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THE ROLE OF SOCIAL MEDIA IN THE DEVELOPMENT AND REGULATION OF STUDENT FREE SPEECH: *MAHANOY AREA SCHOOL DISTRICT V. B.L.* (2021)

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A thesis submitted to the University Honors Program
in partial fulfillment of the requirements for the
Honors Certificate with Thesis.

Approved By
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December 7, 2021

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Biographical Note

Kailyn Stone is an undergraduate student at Southern Illinois University-Carbondale (SIUC). She will graduate in December of 2021 with a double major in Spanish and Political Science with a Pre-law Concentration and a minor in Legal Studies. Kailyn is a member of the University Honors Program and Pre-law Scholars Program. She is a Saluki Ambassador and an ambassador of the Political Science Department. She also leads the mock trial team and the Student-Athlete Advisory Committee as a two-time recipient of the Missouri Valley Conference Good Neighbor Award. Kailyn was awarded the Chancellor Carlo Montemagno Excellence Endowed Scholarship Award, the John and Nancy S. Jackson Scholarship Award, and she was a finalist of the Service to Southern Award. After graduation, Kailyn plans to attend law school and pursue a career as a trial attorney.

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Abstract

This Thesis evaluates the tension between the constitutional free speech rights of students and the rights of schools to maintain a controlled environment that is conducive to learning. The inception of the internet and social media has permanently altered the way that students communicate, impacting student free speech jurisprudence. The significance of evaluating student free speech rights lies in the protection of American schools as "nurseries of democracy". In Tinker v. Des Moines Independent Community School District (1969), the Supreme Court held that students possess First Amendment rights within the schoolhouse, however the Court has failed to provide clear guidance as to whether or not the Tinker doctrine applies to off-campus student speech, especially speech occurring through social media. This lack of guidance has proved to be problematic for district and federal appellate courts that inconsistently apply varying applications of the Tinker doctrine to off-campus student speech. In 2021, the Supreme Court addressed this issue by defending the constitutional rights of Brandi Levy in Mahanoy Area School District v. B.L. (2021) and thereby provided one example of protected off-campus student speech in the form of social media.

The purpose of this research is two-fold. First, this Thesis will reflect that social media should be considered a constitutionally protected form of off-campus student speech with one exception. This exception includes circumstances in which the speech does not withstand the two-pronged approach of the Third Circuit Court: reasonable foreseeability and intent of the speaker. Furthermore, the following research will reflect that it is imperative for all lower courts to adopt the Third Circuit Court approach to establish uniformity until the United States Supreme Court grants certiorari to a subsequent case that clearly defines the boundaries of on and off campus student speech as it pertains to social media. Second, this Thesis will reflect that schools have a duty to educate students on the proper utilization of social media. The landmark Supreme Court case of Mahanoy Area School District v. B.L. (2021) will serve as an important point of reference for examining the role and regulation of social media in regard to student free speech rights throughout this Thesis.

I. Introduction

For more than fifty-two years, American students have practiced the right to the freedom of speech outside of the schoolhouse gate while experiencing restricted rights within the school context. In 2021, the United States Supreme Court upheld the First Amendment off-campus rights of all students in *Mahanoy Area School District v. B.L.* (2021)[1], which has arguably become the most important student free speech case since 1969. In 1969, at the height of the Vietnam War, the landmark Supreme Court case of *Tinker v. Des Moines* (1969)[2] held that "conduct by a student, in class or out of it, which for any reason- whether it stems from time, place or type of behavior- materially disrupts classwork or involves substantial disorder or invasion of the rights or others is not immunized by the constitutional guarantee of freedom of speech". *Mahanoy Area School District*[1] presented an interesting challenge for the United States Supreme Court because it involved student speech that occurred off-campus through Snapchat, a social media application. The introduction of social media as a new outlet for students to express both popular and unpopular speech has engendered confusion for school administrators and students alike.

Social media has impacted the nature of the American education system because the advent of the internet has revolutionized the means by which American citizens connect and communicate. The internet provides a platform for the marketplace of free ideas that drives all aspects of our democracy from the stock market to the education system. According to Katherine Ferry[3], all age groups utilize the internet, however, teenagers take advantage of the internet the

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[1] *Mahanoy Area School District v. B.L.,* 594 U.S. __(2021).

[2] *Tinker v. Des Moines,* 393 U.S. 503 (1969).

[3] Ferry, Katherine A. 2019. "Reviewing the Impact of the Supreme Court's Interpretation of Social Media as Applied to Off-Campus Student Speech". *Loyola University Chicago Law Journal*, 49(4): 717-[xix].

most. Approximately "71% of teenagers use more than one social networking site."[3] As technology continues to evolve, the means by which students communicate will grow. This is problematic for the judicial system because the Framers of the Constitution did not anticipate the advent of the internet and social media at the time that the Constitution was enacted. The Supreme Court has remained ambiguous on the matter of student speech, remaining silent on the issue since 1969.[2]

Consequently, the standard set forth by *Tinker*[2] has been altered and applied inconsistently throughout off-campus student speech jurisprudence established by federal appellate courts and district courts. It is the responsibility of the United States Supreme Court to clarify the boundaries of student speech as they pertain to the introduction and development of social media in an ever-changing digital age.

