #14inches.'"[366]
- "A photo of Howson with the caption '[b]est sex in a Pet Smart #big #throbbing #14inches #raw.'"[367]
- "A photo of Anderson with two unknown students with the caption 'I will find and kill @_treyanderson__ [I'm] going to strangle him with my barehands [sic] until he is barely conscious, then let go. Once he is awake again, [I'm] gonna run him over with my fucking car and crush [h]is skull into a million pieces. #lol @elite_edge.'"[368]

H.K. was aware of these posts made by his friends, joked about the posts, and did not remove them for two days.[369] H.K.'s original innocuous post was made on a Friday night, and by Monday at lunch he had deleted the account after it attracted attention at the school, including from administrators.[370] Ultimately, H.K. was suspended from school for ten days.[371] His father sued on his behalf, resulting in a federal district court awarding summary judgment to the school district.[372]

On appeal, the Sixth Circuit made the dubious proclamation that "*Mahanoy* guides our analysis."[373] After recounting the three *Mahanoy* "features" of off-campus speech that should inform its decision, the Sixth Circuit noted that it had not previously had the opportunity to decide "when one student can be responsible for the speech of others . . . ."[374] The court noted that the First Circuit had considered the question in *Doe*, the previously discussed case involving bullying on a hockey team.[375] Likewise, the Ninth Circuit had taken up a similar issue in the *Chen* case,

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[364] *Id.* at 354.
[365] *Id.*
[366] *Id.*
[367] *Id.*
[368] *Id.* at 354–55.
[369] *Id.* at 355.
[370] *Id.*
[371] *Id.*
[372] *Id.* at 354.
[373] *Id.* at 357.
[374] *Id.* at 358.
[375] *Id.*

involving a student who liked and commented on racist posts made by a fellow student.[376]

Following these cases, the Sixth Circuit concluded that H.K.'s rights had not been violated because he had egged on the bullies, as had the disciplined students in the earlier cases.[377] By way of a standard, the court held that "when a student causes, contributes to, or affirmatively participates in harmful speech, the student bears the responsibility for the harmful speech."[378] This H.K. had done by creating the account initially, then joking with his friends about their posts and accepting followers to the account.[379]

The Sixth Circuit gave short shrift to H.K.'s argument that he was protected by § 230 of the Communications Decency Act, which immunizes the provider of an interactive computer service for liability as publisher of statements made by third-party users of the account.[380] Here, the court found, H.K. was not punished as a *publisher* of his friend's posts, but as an active contributor to the harmful speech on the account.[381] An eminent authority on § 230 has sharply criticized this part of the Sixth Circuit's analysis, arguing that § 230 should clearly have protected H.K. from punishment for speech he did not create.[382] Professor Eric Goldman pointed out that H.K.'s actions in allowing third-party posts, not immediately removing offending posts, and allowing additional followers are all entirely consistent with what other online services routinely do under the umbrella of § 230.[383] "That basically leaves HK liable for joking with KL and LF about their content, and that's too slender a basis for liability," Goldman wrote.[384]

The Sixth Circuit also tersely rejected H.K.'s argument that holding him responsible for others' speech violated the Supreme Court's holding in *NAACP v. Claiborne Hardware Co.*[385] There, the Court ruled that punishment may not be imposed for protected forms of expression merely because the speaker associated with others who engaged in illegal conduct.[386] As the Court put it: "The First

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[376] *Id.*

[377] *Id.* at 360.

[378] *Id.* at 358.

[379] *Id.*

[380] 47 U.S.C. § 230.

[381] *Kutchinski*, 69 F.4th at 359.

[382] Eric Goldman, *Section 230 Doesn't Apply to High Schoolers' Online Bullying—* Kutchinski v. Freeland Community School District, TECH. & MKTG. L. BLOG (June 9, 2023), https://blog.ericgoldman.org/archives/2023/06/section-230-doesnt-apply-to-high-schoolers-online-bullying-kutchinski-v-freeland-community-school-district.htm [https://perma.cc/FG4K-TJYH].

[383] *Id.*

[384] *Id.*

[385] *See Kutchinski*, 69 F.4th at 359 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 918–19 (1982)).

[386] *See Claiborne Hardware Co.*, 458 U.S. at 931.

Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another."[387] The Sixth Circuit, with very little explanation, held that H.K.'s punishment was not equivalent to that of the plaintiffs in *Claiborne Hardware Co.*[388] The court pointed out that "[d]efendants did not discipline H.K. because he associated with K.L. and L.F. They determined that H.K. jointly participated in the wrongful behavior."[389] The ostensible line between "association" and "joint participation" is genuinely mysterious in *Kutchinski,* however, particularly because H.K.'s offense largely consisted of creating a parody website, rather than actually contributing the offensive material under consideration in the case, all of which was added later. It is striking that a speaker whose own speech was clearly protected can be punished for the unprotected speech of others with such hazy reasoning.

G. Hate Speech

Another racist speech case, albeit of a milder variety than those previously discussed, led a New Jersey federal district court to conclude that the speech might well be protected under *Mahanoy*.[390] In *R.H. v. Borough of Sayreville Board of Education*, A.H., a middle school student, created an online post off-campus that featured a photo of a friend with a cosmetic mud bath on her face.[391] The photo caption read: "when he says he's only into black girls."[392] In addition, A.H. made the following comment on the photo: "Ha ha ha! Love her—[laughing face] [laughing face]."[393]

The board of education punished A.H. under a statewide anti-bullying policy with a one-day suspension, removal from the Student Council, and various other sanctions.[394] As to A.H.'s First Amendment claim, the court (at this stage taking the facts as presented in A.H.'s complaint as true) found that A.H.'s speech was much like that of the plaintiff in *Mahanoy*.[395] The post, the court wrote, "did not involve features that would place it outside the First Amendment's ordinary protection."[396] Moreover, the court found that "[t]he post, while racially insensitive, did not amount to fighting words or obscenity. Rather . . . it was intended to be satirical (regardless of its satirical value)" and thus would ordinarily be fully protected speech.[397]

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[387] *Id.* at 918–19.

[388] *Kutchinski*, 69 F.4th at 359.

[389] *Id.*

[390] *See* R.H. v. Borough of Sayreville Bd. of Educ., No. 21-19835 (ZNQ) (DEA), 2023 WL 3431214, at *7 (D.N.J. May 12, 2023).

[391] *Id.* at *2.

[392] *Id.*

[393] *Id.* The friend pictured in the post did not attend A.H.'s school.

[394] *Id.*

[395] *Id.* at *7.

[396] *Id.* (quoting Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021)).

[397] *Id.*

The board argued that the speech risked serious disruption of school activities, but the court was unconvinced.[398] The school did carefully watch A.H.'s interactions with other students at lunch during the days after the post in order to prevent a confrontation, but no such confrontation occurred.[399] The court pointed out that "increased supervision of students in the cafeteria likely does not amount to 'the sort of "substantial disruption" of a school activity or threatened harm to the rights of others that might justify the school's action.'"[400] Still, because the court was hearing the matter on a motion to dismiss, it left open the possibility that the school might produce additional evidence of disruption that could overcome A.H.'s free speech rights.[401]

Another case of racist speech—again, not directed at particular individuals—resulted in a First Amendment victory for a student in 2022. In *C1.G ex. rel. C.G. v. Siegfried*, the Tenth Circuit found that hateful anti-Semitic speech was likely not regulable when uttered off campus without any discernable individual being targeted.[402] The case arose when student C.G. was suspended and expelled from Cherry Creek High School in Colorado after posting a disturbing anti-Semitic Snapchat post.[403] C.G. took a picture of his three friends—wearing hats including one hat that bore a resemblance to World War II headgear—which he then posted with the caption: "Me and the boys bout [sic] to exterminate the Jews."[404] C.G. later removed the post with following statement: "I'm sorry for that picture it was ment [sic] to be a joke."[405]

One viewer of the post told her father, who called the police.[406] The police then visited C.G. at home but found that there was no legitimate threat.[407] After school authorities were notified, C.G. was ultimately suspended for one year on the basis of school policies forbidding such activities as "verbal abuse," "intimidation, harassment or hazing . . . or by threatening another person," and behavior "detrimental to the welfare or safety of other pupils . . . including behavior that creates a threat of physical harm."[408]

In a federal court action, the trial court dismissed C.G.'s challenge to the school's expulsion.[409] On appeal, the Tenth Circuit found that the facts of *Siegfried* were similar to those of *Mahanoy*, since the speech did not rise to the level of a true threat, fighting words, or obscenity.[410] Although the school district argued that

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398 *Id.* at *3.
399 *Id.* at *7.
400 *Id.*
401 *Id.*
402 36 F.4th 1270, 1279, 1282 (10th Cir. 2022).
403 *Id.* at 1274–75.
404 *Id.* at 1274.
405 *Id.*
406 *Id.*
407 *Id.*
408 *Id.* at 1275.
409 *Id.* at 1274.
410 *Id.* at 1277.

