

Cyberbullying is the use of electronic communication to intimidate or threaten people. Victims develop social anxiety, become depressed, and have suicidal thoughts.¹ Students are especially at risk since 7 in 10 experience cyberbullying before the age of 18.² Regulating cyberbullying means regulating speech, which requires balancing the safety of students and schools with protecting First Amendment rights. In *Tinker v. Des Moines School District*, the Supreme Court confirmed First Amendment rights for students on-campus but allowed schools to regulate speech that invaded the rights of others or “materially and substantially” interfered with school operations.³ As for off-campus speech, the Court protected First Amendment freedoms in *Mahanoy Area School District v. B.L.* but left the lower courts scrambling to reconcile the *Tinker* exception with the First Amendment.⁴ Circuit courts have incorporated standards like the “nexus” and “reasonably foreseeable” tests with unclear consensus.^{5,6,7} Considering how cyberbullying occurs both on- and off-campus, a lower court proposal should require speech that is subject to regulation, satisfy both the nexus and reasonably foreseeable tests while falling within the jurisdiction of either the *Tinker* or First Amendment exceptions.

To better understand this proposal, consider when cheerleader B.L. posted an “F”-laced caption with a photo of her raising a middle finger. When her coaches saw this, they removed her from the team, citing B.L.’s violation of school profanity rules. B.L. sued and the case reached the Supreme Court. The Court ruled that B.L.’s speech “did not involve features that would place it outside” First Amendment protection.⁸ B.L. did not incite imminent lawless action (*Brandenburg v. Ohio*), make or distribute obscene materials (*Roth v. United States*), or make an obscene speech at a school-sponsored event (*Bethel School District #43 v. Fraser*).^{9,10,11} However, Justices noted school “special characteristics,” granting them the right to limit student speech.¹²

The *Tinker* exception could be applied to off-campus threats, bullying, and harassment.¹³ While the Court did not say to what degree schools can invoke the *Tinker* exception, they did caution schools when exercising special considerations, to avoid violating the First Amendment. Justices also warned schools against assuming the role of parents or regulating speech on a 24/7 basis.¹⁴

Outside of these conditions, the Supreme Court stopped short of giving specifics about how schools could limit unpopular, distasteful, or potentially harmful speech. The lower courts still had the burden to balance the protection of students and schools with the First Amendment. They have used various tests when assessing a school's right to apply *Tinker's* exception. The "nexus test" has been favored by the Fourth Circuit as in *Kowalski v. Berkeley County Schools*.¹⁵ If there is enough evidence that one's off-campus speech will compromise the school's "pedagogical" mission, then that school has the grounds to regulate and punish students.¹⁶ Kowalski's MySpace page was found guilty of harassing a student peer, with enough nexus between her harmful actions and the school's cyberbullying prevention efforts.¹⁷ This nexus criterion is consistent with the Justices' comments from B.L.'s case. While they did not use the term nexus, they noted that regulation is appropriate when the violation meets the *Tinker* exceptions of substantial disruption and invasion of rights of others.¹⁸

The Eighth Circuit has followed the "reasonably foreseeable" test.¹⁹ That is, the *Tinker* exception comes into play when a school reasonably foresees that a student's off-campus speech will "reach the school environment."²⁰ In *S.J.W. v. Lee's Summit R-7 Sch. Dist.*, the Circuit believed that it was reasonably foreseeable that S.J.W.'s racist and sexist blogs about his classmates would reach and affect the school community.²¹ Despite S.J.W.'s claim that his posts were meant to be satirical rather than serious, the *Tinker* exception applied. This standard seems outdated since today's online speech and social media platforms can reach on-campus and off-

campus realms at a push of a button. Cyberbullying speech can spread quickly to public space and reach any school's environment.