Contrary to popular belief, no student, teacher, or administrator possesses an *absolute* right to the freedom of speech.[4] Students have the right to free speech, but this right is limited when the student enters school grounds. Thus, one common approach of the judicial system evaluates the location of the student at the time the speech was concepted in order to determine if the speech may be constitutionally restricted by school administrators. As a result, the judicial system has traditionally relied on distinguishing between on and off campus speech to decide if student speech may be repressed. Time and time again the court system has maintained that unique forms of off-campus speech, such as student newspapers, banners, and notebooks may be regulated when they infringe upon the pedagogical goals of the school. What about social media posts?

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[4] Davis, Josh, and Josh Rosenberg. 2009. "Government as Patron or Regulator in the Student Speech Cases." *St. John's Law Review,* 83(4), 1047-1126.

Analysis of the first amendment rights of students via social media requires a primary understanding of whether the speech took place on or off campus. While the rights of students are not shed at the "schoolhouse gate"[2], the rights of students are also not coextensive with the rights of adults in other settings."[5] The Constitution of the United States does not clarify the explicit boundaries of off-campus speech, however it is clear that a social media post composed by a student off-campus would have less protection if it was composed on-campus. This Thesis will address social media posts occurring off-campus, which generally call for greater protection for the interests of the student and less protection for the interests of the school.

II. Overview of *Mahanoy Area School District v. B.L*.

Mahanoy Area School District v. B.L.[1] is the first time that the Supreme Court has revisited student speech since the decision in *Tinker v. Des Moines.*[2] Unlike *Tinker*[2]*, Mahanoy Area School District*[1] arose out of a dispute that took place on social media. Brandi Levi (B.L.), who is the Respondent in the case, was a student at Mahanoy Bay Area High School in Mahanoy City, Pennsylvania. Brandi Levy tried out for both the cheerleading team and the right fielder position on a private softball team. Levy did not make the varsity cheer team, and she did not get the right fielder position on the softball team. B.L. was offered a spot on the junior varsity cheerleading team, however she did not enthusiastically accept the offer. While B.L. was visiting a local convenience store the weekend after, she posted two images on her Snapchat, which is a social media application where users post photos and videos. B.L. posted these images to her Snapchat "story", which is a function that permitted about 250 people in B.L.'s "friend group" to view the images for twenty-four hours.

The first image posted by Brandi Levy included her and a friend with middle fingers up. The caption read "Fuck school fuck softball fuck cheer fuck everything."[1] The next posted image

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[5] *Bethel School District No.403 v. Fraser,* 478 U.S. 675 (1986).

was a blank-screen, however, it had a caption that read "Love how me and [another student] get told we need a year of junior varsity before we make varsity but tha[t] doesn't matter to anyone else?"[1] Brandi Levy's Snapchat posts quickly spread among other members of the cheerleading team, and eventually the cheer coaches became aware of the posts. The cheerleading coaches met with the administrators at Mahanoy Bay Area High School to determine that Brandi Levy's Snapchat posts were a violation of team and school rules because they included profanity in juxtaposition with a school-related extracurricular activity. The athletic director, principal, superintendent, and school board collectively suspended Levy from the junior varsity cheerleading team for one year. Consequently, Brandi Levy, through her parents, filed a landmark lawsuit that reached the United States Supreme Court.

First, the District Court ruled in favor of Brandi Levy reasoning that "(t)he interest that a school or coach has in running a team does not extend to off-the-field speech that, although unliked, is unlikely to create disorder on the field."[6] As a result, the court ordered a temporary restraining order and required the school to end the suspension of Brandi Levy from the junior varsity cheer team. The Third Circuit affirmed the decision of the District Court but found that *Tinker*[2] "does not apply to off-campus speech- that is, speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[1] The Mahanoy Area School District appealed, asserting that the Third Circuit went too far when designating which categories of speech violated *Tinker*[2]. A *writ of certiorari* was filed asking the United States Supreme Court to scrutinize whether the *Tinker*[2] substantial disruption loophole for regulating student speech applies to off-campus speech.

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[6] Hudson, David L. Jr. 2021."*Mahanoy Area School District v. B.L.*: The Court Protects Student Social Media but Leaves Unanswered Questions." *Cato Supreme Court Review.*

The Supreme Court agreed that the Third Circuit Court went too far, yet Justice Breyer delivered the majority opinion of the Supreme Court in favor of Brandi Levy. The 8-1 decision reaffirmed *Tinker*[2] and held that the Mahanoy Area School District violated Brandi Levy's free speech rights under the First Amendment. However, the decision left many unanswered questions for future litigation to decide because Justice Breyer did not establish a broad, general rule to explicitly state which forms of speech are considered to be "off-campus."[6] However, the Court did note "three features of off-campus speech" to suggest that school officials generally have weakened power over such speech.