C.G.'s speech was "hate speech targeting the Jewish community," the Tenth Circuit pointed out that such speech might nevertheless be protected.[411]

C.G.'s speech also resembled that considered in *Mahanoy* in that it arose away from the school campus, did not identify the school or target individuals in the school community, and was disseminated through the student's private social media account to a limited circle of friends.[412] Moreover, as in *Mahanoy*, C.G.'s circumstances did not justify the school's claim to stand *in loco parentis* under these facts.[413]

As to the "substantial disruption" prong of *Tinker*, the Tenth Circuit found that the school's paltry evidentiary showing established neither a reasonable anticipation of substantial disruption nor actual disruption sufficient to meet the *Tinker* standard.[414] The court noted that reasonable anticipation of substantial disruption was particularly lacking because C.G.'s post "did not include weapons, specific threats, or speech directed toward the school or its students."[415] As far as actual disruption of the school environment, a few emails from parents and some news reports about the event did not meet "*Tinker*'s demanding standard."[416] The appellate court thus reversed the lower court's dismissal of C.G.'s First Amendment claim.[417]

V. ANALYSIS

It is still early in the post-*Mahanoy* era, but the foregoing suggests that *Mahanoy* has not had the sort of influence on student speech law that one might hope for. Unfortunately, *Mahanoy* continues a line of particularly unhelpful Supreme Court opinions in school speech law. Noted First Amendment scholar Frederick Schauer pointed out that the *Morse* decision in 2007 was "so narrow, so case-specific, and so idiosyncratically about alleged encouragement of drug use as to provide virtually no guidance to the courts that have to deal with student speech issues."[418] *Mahanoy* unfortunately replicates those flaws.[419] As Professor Papandrea put it,

> the allure of the "special First Amendment leeway" *Mahanoy* affords public schools is that it allows the Court to avoid articulating a clear student speech doctrine, but it leaves schools and

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411 *Id.*
412 *Id.*
413 *Id.*
414 *Id.*
415 *Id.* at 1279.
416 *Id.* (citing Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2048 (2021)).
417 *Id.* at 1282.
418 Frederick Schauer, *Is It Important To Be Important?: Evaluating the Supreme Court's Selection Process*, 119 YALE L.J. ONLINE 77, 82 (2010).
419 Cheng, *supra* note 27, at 524 (noting the "dubious tradition" of minimalism and ambiguity in both *Morse* and *Mahanoy*).

> judges free to consider any factors they wish to evaluate the constitutional rights of millions of public-school students on a case-by-case basis.[420]

Because of its Breyerian abstraction and fuzziness, *Mahanoy* leaves lower courts with little jurisprudential substance as they attempt to apply the case to later online speech cases.

The "three features" Breyer identified as particularly salient in *Mahanoy* are nearly useless in devising an analytical structure for these cases. The three features, as noted earlier, include the degree to which schools are *in loco parentis* as to off-campus speech; the concern that schools regulating off-campus speech may create an environment in which students can never engage in certain political or religious speech; and the importance of schools inculcating marketplace of ideas notions in students by protecting unpopular expression.[421] However, the Court explicitly disclaimed any guidance on how the three features should apply, stating only that it would "leave for future cases to decide when, where, and how these features mean the speaker's off-campus location will make the critical difference."[422] When one considers the relative rarity of the High Court's incursions into the student speech domain, that seems a particularly troubling lack of guidance for lower courts, school officials, and student speakers. As the Third Circuit put it in *Mahanoy*, "[o]bscure lines between permissible and impermissible speech have an independent chilling effect on speech."[423]

Because of the extreme doctrinal uncertainty created by *Mahanoy*, lower courts are left to pick up the pieces as best they can. The remainder of this work will focus on a few areas of the doctrine that we believe need particularly urgent attention post-*Mahanoy*.

A. Minor Actors and Major Punishment

One of the most striking aspects of the post-*Mahanoy* landscape is courts repeatedly holding relatively minor participants to be fully responsible for various harms and thus subject to school discipline.[424] The lack of rigorous analysis in some of these cases is disturbing, as courts repeatedly substitute casual *ipse dixit* for serious thought.

For example, in *Doe*, the two students who supposedly took part in the bullying of their hockey teammate simply did not participate in direct bullying of the teammate in real world settings.[425] Their participation was limited to online unflattering

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[420] Papandrea, *supra* note 26, at 54.