Critics say that the nexus and reasonably foreseeable tests offer a low threshold for schools to invoke the *Tinker* exception, leading to too much power for schools.²² The solution may thus be to incorporate a composite guideline. Schools seeking disciplinary action should require that the speech satisfy both the nexus and reasonably foreseeable tests *and* fall within the *Tinker* or First Amendment exceptions. In this fashion, offenders accountable for bullying behavior on- and off-campus can face more predictable consequences. The stakes have never been higher to get each case right, as 49 states require schools to have anti-bullying policies and 45 states require them to sanction students for cyberbullying.²³ Hence, if the lower courts can agree on the proposed fusion of criteria, then everyone can benefit from this uniformity in the legal system.

While cyberbullying senders can face administrative and criminal sanctions, there is less clarity about how to address receivers who often claim innocence as bystanders. Yet, bystanders can harm victims even in silence, by tacitly supporting the bully's power.²⁴ "Cyber-Samaritan" laws should thus be proposed, holding bystanders liable for failing to report cyberbullying.²⁵ The moral duty to offer aid thus becomes a legal obligation. Given these far-reaching implications, the liability bar can be set high such that bystanders receive punishment only when inaction involves a threat of violent criminal behavior or when they know there will be harm to victims.²⁶ To justify criminal sanctions though, Cyber-Samaritan laws would have to be attached to existing jurisdictions where cyberbullying is a crime.

The rules of engagement for prosecuting cyberbullying should follow existing laws. However, students, teachers, and courts alike need to know what the limits of a school's authority is in regulating and punishing cyberbullying. Incremental clarity and progress will manifest as

more cases go through the courts and reach the Supreme Court, but this process will take time. Meanwhile, the lower courts can work together to adopt a more robust legal framework to ensure the safety of students while protecting their speech rights. With legal precedence and nuanced scrutiny, a case-by-case approach can be replaced by a more standard and consistent legal consensus.

Endnotes

1. Ogi Djuraskovic, *Cyberbullying Statistics, Facts, and Trends (2022) with Charts*, FIRSTSITEGUIDE (Jan. 26, 2022), <https://firstsiteguide.com/cyberbullying-stats/>
2. *Id.*
3. *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506, 512–13 (1969).
4. *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021).
5. Victoria R. Bonds, *Tinkering With the Schoolhouse Gate: The Future of Student Speech After Mahanoy Area School District v. B.L.*, 42 Loy. L.A. Ent. L. Rev. 83 (2022).
6. *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011).
7. *S.J.W. v. Lee’s Summit R–7 Sch. Dist.*, 696 F.3d 771, 777 (8th Cir. 2012).
8. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2048.
9. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).
10. *Roth v. United States*, 354 U.S. 476 (1957).
11. *Bethel School District No. 403 v. Fraser* (1986).
12. *Mahanoy Area Sch. Dist.*, 141 S. Ct. at 2045.
13. *Id.*
14. *Id.* at 2046.
15. *Kowalski*, 652 F.3d 565 at 573.
16. *Id.*
17. *Id.* at 577.
18. *Tinker*, 393 U.S. 503, 506 at 513.
19. *S.J.W.*, 696 F.3d 771, at 777.
20. *Id.*
21. *Id.*
22. Victoria R. Bonds, 42 Loy. L.A. Ent. L. Rev. 83 at 102.
23. Joseph Johnson, *Number of U.S. States with State Cyber Bullying Laws as of November 2018, by Policy*, STATISTA (Jan. 25, 2021), <https://www.statista.com/statistics/291082/usstates-with-state-cyber-bullying-laws-policy>
24. Tommy K.H. Chan, Christy M.K. Cheung, Zach W.Y. Lee, *Cyberbullying on social networking sites: A literature review and future research directions*, INFORMATION & MANAGEMENT, 58(2), (2021).
25. Heather Benzmilller, *The Cyber-Samaritans: Exploring Criminal Liability for the "Innocent" Bystanders of Cyberbullying*, 107 Nw. U. L. Rev. 927 (2013).

26. *Id.* at 952.