III. Three Features of Off-Campus Speech

These general features identified by the Supreme Court strengthen Brandi Levy's claim to the exercise of her First Amendment right to free speech. Furthermore, these three features support the argument that social media should be considered a constitutionally protected form of off-campus student speech in most circumstances.

a. Schools Rarely Stand In Loco Parentis

First, the Court identified that schools usually do not act *in loco parentis* with regard to off-campus speech. The doctrine of *in loco parentis* allows school administrators to take the place of a students' parents when the parents are not present to discipline the student. "Geographically speaking, off-campus speech will normally fall within the zone of the parental, rather than school-related responsibility."[7] It is crucial to consider when, where, and how Brandi Levy spoke in order to determine if Mahanoy Area High School acted *in loco parentis*. The doctrine of *in loco parentis* strengthens the interest of Brandi Levy's claim to free speech because Brandi Levy posted her Snapchats off-campus at a convenience store during the

[7] Ingles, Ignatius M. 2015. "Are You Sure You Want to Post That?" Examining Student Social Media Use and Constitutional Rights". *Ateneo Law Journal,* 60(484).

weekend.[7] Brandi Levy never identified the name of the school in her posts, and she did not target any specific member of the school. Moreover, she posted Snapchats using her own personal cell phone to communicate her criticism to her close "Snapchat friends". Thus, there is no way for the school to claim that they were acting *in loco parentis* when they disciplined Levy for her posts. Levy was clearly acting within the geographical zone of parental responsibility when she posted to social media. School administrators have the right to maintain an environment that is conducive to education, but this right is limited when the school does not stand *in loco parentis,* or "in place of" the parents of the student. When schools do not stand *in loco parentis,* which is the case for most off-campus social media posts, regulation afforded by the *Tinker*[2] doctrine should be extremely limited because discipline falls within the authority of the parent, not the school.

b. Speech Includes the Full 24 Hour Day

Second, if off-campus speech was freely regulated by school administrators, school officials would have to serve as monitors of speech that takes place throughout the course of a 24 hour day. According to *Mahanoy*[1], "regulations of off-campus speech, when coupled with on-campus speech, include all speech a student utters during the full 24 hour day". According to Ingles (2015), speech occurring throughout an entire day could potentially include political or religious speech that should be protected.[7] The school would have a significant burden to justify suppression of such speech.

Therefore, if the Court granted the Mahanoy Area High School the power to suppress Brandi Levy's off-campus social media post, they would be severely limiting American students' rights to freedom of speech moving forwards. While schools do have the ability to limit speech in specific circumstances, this right is not all-inclusive. Social media posts that take place

off-campus cannot be suppressed simply because they are offensive or unpopular. By limiting one example of off-campus social media speech in *Mahanoy*[1], the Supreme Court would be limiting the overarching ability of students to freely express a wide array of viewpoints during their own free time outside of the schoolhouse gate. The majority opinion in *Mahanoy*[1] to uphold the ability of students to exercise their first amendment right on social media is a significant win for students that will continue to impact decades of free speech jurisprudence.

c. Schools Have an Interest in Protecting Unpopular Expression

Third, the Court asserted that schools have an interest in protecting unpopular student speech, because schools are the "nurseries of democracy."[1] Protection of the marketplace of ideas, popular and unpopular, is necessary for a functional democracy in which lawmakers compose laws that reflect the requests of the People. Schools play a vital role in the protection of the marketplace of ideas because they are tasked with educating the youngest generations to promote democracy.[8] The First Amendment safeguards unpopular speech, including criticism. The regulation of unpopular expression compromises the underlying fundamental values that uphold our democracy. Thus, schools have a significant interest in educating the younger generations to protect unpopular expression. Brandi Levy's interest in exercising her right to free speech through social media is strengthened by the fact that schools have an interest in protecting unpopular expression in order to uphold the fundamentals of democracy. Brandi Levy's criticism is exactly the kind of unpopular speech that the Framers of the Constitution sought to protect through the establishment of the First Amendment.

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[8] Dryden, Joe. 2010. "School Authority over Off-Campus Student Expression in the Electronic Age: Finding a Balance between a Student's Constitutional Right to Free Speech and the Interest of Schools in Protecting School Personnel and Other Students from Cyberbullying, Defamation, and Abuse." Ed.D. Diss. University of North Texas. 193.

IV. The Substantial Disruption Standard: *Tinker v. Des Moines* (1969)

As reflected by *Mahanoy Area School District v. B.L.*[1], speech that occurs within the school setting presents a unique challenge that is not explicitly addressed by First Amendment jurisprudence. Bradley (2014) asserted that the school restriction of student speech calls for the complexity of the "inherent tension between students' constitutional rights of free speech and schools' rights to promote their work and control their classrooms."[9] As a result, the Court in *Mahanoy*[1] weighed the competing interests of the Mahanoy Area School District and Brandi Levy in order to render a decision. This balancing inquiry was created through the implementation of the substantial disruption standard in the infamous case of *Tinker v. Des Moines.*[2] In *Tinker*[2], three students wore black armbands to school in protest of the Vietnam War. The school authorities created a resolution banning students from wearing black armbands at school. Those who disregarded the resolution and wore them anyways were suspended. Consequently, the students sued the school in the federal district court and argued that their First Amendment right to free speech was violated. The landmark decision of the Supreme Court in 1969[2] laid the foundation shaping the development of decades of student free speech cases occurring within the United States, ultimately impacting *Mahanoy*[1].