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

[422] *Id.*

[423] B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 185 (3d Cir. 2020).

[424] *See* Cheng, *supra* note 27, at 511–12.

[425] Doe v. Hopkinton Pub. Schs., 19 F.4th 493, 508 (1st Cir. 2021).

pictures and commentary on the victim and his family that, critically, *the victim never saw*.[426] That type of critical speech, standing alone, would almost unquestionably be protected by the First Amendment. Rather than engage in a rigorous analysis of the extent of the two students' individual culpability, the court simply deployed the 'children bully in groups' trope and, in particular, the claim that "[t]he children who stand on the sidewalk and cheer as one of their friends shakes down a smaller student for his lunch money may not be as culpable, but they are not entirely blameless."[427] But, of course, 'not entirely blameless' is a long way from legitimately unprotected activity under the First Amendment. The court's analogy is in any event flawed since the children in the court's imagined lunch money scenario are publicly supporting the bully in a setting that directly involves the victim, who is no doubt fully aware of the threatening group arrayed against him. The *Doe* plaintiffs had nothing close to this level of engagement, since their derogatory messages existed only online and did not reach the victim. The court simply chose not to look too deeply into the culpability issue.

Similarly, H.K., the student in *Kutchinski* who created a fake Instagram account of his teacher,[428] deserved a more searching and serious inquiry into his individual culpability than that provided by the Sixth Circuit. As noted earlier, H.K. created a "benign" fake account that only descended into threats and bullying after additional content was added by H.K.'s friends.[429] H.K. himself created none of the unprotected content.[430] In any other First Amendment context, H.K. would almost certainly not be responsible for the unprotected speech of others, even if one could argue that he facilitated it to some extent through his original creation of the account. This is the import of *Claiborne Hardware Co.*,[431] which the Sixth Circuit chose to gloss over in a casually superficial way.[432] If *Claiborne Hardware Co.* means anything, it is that unprotected activities by some members of a group cannot serve as a basis for the liability of other members of the same group who engage only in protected speech.[433] Although not precisely a First Amendment question, it is worth reiterating that the Sixth Circuit also took a remarkably obtuse approach to H.K.'s § 230 defense in that case, which attempts to limit the liability of website creators for the speech of third parties. Section 230 should have immunized H.K. from follow-on speech that he did not create, but the Sixth Circuit's analysis muddied the water by claiming that H.K.'s liability arose not from being a "publisher" of his friends' comments but rather an active contributor to the harmful speech.[434] This cryptic distinction, offered without

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426 *Id.*
427 *Id.* at 507.
428 Kutchinski *ex rel.* H.K. v. Freeland Cmty. Sch. Dist., 69 F.4th 350, 354 (6th Cir. 2023).
429 *Id.* at 354, 358.
430 *Id.* at 358.
431 458 U.S. 886 (1982).
432 *See Kutchinski*, 69 F.4th at 359.
433 *Id.* (citing *Claiborne Hardware Co.*, 458 U.S. at 918–19).
434 *Id.* at 359.

support by citation or otherwise, makes little sense and simply does not comport with existing § 230 jurisprudence. Although the § 230 discussion is not constitutional in nature, it does point to the court's stubborn refusal to rigorously unpack the culpability issue, either at the constitutional or the statutory level.

Another undertheorized case upholding punishment of a relatively minor transgressor is, of course, *Chen v. Albany Unified School District*.[435] As discussed more fully earlier, Chen himself did not engage in the most egregious racist speech in that case.[436] Instead, Chen liked and commented on some posts, contributed a photograph of a Black classmate (the caption of which did not appear to be racist in nature), and used racist language in some posts.[437] Acknowledging that Chen's participation was limited, the Ninth Circuit pointed out that he "affirmatively liked two posts and denounced, in vulgar terms, another follower who criticized one such post. At the very least, Chen is akin to a student who eggs on a bully who torments classmates."[438] Other than the predictable "egging on" language, this analysis is particularly weak. By any reasonable standard, "liking" someone else's social media post is almost certainly an inadequate basis for serious sanction by itself. Chen was at most a peripheral character in the extreme racist bullying that took place in the school, and the absence of any rigorous analysis by the Ninth Circuit in upholding his punishment is striking.

Reasonable observers may reach different conclusions in these three cases. Some might argue that Chen's activities supporting the racist bullying were more culpable than H.K.'s creation of the benign version of the fake Instagram account or the speech of the two hockey players in *Doe*. The authors of this Article indeed have some disagreement as to the ideal outcomes in these cases. But what is indisputable is that none of the courts involved distinguished themselves in their analyses or provided any workable standard for future courts to handle cases of this type. Invocation of the "egging on" trope is not serious legal analysis by any means. It is, rather, a talismanic phrase that seeks to avoid deep thought.

