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May a school monitor and discipline a student for her content on social media? This blog post will explore the foundations of student speech law and how courts are trying to adapt the principles established in an analog era to an ever-connected digital world. With the Supreme Court having recently granted certiorari in a case involving student speech on social media,[1] I will explore potential concerns with abandoning a school's ability to police students' online activity, while also looking at when a school might go too far in surveilling and punishing a student for her speech on social media platforms.

Brief Legal Background

The essential starting point for student speech cases is *Tinker v. Des Moines Independent Community School District*, which developed the "substantial disruption" test for deciding whether or not a student's speech may be restricted by the school, regardless of where it

occurs.[2] The students in that case planned to wear black armbands at school to publicize their objections to the Vietnam War.[3] When the school heard about the students' plan, it adopted a policy that any student wearing an armband in school would be asked to remove it, and if the student did not do so, then he or she would be suspended.[4]

The *Tinker* Court explained that students retain their First Amendment rights in the school environment: "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[5] The *Tinker* court held that in order for school officials to justify restricting student speech, they must show that their action was guided by something more than "a mere desire to void discomfort unpleasantness that always accompany an unpopular viewpoint,"[6] and that the speech caused a substantial disruption to the learning environment.[7]

Another important case in the student speech context is *Bethel School District No.403 v. Fraser*.[8] After a student delivered a speech containing many sexual innuendos at a school assembly,[9] the school suspended the student for violating the school's disciplinary code prohibiting use of obscene language.[10] The student brough a lawsuit alleging a violation of his First Amendment rights and the case ultimately reached the Supreme Court. When the Supreme Court reviewed the case, it looked at the objectives of public education and the role of a school in enshrining fundamental values of citizenship and the importance of public discourse, while also acknowledging the sensibilities of fellow students and the environment a school aims to create.[11] The *Fraser* Court held that the school board can determine whether speech is inappropriate when it takes place *inside* the school.[12] Distinguishing the "political" speech at issue in *Tinker* from the "vulgar" speech uttered by the student in this case, the court held that the First Amendment does not prevent a school from creating and enforcing a policy regarding lewd and vulgar speech *in* school.[13]

What Happens When Social Media Is Involved?

In the years since *Fraser* and *Tinker*, many other important student speech cases have been decided. Among these, many student speech cases involving social media have been litigated in the lower courts. In most of these, the court has allowed public schools to discipline students for social media content related to, and that themselves disrupt, school activities.[14] On January 8, 2021, the Supreme Court granted certiorari in a student speech case concerning expressive conduct on social media during non-school hours.[15] At stake is whether *Tinker*'s substantial disruption testgoverns student speech that occurs off-campus and over social media.[16]

In this case, *B.L. v. Mahoney Area School District*, a high school student, B.L., posted a picture of herself on her Snapchat story, raising her middle finger, with a caption using a curse word four times to describe her anger towards "school," "softball," "cheer," and "everything."[17] She was frustrated that she had not made the varsity cheerleading team and took to social media

to vent. Her Snapchat story, which was visible to a group including classmates and teammates,[18] was later shown to the cheerleading coaches by students and teammates who said they were upset by and concerned with the snaps at issue.[19] The coaches determined that B.L.'s snaps violated both the team's and the school's rules, and as a result, removed her from the team.[20] B.L. sued in federal court, arguing that the school had violated her First Amendment rights.

The district court found that the snaps were off-campus speech and, so, the *Fraser* standard did not apply.[21] The court also found that her snaps had not caused a substantial disruption in the school environment, and so they were not punishable under *Tinker*.[22] On appeal, the Third Circuit emphasized certain facts that distinguished this case from other cases pertaining to speech on social media: "B.L. created the snap away from campus, over the weekend, and without school resources, and she shared it on a social media platform unaffiliated with the school."[23] Even though the snaps mentioned the school and reached students and faculty at the school, these factors were not enough to render the speech "on-campus."[24]