The Supreme Court in *Tinker v. Des Moines*[2] ruled in favor of the students for the first time in history, asserting that students and teachers "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The majority opinion[2] classified children as "persons" under the United States Constitution, which is significant because the constitutional rights of children had previously never been recognized by the highest court of

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[9] Bradley, Eleanor. 2014. "Adjusting the Law to Reflect Reality: Arguing for a New Standard for Student Internet Speech." *Temple Law Review,* 86(4), 881-915.

law. On the contrary, the Supreme Court also limited the application of the protection of student free speech by emphasizing that free speech protection is dependent upon the "special characteristics of the school environment."[2] Thus, interpretation was left for the lower courts to decide in subsequent cases. In 2021, Justice Breyer wrote for the majority in *Mahanoy*[1] that the aforementioned three features of off-campus speech mean that "the leeway the First Amendment grants to schools in light of their special characteristics is diminished." While *Mahanoy*[1] limited the freedom granted in *Tinker*[2] to schools in light of their special characteristics, the Court utilized the substantial disruption standard established by *Tinker*[2] to justify the constitutionality of Brandi Levy's off-campus speech.

The substantial disruption standard established that schools have a special interest in regulating speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." [2] The Court held in *Tinker*[2] that there was no evidence suggesting that the protest of the students would "substantially interfere with the work of the school or impinge upon the rights of other students." The "substantial disruption test" has become an important standard for weighing the interests of students against the interests of schools in student free speech cases. The majority opinion in *Mahanoy*[1] referenced the "substantial burden test" set forth by *Tinker*[2] to determine that Brandi Levy's Snapchats did not cause a substantial disruption within the school. For over forty years this standard set forth by *Tinker*[2] has acted as a loophole for schools to discipline student free speech that the First Amendment would otherwise protect.[10] However, this doctrine has been applied inconsistently over time. The inconsistent application of the *Tinker*[2] doctrine is prevalent in several landmark cases, which were referenced as precedent

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[10] Brooks, Jeremy M. 2017. "Tinkering with Students' Free Speech Beyond the Schoolhouse Gate during the Digital Age." *Rutgers Computer & Technology Law Journal,* 43(1), 141-167.

to counter the interests held by Mahanoy Bay Area High School and the Mahanoy Bay Area School District.

V. Three Interests held by Mahanoy Bay Area High School

Although the Court ruled in favor of Brandi Levy, Justice Breyer explained in the majority opinion that the schools generally do retain some regulatory interests in off-campus speech, writing that:

> "The school's regulatory interest remains significant in some off-campus circumstances… These include serious or severe bullying or harassment targeting specific 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." [1]

That being said, Mahanoy Bay Area High School and the Mahanoy Bay Area School District expressed several interests that they considered as sufficient grounds for disciplining Levy's speech. The application of the *Tinker*[2] doctrine to the interests of the Mahanoy Bay Area High School can be broken down into three parts. First, the school has an interest in teaching appropriate manners and disallowing vulgar language aimed at the school. Second, the school has an interest in preventing disruption within a school-sponsored activity. Third, the school has an interest in protecting team morale.

a. *Teaching Manners and Disallowing Vulgar Language*

This interest is considerably weak because Brandi Levy spoke outside of the school on a weekend. Justice Brennan concurred in *Bethel School District v. Fraser* (1986)[5] and emphasized that if the student "had given the same speech outside of the school environment, he could not have been penalized simply because he used offensive language." In *Fraser*[5], a high schooler gave a vulgar speech at an assembly in front of six hundred other students. Following his suspension, the Court ruled in favor of the school and implemented the first exception to the

Tinker[2] standard. The Court differentiated the lewd and offensive language in *Fraser*[5] from the peaceful demonstration in *Tinker*[2]. The majority opinion held that "the First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as [the student's] would undermine the school's basic educational mission."[5] *Fraser*[5] transcended the boundaries set forth by *Tinker*[2] by ruling that it is constitutional for schools to restrict lewd or offensive speech, even if the speech does not materially disrupt the work of the school. While Brandi Levy's speech was vulgar, *Fraser*[5] is differentiated because Levy's speech did not occur on school grounds or during school hours. Since Brandi Levy's speech did occur off-campus, the school's interest in prohibiting vulgarity is weakened. Furthermore, Mahanoy Area High School never attempted to prevent vulgarity from students outside of school.