We suggest that one way to add rigor to cases involving the liability of relatively minor participants would be to incorporate at least some elements of the law of civil aiding and abetting into school speech caselaw. Civil aiding and abetting doctrine is a particularly apt analogue since, as in the cases discussed above, courts are attempting to determine tort liability for one who perhaps assists but does not carry out the bulk of the tortious action. The Restatement (Second) of Torts articulates the concept as follows: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b). knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself."[439] "Substantial assistance or encouragement" is a key

[435] 56 F.4th 708 (9th Cir. 2022).

[436] *Id.* at 713.

[437] *Id.* at 712.

[438] *Id.* at 723.

[439] RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979). For excellent scholarly commentary on civil aiding and abetting liability, see, for example, Nathan Isaac Combs,

concept that could help weed out those genuinely deserving punishment from the less culpable. The comments to the Restatement suggest five factors in determining whether substantial assistance or encouragement is present: "the nature of the act encouraged, the amount of assistance given by the defendant, his presence or absence at the time of the tort, his relation to the other and his state of mind."[440]

Some versions of aiding and abetting liability add additional requirements that increase the concept's rigor. California Civil Jury instructions, for example, not only require substantial assistance or encouragement, but add the requirement that the aider and abetter's conduct "was a *substantial factor* in causing harm to the plaintiff."[441] As one treatise put it, ultimately "the question of liability is a normative one," concerning "whether a person is sufficiently involved in the primary wrong such that it is appropriate to hold him or her liable for the primary wrong of the primary wrongdoer."[442]

Our suggestion does not necessarily involve wholesale importation of the civil aiding and abetting doctrine into school speech cases, but rather offers the general concept as an analogical guide to help courts decide close cases. The precise degree of participation or assistance necessary for culpability is of course a matter of judgment, but existing aiding and abetting case law can help set the boundaries more precisely than courts have currently done in school disciplinary cases.

A leading case in civil aiding and abetting law is *Halberstam v. Welch*, a 1983 decision of the U.S. Court of Appeals for the D.C. Circuit.[443] In *Halberstam*, the court considered the liability of the live-in companion of a long-time burglar for a killing that took place during a burglary.[444] In the course of its opinion, the *Halberstam* court engaged in an extended analysis of various aiding and abetting cases to more precisely map the legal terrain.[445] To mention just two brief examples, *Halberstam* discussed the differing outcomes of *Rael v. Cadena*[446] and *Duke v. Feldman*[447] and the precise factual context of each. In *Rael*, a third party gave the main tortfeasor significant encouragement at the scene of an assault, shouting "Kill him!" and "Hit him more."[448] The court found this level of assistance and encouragement was sufficient to create liability.[449] On the other hand, in *Duke*, the evidence showed that the

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Note, *Civil Aiding and Abetting Liability*, 58 VAND. L. REV. 241 (2005); Sarah L. Swan, *Aiding and Abetting Matters*, 12 J. TORT L. 255 (2019). One of the leading cases in this area is *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983).

[440] RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979).

[441] Swan, *supra* note 439, at 256 (quoting JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS (2016)) (emphasis added).

[442] *Id.* at 437 (quoting JOACHIM DIETRICH & PAULINE RIDGE 4 (2016)).

[443] 705 F.2d 472 (D.C. Cir. 1983).

[444] *Id.* at 475.

[445] *Id.* at 479–89.

[446] 604 P.2d 822 (N.M. 1979).

[447] 226 A.2d 345 (Md. App. Ct. 1967).

[448] *Rael*, 604 P.2d at 822.

[449] *Id.* at 822–23.

tortfeasor's wife's level of involvement was significantly lower in a case in which her husband assaulted the plaintiff: "consisting of the defendant's awareness of her husband's previous threats to plaintiff; her contemporaneous request to her husband get their down payment back from the plaintiff; her observation of the incident; and driving her husband away."[450] As the court put it, this low level of involvement shielded the wife from aiding and abetting liability, even if "she took pleasure in the assault and battery."[451]