However, the Third Circuit went one step further and held that *Tinker* does not apply *at all* to off-campus speech. According to the Third Circuit, *Tinker*'s focus on disruption does not make sense outside of school, because "any effect on the school environment will depend on others' choices and reactions."[25] Moreover, abandoning *Tinker* for speech outside the school would, in the Third Circuit's opinion, provide much needed clarity that students currently lack when it comes to determining what free speech rights they enjoy.[26]

In their amicus brief to the Third Circuit, Electronic Frontier Foundation ("EFF") detailed other reasons why, in their view, it is necessary for students to have ample space to speak freely on social media, without concern about their school's oversight. The EFF brief refers to many examples of ways young students have used social media to advocate for important causes, as well as examples of how social media serves as an important forum for students to discuss school-related issues.[27]

Reading this brief, and the similar sentiment in the Third Circuit's opinion regarding the care that must be exhibited towards new technologies and not suppressing speech,[28] I fear that risks inherent in young students engaging with social media and schools' role in teaching students about this important speech tool are being ignored. Just as *Fraser* looked at the role of a school in educating students not just about the ABCs, but also about productive means of public discourse and values of good citizenry, schools have a role to play in educating students on the relatively new frontier of discourse and citizenship presented by social media. Young students need guidance on issues such as the lasting nature of social media, the reach of social media, and how to behave on social media. It is precisely because technology is so important that schools need to have the authority to regulate and *educate* on the use of social media.

However, a recent lawsuit filed in the District Court for the Western District of Tennessee may circumscribe the outer limits of my concern for schools being allowed to reach student's speech her on social media. In *Diei v. Boyd,* the plaintiff, Kimberly Diei, had her social media posts investigated by the school administration on two different occasions based on an anonymous complaint, and on both occasions, the administration concluded that Ms. Diei violated "various professionalism codes."[29] Ms. Diei, a graduate student at the University of Tennessee Health Science Center College of Pharmacy, was nearly expelled for her content on social media.[30] The university found content she posted under a pseudonym on platforms such as Twitter and Instagram to be "vulgar," "crude," or "sexual."[31] However, Ms. Diei alleges that none of her posts indicate any affiliation with the university.[32] The complaint also alleges that, although Ms. Diei asked for the school for the "professional codes," she was not provided with any.[33]

What stands out from the complaint is plaintiff's desire to understand the school's relevant policies. The thrust of her complaint is the overbreadth and vagueness of whatever the school's policies may be.[34] The complaint reads: "Although Diei successfully appealed her expulsion, Diei fears that it is simply a matter of time before the Committee begins another investigation into her protected expression on social media."[35] This call for clarity exemplifies what is on the line when the Supreme Court hears and decides *B.L. v. Mahoney Area School District*. Instead of abandoning *Tinker* in order to provide clarity by eliminating the school's reach altogether, clarity could come in other forms, like factors that bring the speech within the control of the school.

A recent *New York Times* article reports on the view of civil libertarians, including a lawyer at the American Civil Liberties Union (whose Pennsylvania affiliate is representing the student cheerleader in *B.L. v. Mahoney School District*): students should be able to "stop worrying about how they reflect on their school when they leave campus." To illustrate the point, the ACLU attorney asks, "does she ever get to not be a cheerleader . . . ?"[36] And yet, while I agree that a student is not only a reflection of his or her school, this narrow view leaves no opening for schools to play a role in helping young citizens learn the tools of democracy. Given the prevalence of social media and the role it plays in elections and other aspects of democracy,[37] an ability to effectively communicate on social media is part of being an educated citizen.

However, this does not mean that *all* student off-campus social media should be within the reach of a school. If Ms. Diei, as an adult who earned a bachelor's degree and is now pursuing a doctorate,[38] and who has been a member of the workforce without complaints of being unprofessional,[39] chooses to post "sex positive"[40] content on her own personal social media, that speech should not be controllable by the school. She has taken active steps to disassociate from the school on her social media,[41] and she knows what she is posting and why she is posting it.[42] Just as the Third Circuit in *Mahanoy* looked to factors in prior cases to determine whether B.L.'s speech caused a substantial disruption, factors such as Ms. Diei's

efforts separate her personal life from her online identity should weigh against the university's ability to regulate her speech.[43]

I am eager to see whether the Supreme Court upholds the Third Circuit's opinion in *Mahoney*, or clarifies the circumstances in which a school can restrict student, off-campus speech. My hope is that the Court does not put on the rose-tinted glasses the Third Circuit wore when it glorified the benefits of social media and technology, and that instead, it delineates the role a school should play in shaping future creators and leaders via their engagement with social media.