The "vulgarity" expressed by Levy was also a criticism of the school and cheerleading team. This criticism regarded the rules of a community which Brandi Levy belonged to. Such criticism is exactly the type of speech that the Framers of the Constitution sought to protect through the establishment of the First Amendment. The Constitution of the United States of America guarantees the freedom of expression by inhibiting Congress from "abridging the freedom of speech."[11] However, the right to free speech is not absolute, and there is no national consensus as to the original intent of the Framers of the Constitution regarding the First Amendment at the time it was written. According to Bradley (2014), four reoccurring policies exist to justify protection of the freedom of speech. First Amendment jurisprudence emphasizes that free speech is required for self-governance, necessary for the discovery of truth, imperative for shaping the intellectuality of society, and essential for preserving individual autonomy. While most forms of speech receive protection under the First Amendment, there are certain circumstances upon which the government may constitutionally restrict speech (Ruane 2014).

[11] U.S. Const. Amend. I.

Examples of categories of speech that are unprotected by the First Amendment include but are not limited to obscenity and speech that contains "fighting words" or incites harm.[12] Free speech is one of the most important rights granted by the U.S. Constitution, yet the judicial system has made it clear that those rights are not absolute.

Brandi Levy's words, while vulgar, are not outside of the protection of the First Amendment because they are not fighting words and they are not obscene. In *Chaplinsky v. New Hampshire* (1942)[13], Walter Chaplinsky was passing out literature about his beliefs as a Jehovah's witness when he attacked other religions by calling the town marshal "a God-damned racketeer" and "a damned Facist." The Supreme Court upheld Chaplinksy's conviction and held that "fighting words" are outside of the protection of the First Amendment. The Supreme Court defined "fighting words" as words which "by their very utterance, inflict injury or tend to incite an immediate breach of peace" and went on to state that "it has been well observed that such utterances are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[13]

It is clear that Brandi Levy's speech on social media did not inflict any injury beyond a few upset cheerleaders. There was not an immediate breach of peace as the speech did not cause any substantial disruption or disorder to the work of the school or the cheerleading program. Levy's words did not incite violence. In fact, Brandi Levy's speech gave Mahanoy Area High School an opportunity to exercise its interests as a "nursery of democracy" through protection of unpopular speech.[1] Thus, the interest in protecting Levy's speech outweighs the regulation of it.

Furthermore, Brandi Levy's speech would have been undoubtedly protected if she was an

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[12] Ruane, Kathleen A. 2014. "Freedom of Speech and Press: Exceptions to the First Amendment." *Congressional Research Service.*

[13] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

adult according to *Snyder v. Phelps* (2011).[14] *Snyder*[14] established that the First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate." The ruling in *Snyder*[14] supports the notion that Levy's off-campus words cannot be regulated simply because they are vulgar. Therefore, since Levy's speech was not obscene, did not amount to fighting words, constituted a form of criticism, never specifically mentioned the school or administrators, and took place off-campus on her own time, the interest of the school in *Mahanoy*[1] to teach appropriate manners and prohibit vulgarity is diminished.

b. Preventing Disruption Within a School-sponsored Activity

The school's interest in preventing disruption, if not within the classroom then within an extracurricular activity, is also weak. The majority opinion in *Mahanoy*[1] declared that there is no evidence of "substantial disruption of a school activity or a threatened harm to the rights of others that might justify the school's action." Brandi Levy's Snapchats were only discussed for five to ten minutes in class for a couple days and some of the cheerleaders at the school were upset about the matter. One of Levy's coaches even stated that she possessed no reason to think that "this particular incident would disrupt class or school activities other than the fact that kids asked about it."[6] There is no evidence to suggest that Brandi Levy's speech created a disruption within the school or within the cheerleading team to the extent that the regulation of her speech should outweigh her constitutional right as a student to express criticism of her community.

Morse v. Fredrick (2007)[15] is another example of a landmark exception to the *Tinker*[2] standard. *Morse*[15] regulated speech that incites illegal drug usage. In *Morse*[15], students held up a banner that read "Bong Hits 4 Jesus" at an off-campus, school-sponsored activity. The principal viewed the banner as promoting illegal drug abuse. The Court weighed the interests of the school

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[14] *Snyder v. Phelps,* 562 U.S. 443 (2011).
[15] *Morse v. Fredrick,* 551 U.S. 393 (2007).

system to decrease illegal drug abuse against the interest of the students to exercise the First Amendment right to free speech. Despite the fact that the speech took place off-campus, the Supreme Court granted the school authority over the speech because it occurred during school hours at a school-sanctioned event. Brandi Levy's speech can be distinguished from the speech in *Morse*[15] because her speech took place off-campus through social media on her own time. Levy's speech did not take place at a school-sponsored activity. Although her speech regarded a school-sponsored activity, she never explicitly mentioned the name of the school, the team, or any of the individuals involved in the matter.