Clearly the utility of importing aiding-and-abetting concepts into school speech law comes not merely from the verbal formulation of the concept, but from a highly developed caselaw of culpability that is easily adaptable to the common-law-like environment of school disciplinary cases. Applying the "substantial assistance or encouragement" test—even if not including California's tweak of requiring that the assistance be a "substantial factor" in the resulting harm—it seems clear that the peripheral students in *Doe* and *Kutchinski* would not have been sufficiently involved in the ultimate harm to justify culpability. The harmful activity in those cases was almost entirely carried out by others and did not depend on direct assistance or encouragement from the lesser participants. *Chen* is a closer case, resembling to some extent an online version of *Rael*'s live encouragement of a physical assault. Still, "liking" posts online and yelling out for the plaintiff's murder in an emotionally charged real-world environment are not exactly the same thing, particularly assuming that live encouragement could have emotionally activated the main tortfeasor during a highly stressful real-world encounter, while online support from a distance of both time and space might be considerably less galvanizing to the primary actor.[452] This kind of difference is noted in the Restatement's five factors, one of which refers to the defendant's "presence or absence at the time of the tort."[453]

One of the benefits of employing the aiding and abetting construct in school speech cases is that there is a developed jurisprudence offering significantly more precision to the process of evaluating culpability among student actors. We do not purport to offer a complete account of its application, instead proposing that a deeper development of the concept could provide a significantly enhanced analytic framework compared to the one currently in use. We also recognize that there might need to be some calibration when adapting the concept from civil cases to school disciplinary settings. But it is clear that—particularly where protected speech is in play—courts need a more rigorous method than is currently being deployed.

B. IRL vs. Online Disruption

Some of the post-*Mahanoy* cases demonstrate the limitations of the *Tinker* substantial disruption test when applied to online messages. Part of the reason for

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[450] *Halberstam*, 705 F.2d at 483 (citing *Duke*, 226 A.2d at 348).

[451] *Id.*

[452] *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969).

[453] RESTATEMENT (SECOND) OF TORTS § 876 (AM. L. INST. 1979).

this disconnect is almost certainly that *Tinker* was created in the context of IRL school speech that would have immediate consequences in the learning environment. When the Justices spoke of substantial disruption in *Tinker*, they were envisioning something like the *Tinker* facts, in which a student engages in speech (such as wearing protest armbands) in direct proximity to other students during the school day. In these IRL scenarios, it is at least somewhat easier for school officials to identify what sort of disruption might or did occur, and exactly what caused it. This presupposition of a live encounter between speaker and audience is present throughout the language of the *Tinker* opinion, including such statements as the following:

> When [a student] is in the cafeteria, or on the playing field, or on the campus during authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfering with the requirements of appropriate discipline in the operation of the school . . . ."[454]

Once the speech moves online and is not directly disseminated to other students IRL, the attenuated nature of the communication makes it much more difficult to assess or predict likely school disruption at some later time, sometimes many days or weeks after the message was created. And, at times, it can be difficult to determine whether the later disruption was caused by the student speech itself, or, instead, by the actions of administrators in publicizing the online speech. Consider, for example, *Manheim*, in which the satiric school shooter message was circulated to very few students.[455] The later disruption at the school, to the extent there actually was one, was largely driven by the school superintendent's email about a "threat" (which of course J.S.'s posts were not) to the school, rather than by J.S.'s own posts.[456] Fortunately, the *Manheim* court identified this problem with alacrity, but other courts seem less attuned to the nuances of this problem.

The uncertainty surrounding the distinction between IRL speech and mediated/online speech is one the occurs in other First Amendment areas beyond student speech. Compare, for example, the *Tinker* standard with another First Amendment standard (mentioned earlier) originally crafted for IRL speech. In *Brandenburg v. Ohio*, the Court established the standard for when the First Amendment allowed a criminal prosecution for inciting violence.[457] The Court set a high bar, holding that government could not punish "advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[458] The case arose from a live Ku Klux

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[454] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512–13 (1969).
[455] J.S. *ex rel.* M.S. v. Manheim Twp. Sch. Dist., 263 A.3d 295, 299 (Pa. 2021).
[456] *Id.* at 321.
[457] 395 U.S. 444, 447–48 (1969).
[458] *Id.* at 447.