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1. Mahanoy Sch. Dist. v. B.L., 964 F.3d 170 (3d Cir. 2020), cert. granted, 2021 U.S. LEXIS 482 (U.S. Jan. 8, 2021) (No. 20-255).
2. Tinker v. Des Moines Indep. Comty. Sch. Dist., 393 U.S. 503, 513 (1969).
3. Id. at 504.
4. Id.
5. Id. at 506.
6. Id. at 509.
7. Id. at 514.
8. 478 U.S. 675 (1986).
9. Id. at 677-78.
10. Id. at 678.
11. Id. at 681-82.
12. Id. at 683.
13. Id. at 685.
14. Adam Liptak, A Cheerleader's Vulgar Message Prompts a First Amendment Showdown, N.Y. Times (Dec. 28, 2020), https://www.nytimes.com/2020/12/28/us/supreme-court-schools-free-speech.html [https://perma.cc/H7KH-WA8F].
15. Mahanoy Area School District v. B.L., SCOTUSblog, https://www.scotusblog.com/case-files/cases/mahanoy-area-school-district-v-b-l/ [https://perma.cc/9EP6-BH8P].
16. Id.
17. B.L v. Mahanoy Area Sch. Dist., 964 F.3d 170, 175 (3d Cir. 2020).
18. Id.
19. Id. at 176.
20. Id.
21. Id.
22. Id.
23. Id. at 180.

24. Id at 180-81.
25. Id. at 189.
26. Id.
27. Brief for the Plaintiffs-Appellees as Amici Curiae at 16, B.L v. Mahanoy Area Sch. Dist., 964 F.3d 170 (3d Cir. 2020) (No. 19-1842), 2019 WL 4137921, at *16.
28. Mahanoy, 964 F.3d at 189.
29. Complaint at 2, Diei v. Boyd, No. 2:21-cv-02071 (W.D. Tenn. Feb. 3, 2021).
30. Id. at 1.
31. Id.
32. Id. at 2.
33. Id. The complaint also alleges that the "Standards for Student Professionalism Conduct," the policy the university concluded Ms. Diei violated, cannot be found online; instead of a policy, there is only an error message. Id. at 8.
34. Id. at 18.
35. Id. at 2.
36. Anemona Hartocollis, Students Punished for "Vulgar" Social Media Posts Are Fighting Back, N.Y. Times (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html.
37. Philip Bump, All the ways Trump's campaign was aided by Facebook, ranked by importance, Wash. Post (Mar. 22, 2018), https://www.washingtonpost.com/news/politics/wp/2018/03/22/all-the-ways-trumps-campaign-was-aided-by-facebook-ranked-by-importance/ [https://perma.cc/N94T-JB2L].
38. Complaint at 6, Diei v. Boyd, No. 2:21-cv-02071 (W.D. Tenn. Feb. 3, 2021).
39. Id.
40. Anemona Hartocollis, Students Punished for "Vulgar" Social Media Posts Are Fighting Back, N.Y. Times (Feb. 5, 2021), https://www.nytimes.com/2021/02/05/us/colleges-social-media-discipline.html.
41. Id.
42. Complaint at 2, Diei v. Boyd, No. 2:21-cv-02071 (W.D. Tenn. Feb. 3, 2021).
43. However, I would argue that factors like her maturity and intelligence, her choice to post content to express herself and encourage sex positivity, and others, demonstrate a knowledge of social media and the effective use of tools for digital discourse. Maybe the school should not be able to reach Ms. Diei because it is such an advanced degree and education, and the concern with educating youth on the values of citizenry and public discourse are no longer a primary concern of the school.