Further, the *Mahanoy*[1] Court referenced the "substantial burden test" from *Tinker*[2] to declare that Brandi Levy's unpopular viewpoint could not be suppressed unless it caused more than the discomfort that accompanies every unpopular viewpoint. A few minutes of discussion in a class and a couple upset cheerleaders is not sufficient evidence to justify the suppression of Brandi Levy's personal viewpoint. Therefore, Levy's speech did not meet the *Tinker*[2] standard and the interest of the school to prevent disruption within a school-sponsored activity is also diminished.

c. Protecting Team Morale

The last interest of Mahanoy Area High School concerning team morale is equally unconvincing. There is no evidence in the case suggesting a serious decline in the cheer team morale to the extent that it would cause a substantial disruption or to the extent that Brandi Levy's free speech rights should be revoked. The majority opinion in *Tinker*[2] mentioned that "undifferentiated fear or apprehension...is not enough to overcome the right to freedom of expression." It is imperative to protect speech, even speech that appears to be an abuse of privilege. In a dissenting opinion, Justice Holmes infamously stated, "sometimes it is necessary

to protect the superfluous in order to preserve the necessary."[16] An infamous quote by English Writer, Evelyn Beatrice Hall, embodies the idea of protecting the superfluous by stating, "I disapprove of what you say, but I will defend to the death your right to say it." By favoring one viewpoint at the expense of another, the court is engaging in "viewpoint discrimination", which is an egregious form of content discrimination.[10] Thus, the United States Supreme Court has engendered a clear distinction separating restrictions of speech that are content-based from those that are content-neutral. As a result, the government cannot suppress the marketplace of ideas by regulating speech based on content.

VI. Content-based Speech vs. Content-neutral Speech

In cases involving content-based speech, the Supreme Court utilizes a strict scrutiny test, which only upholds a content-based restriction if it is essential "to promote a compelling interest" and is the "least restrictive means to further the interest."[17] Wherein the government limits non-content-based speech, the Supreme Court applies an intermediate scrutiny that appears to be less than the high level of "strict scrutiny." In cases addressing non-content-based restrictions, governmental interest must be "significant," "substantial," or "important." Note that governmental interest in these cases does not have to be "compelling" as do content-based restrictions.[12] Furthermore, non-content-based restrictions must be narrowly tailored, but they are not necessarily obliged to be the "least restrictive means to advance the governmental interest."[12]

In *Mahanoy*[1], Brandi Levy's speech cannot be restricted based on content because restricting her speech is not essential to promote a compelling interest and it is not the least restrictive means to further the interest. It has already been established that Brandi Levy's speech did not cause a substantial disruption within Mahanoy Area High School. As a result, it is not

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[16] *Tyson & Brother v. Banton*, 273 U.S. 418 (1927).
[17] *Stable Communications of California, Inc. v. Federal Communications Commission,* 492 U.S. 115 (1989).

essential for the Mahanoy Area School District to suppress Brandi Levy's speech based on content (profanity). It follows that Mahanoy Area School District can promote their interests in maintaining an environment that is conducive to the pedagogical goals of Mahanoy Area High School without restricting Levy's criticism. Additionally, restricting Brandi Levy's speech is not the "least restrictive means" to advance the interests of the school district. The school district should advance their interests through educational platforms and seminars dedicated to educating students about proper social media usage, rather than suppressing a form of criticism that took place off-campus through the suspension of a student.

The restriction of Brandi Levy's speech is not content-neutral because the school administrators suspended her primarily on the grounds that her speech utilized profanity in connection with the school. Rather, the suppression of Brandi Levy's speech on the basis of content does not withstand the strict scrutiny test. Since there is no nation-wide uniformity regarding the constitutional rights belonging to students off-campus or on social media, varying tests, such as the strict scrutiny test, have been applied to student speech rights over time.

VII. Federal Appellate Court Approaches to Regulating Off-Campus Student Speech

The lack of consistency among federal appellate courts, which vary in their approach to off-campus student speech cases, means that the geographical location of the students involved often determines whether or not the speech is protected. This is problematic because a certain expression of student speech could potentially receive protection in one circuit or district court but that same expression may not receive protection in another. Courts disagree as to whether the protection of the First Amendment extends to off-campus speech in circumstances where the student's interests outweigh the interests of the school.

Some courts rely on the substantial disruption standard set forth by *Tinker*[2] while other courts apply their own variations to the *Tinker*[2] doctrine. Technological advancement has further complicated the inconsistent application of *Tinker*[2] to off-campus student speech cases because the Supreme Court has not provided clarity to specify the explicit rights held by students on social media applications such as Snapchat, Instagram, and Twitter. This section will explore the different approaches practiced by varying federal appellate courts in order to establish the necessity for all lower courts to adopt the approach of the Third Circuit Court. Through an adoption of the two-pronged approach set forth by the Third Circuit, courts will be limited in their ability to constitutionally restrict student off-campus social media posts. This limitation is a direct result of the three features of off-campus speech presented by *Mahanoy.*[1]

a. *Reasonable Foreseeability*

The addition of reasonable foreseeability doctrine to the substantial disruption standard is a common approach to the regulation of off-campus student speech. In 2007, the Second Circuit Court established this approach in *Wisniewski v. Board of Education of the Weedsport Central School District* (2007).[18] This new threshold has led the court to examine whether it is "reasonably foreseeable" that the student's speech will reach school grounds. In *Wisniewski*[18]*,* a student was disciplined for posting on his social media that a teacher should be shot and murdered. *Wisniewski*[18] held that student speech may be regulated in instances when off-campus speech engenders a foreseeable risk of substantial disruption within a school. In 2008, the Second Circuit again relied on the reasonable foreseeability threshold of *Wisniewski*[18] to decide the outcome of *Doninger v. Niehoff.* [19] In *Doninger*[19], the Second Circuit Court ruled that a student could be reprimanded for composing a blog post outside of school hours that attacked the

[18] *Wisniewski v. Board of Education of the Weedsport Central School District,* 494 F.3d (3d Cir. 2007).