Klan rally in which a speaker had promised "revengeance" for the supposed suppression of whites by the government.[459] The Court found that the speech was not regulable under its newly created test, in part because any violence the group planned to carry out was somewhat abstract and set in some indefinite future context.[460]

Once incitement to violence is moved from a live context to a mediated one, courts have struggled. They have almost never found liability under *Brandenburg* based upon non-live expression.[461] For example, in *Herceg v. Hustler Magazine, Inc.*, the Fifth Circuit rejected a claim against a magazine publisher for printing an article about the practice of autoerotic asphyxiation that inspired a fourteen-year-old boy to accidentally hang himself.[462] The Fifth Circuit pointed out that: "Even if the article paints in glowing terms the pleasure supposedly achieved by the practice it describes, as the plaintiffs contend, no fair reading of it can make its content advocacy, let alone incitement to engage in the practice."[463]

The mismatch between the live-centric *Brandenburg* test and a magazine article or social media post suggests that the *Brandenburg* test is inapt when translated from IRL contexts to print or online ones. One of the unspoken presuppositions of the *Brandenburg* opinion seems to be (at least as we interpret it) that of an impassioned speaker encouraging some sort of imminent mob violence in a way that would override the rational faculties of the audience in the heat of the moment.[464] This exact same mismatch occurs in *Tinker*, in which the majority opinion presupposes an IRL interaction between speaker and audience.[465]

Above all else, courts need to carefully scrutinize the purported disruption and make sure it in fact actually springs from the accused student's message and not from some other source, such as the publicity driven by a school administration's response. Or, as Mary-Rose Papandrea has suggested, via a "heckler's veto" where recipients of the speech overreact in order to justify punishing the speaker.[466]

C. Leaks and Reasonable Foreseeability

Another highly significant (and dubious) feature of the post-*Mahanoy* landscape is the largely unquestioned judicial assumption that speech can be punished that

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[459] *Id.*

[460] *Id.* at 448.

[461] John Charles Kunich, *Natural Born Copycat Killers and the Law of Shock Torts*, 78 WASH. U. L. Q. 1157, 1214 (2000) ("The courts that have applied *Brandenburg* in media related cases have almost always found its requirements unsatisfied . . . .").

[462] 814 F.2d 1017, 1018–19 (5th Cir. 1987), *cert. denied*, 485 U.S. 959 (1988).

[463] *Id.* at 1022–23.

[464] *See generally Brandenburg*, 395 U.S. at 445–46 (speech taking place at a rally with armed members of the Ku Klux Klan).

[465] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 515 (8th Cir. 1968).

[466] Papandrea, *supra* note 26, at 73–74. This point was also made, of course, by Justice Alito in *Mahanoy*, as discussed earlier. Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2056 (2021) (Alito, J., concurring).

either never reached its putative target or did so only because of the intervention of third parties. As noted earlier, one simply cannot have a threat, or harassment, or bullying unless the message reaches its target in some way. In most of the cases discussed herein, the offending message was not delivered to its subject by any intentional act of the author.

A notable example of this phenomenon is found in *Chen*, during its discussion of the main offender in that case, Cedric Epple. Epple argued that he had not intended his racist messages to reach their targets or cause any disruption because he had intended to keep his Instagram account private.[467] The Ninth Circuit rejected this argument, pointing out that regardless of Epple's intentions, it was reasonably foreseeable that the messages would reach the other students.[468] The court pointed out that Epple had in fact failed to keep the account private since one of his followers had shared it with other members of the school community.[469] Furthermore, "[g]iven the ease with which electronic communications may be copied or show to other persons, it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole."[470] The problem with this analysis, with its automatic assumption of reasonable foreseeability, is that it may leave very little or no space at all for students to share controversial or upsetting messages privately via electronic means. The court simply declared that all electronic communications are easily shared, and thus it is *always* reasonably foreseeable that any electronic message created by a student would reach and impact the school.[471] Students by virtue of this rule simply have no ability to share anything electronically without great risk. This seems an extreme doctrine that intrudes upon student privacy and could benefit from some additional nuance. And as one commentator has pointed out,

> [t]eens aren't exactly known for logically anticipating and thinking through the consequences of their decisions, which is why we require them to get an education and legally treat them differently than adults. So saying the damage was "plainly foreseeable" to Epple seemingly applies adult logic and standards to immature and underdeveloped teen brains.[472]

We propose that courts avoid this unfortunate axiomatic leap to reasonable foreseeability by engaging in a deeper contextual analysis of the facts of each case, to determine if a reasonable student would expect that his or her message would

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[467] Chen v. Albany Unified Sch. Dist., 56 F.4th 708, 711 (9th Cir. 2022).
[468] *Id.* at 720.
[469] *Id.*
[470] *Id.*
[471] *See id.*
[472] Goldman, *supra* note 361.

reach and affect the school. One cogent scholarly analysis suggested some considerations that courts could apply in making such a foreseeability determination: "Examples of measures taken by students to limit the possibility of the speech reaching school include password protection, limiting other students' access to the speech, and even using a foreign domain site to prevent U.S. users from finding it via a Google search."[473] In addition to these excellent ideas, we suggest courts consider the following questions: First, how many individuals did the student share the message with? A smaller number of intimates might suggest a lower likelihood that the post would be shared outside the group. Second, did the sender explicitly request confidentiality? If so, the expectation of confidentiality might be a more reasonable one. And third, had the group had prior confidential conversations that were *not* shared with the world? If so, that fact would affect the reasonableness of assuming continued confidentiality. There may be other factors that could be considered, but the suggestions offered here at least point the way toward a more nuanced application of foreseeability that does not entirely foreclose the possibility of private online speech by students.

D. Invading the Rights of Others

Finally, the Supreme Court's jurisprudence has unfortunately avoided entirely a difficult aspect of *Tinker* by providing no guidance on when speech invades the interests of others, *Tinker*'s alternative grounding for regulation of speech that does not necessarily cause a substantial disruption. As one commentator noted: "many lower courts never even refer to this standard in student-speech cases."[474]

The dangerously vague "rights of others" prong could, in theory, result in vast overregulation of speech. One lower court judge, in a powerful dissent, noted that "[t]he possibilities of harmful censorship under the guise of 'protecting' the rights of students against emotional strain are sufficiently numerous to be frightening."[475] In his dissent in *Kuhlmeier*, Justice Brennan suggested that only legitimately tortious or criminal conduct could meet the invasion of the rights of others standard: "If that term is to have any content, it must be limited to rights that are protected by law."[476] While that standard may be a bit too rigorous in school cases, it does have the advantage of providing some clarity to this deeply opaque doctrine.

"A few lower courts have delved into the rights of others issue, but it remains the 'forgotten' part of *Tinker*."[477] Until the Court establishes with some rigor the

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[473] W. Christopher Schwartz, Mahanoy v. B.L. *ex rel.* Levy *and the Virtual School Environment, A Framework for Regulating Online, Off-Campus Student Speech*, 51 J.L. & EDUC. 262, 285 (2022).

[474] Hudson, *supra* note 136, at 1121–22.

[475] Trachtman v. Anker, 563 F.2d 512, 521 (2d Cir. 1977) (Mansfield, J., dissenting).

[476] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 289 (1968) (Brennan, J., dissenting).

[477] David L. Hudson Jr., Mahanoy Area School District v. B.L.*: The Court Protects Social Media but Leaves Unanswered Questions*, 2021 CATO SUP. CT. REV. 93, 106; *see also, e.g.*,

severity of the necessary "invasion," that prong of *Tinker* cannot serve as a useful guide for distinguishing free speech from regulable expression and remains a potentially dangerous source of overregulation by school officials.

CONCLUSION

Although the lower courts' reception of *Mahanoy* is still in its early stages, developments thus far are less than reassuring. While the actual outcome in the case was a welcome reaffirmation of students' rights, *Mahanoy*'s feeble doctrinal structure leaves nearly all vital questions about online school speech unanswered. This in turn almost certainly produces chilling effects on student expression given the insecure borders of the doctrine. The consequences bear some resemblance to developments in Second Amendment jurisprudence since the Court's controversial decision in 2022 in *New York State Rifle & Pistol Ass'n v. Bruen*.[478] As Professor Jacob D. Charles pointed out in a perceptive analysis of *Bruen*, that decision's vague melding of originalist and traditionalist methodologies has "already generated—and is likely to continue generating—confused and confusing lower court precedent."[479] So it is with *Mahanoy*. The extent to which the Supreme Court allows such extreme legal uncertainty to persist raises questions about the Court's good faith in attempting to provide serious doctrinal tools for future application, as Professor Charles points out: "After all, the more indeterminate the test, the more authority the Court retains to reach whatever conclusion it wants."[480] If the Court truly believes its own rhetoric in *Mahanoy* encouraging the inculcation of free speech values in young people during their school years, rehabilitating school speech doctrine would be an excellent place to start.

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) (suggesting that ignored "rights of others" prong could be further developed to support regulation of cyberbullying).

[478] 597 U.S. 1 (2022). On *Bruen* and its implications for free speech doctrine, see generally Emily Erickson & Matthew D. Bunker, *The Jurisprudence of Tradition: Constitutional Gaslighting and the Future of First Amendment Free Speech Doctrine*, 29 WIDENER L. REV. 139 (2023).

[479] Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 76 (2023).

[480] *Id.* at 155.