[19] *Doninger v. Niehoff, 527 F.3d* (2d Cir. 2008).

school administration because it was reasonably foreseeable that the speech of the student would reach and disrupt the school.

The approach of the Seventh Circuit mirrors the "reasonably foreseeable" threshold incorporated by the Second Circuit in addition to the *Tinker*[2] test. The Seventh Circuit Court first applied this threshold in *Scoville v. Board of Education of Joliet Township* (1970)[20] to decide if a student who composed off-campus newspapers criticizing the policies of the school could be constitutionally disciplined. The Seventh Circuit Court sided with the student, arguing that it was not reasonably foreseeable to conclude that the newspaper would cause a substantial disruption within the school.[20] In 1998, the Seventh Circuit inversely suppressed the rights of a student to write a negative off-campus newspaper about the school because reasonable foreseeability existed to suggest that the newspaper would compel material and substantial disruption within the school.[21]

The approach of the Fifth Circuit Court has changed over time, slowly shifting towards the usage of the reasonable foreseeability doctrine. The Fifth Circuit Court initially applied *Tinker*[2] to off-campus student speech cases until 2001 when the court deviated from its prior application of *Tinker*[2] to accommodate the facts presented in *Porter v. Ascension Parish School Board* (2001).[22] Preceding *Porter*[22], the Fifth Circuit analyzed the discipline of students who were suspended for the distribution of an off-campus newspaper. The court relied on *Tinker*[2] to hold that the circumstances did not warrant the discipline of the students in *Shanley v. Northeast Independent School District* (1972).[23] Online speech was not addressed by the Fifth Circuit until the advent of *Bell v. Itawamba County School Board* (2015).[24] The majority opinion in *Bell*[24]

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[20] *Scoville v. Board of Education of Joliet Township,* 425 F.2d (7th Cir. 1970).
[21] *Boucher v. School Board of the School District of Greenfield* 134 F.3d (7th Cir. 1998).
[22] *Porter v. Ascension Parish School Board,* 393 F.3d (5th Cir. 2001).
[23] *Shanley v. Northeast Independent School District,* 462 F.2d (5th Cir. 1972).
[24] *Bell v. Itawamba County School Board,* 799 F.2d (5th Cir. 2015).

ruled that the discipline of online, off-campus student speech in this instance was constitutional because there was reasonable foreseeability that the speech would substantially disrupt the school environment. The Fifth Circuit diverged from *Tinker*[2] and shifted towards reasonable foreseeability through case-by-case evaluation of the facts presented.

b. Sufficient Nexus Test + Reasonable Foreseeability

The unique threshold implemented and exercised by the Fourth Circuit Court was originally articulated in *Hazelwood School District v. Kuhlmeier* (1988).[25] In *Kuhlmeier*[25], the Supreme Court addressed the censorship of student newspaper articles containing inappropriate content and controversial topics. The Supreme Court ruled in favor of the school district, holding that the schools can constitutionally regulate the content of a school-sponsored publication if the school's actions are "reasonably related to legitimate pedagogical concerns."[25]

Furthermore, the Court gave schools permission to censor speech in cases where it is reasonably inferred that the public would view the speech as a product of the school as "school-sponsored speech."[25] Moreover, the Court asserted that the First Amendment rights of students are not analogous to the First Amendment rights of adults, while emphasizing that students are typically minors with less constitutional protection. It is imperative to note Justice Brennan's dissent, which advanced the notion that by allowing a category of school censorship, the majority opinion generated "heightened scrutiny for one category of speech but not another."[25]

While *Kuhlmeier*[25] addressed speech in the form of a school-sponsored newspaper, *Kowalski v. Berkeley County Schools* (2011)[26] referenced speech in the form of a social media post. The Fourth Circuit utilized the "sufficient nexus test" in *Kowalski*[26] to determine whether

[25] *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988).
[26] *Kowalski v. Berkeley County Schools,* 652 F.3d (4th Cir. 2011).

the off-campus conduct was sufficiently connected to the didactic interests of the school. *Kowalski*[26] involved a student who started a social media page to post mean comments about a classmate. The Fourth Circuit relied on the *Tinker*[2] substantial disruption standard as well as the doctrine of reasonable foreseeability to implement the "sufficient nexus test". The Fourth Circuit Court determined in *Kowalski*[26] that the nexus bridging the off-campus conduct and the school's interests was sufficiently strong because the student possessed reasonable foreseeability that the speech would reach the school.

c. True Threat Doctrine + Reasonable Foreseeability

Another common approach to off-campus speech is the application of the "true threat" doctrine. The Eighth Circuit Court has demonstrated an approach akin to the Second and Seventh Circuits, while also adopting the "true threat" doctrine. In *D.J.M. v. Hannibal Public School District No. 60* (2011)[27], the Eighth Circuit ruled against the free speech interests of a student who sent electronic messages threatening to shoot other students at school. The court held that the statements of the student produced reasonable foreseeability that the speech would substantially disrupt the school. Moreover, the court specified that the speech was not protected by the "true threat" doctrine or the *Tinker*[2] standard by noting that "a reasonable recipient would have interpreted [them] as a serious expression of an intent to harm or cause injury to another."[27]

The Eighth Circuit extended the same line of reasoning in *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District* (2011)[28] to uphold the suspension of students who published an online blog containing offensive and degrading comments about other classmates. Interestingly, the Eighth Circuit Court noted that the location of the speech was irrelevant because the speech was likely to cause a substantial disruption to the school.[28]

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[27] *D.J.M. v. Hannibal Public School District No. 60,* 647 F.3d (8th Cir. 2011).
[28] *S.J.W. ex rel. Wilson v. Lee's Summit R-7 School District,* 696 F.3d (8th Cir. 2011).

The Eleventh Circuit Court also applied the "true threat" doctrine to the *Tinker*[2] substantial disruption standard in *Boim v. Fulton County School District* (2007).[29] *Boim*[29] involved the expulsion of a student who possessed a notebook entry written off-campus that explained a dream where the student shot a teacher at the school. Even though the entry took place off of school property, the Eleventh Circuit upheld the expulsion of the student on the basis of the "true threat" doctrine and *Tinker*[2] test. *Boim*[29] did not clarify whether or not the *Tinker*[2] standard and "true threat" doctrine could apply to off-campus, online speech. The Second Circuit Court also alluded to the principles of the "true threat" doctrine by invalidating it in *Wisniewski.*[18]

d. Identifiable Threat of Violence

The line of constitutional off-campus, free speech precedent established by the Ninth Circuit Court is unique. The Ninth Circuit declared in *LaVine v. Blaine School District* (2001)[30] that schools may regulate off-campus speech in accordance with the guidance provided by *Tinker*[2]. Although, another case called *Wynar v. Douglas County School District* (2013)[31] countered that *Tinker*[2] only applies to off-campus speech that incites an "identifiable threat of school violence." The Ninth Circuit emphasized the school's interest in safety to classify a student's instant messages sent to other classmates as an "identifiable threat of school violence" because they threatened a school shooting.

e. Intent of the Student + Reasonable Foreseeability

The Third Circuit Court utilizes a two-pronged approach to off-campus student speech in relation to the doctrine set forth by *Tinker.*[2] The first prong relies upon the doctrine of reasonable foreseeability and the second prong addresses the intent of the student. For example, in *J.S. ex*

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[29] *Boim v. Fulton County School District,* 494 F.3d (11th Cir. 2007).
[30] *LaVine v. Blaine School District,* 257 F.3d (9th Cir. 2001).
[31] *Wynar v. Douglas County School District,* 729 F.3d (9th Cir. 2013).

rel. Snyder v. Blue Mountain School District (2011)[32] a student was suspended for criticizing the school principal on a fake social media account that he made. In contrast to the Second Circuit, the Third Circuit Court determined reasonably foreseeability in light of the student's original intent. Since the student did not intend for his speech to reach the school, the Third Circuit Court concluded that it was not reasonably foreseeable that the speech would create substantial disruption to the school environment.[32]

The Third Circuit Court similarly held in *Layshock ex rel. Layshock v. Hermitage School District* (2011)[33] that the school administration could not regulate student speech that took place outside of school hours and had no intention for the speech to substantially disrupt the school. *Layshock*[33] also involved a student who created a social media account that criticized the school principal. Furthermore, the Third Circuit Court exhibited a more conservative nature to student speech regulation and explicitly advised that schools may only constitutionally discipline off-campus speech under "very limited circumstances".

VIII. The Argument for the Two-Pronged Approach of the Third Circuit Federal Appellate Court

It is evident that the reasonable foreseeability doctrine is an important part of the two-pronged approach of the Third Circuit Court utilized to analyze and regulate off-campus speech. However, the Second, Seventh, and Eighth Circuit Courts apply this doctrine without acknowledgement of the intent of the speaker, which is problematic for a few reasons. First, the reasonable foreseeability doctrine by itself is too broad.

Consider the decision in *Doninger v. Niehoff* .[19] Recall that the student in *Doninger*[19] was disciplined for composing a blog post that attacked school administrators and urged peers to

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[32] *J.S. ex rel. Snyder v. Blue Mountain School District,* 650 F.3d (3rd Cir. 2011).
[33] *Layshock ex rel. Layshock v. Hermitage School District ,* 650 F.3d (3rd Cir. 2011).

harass the administrators. While the doctrine resulted in the proper outcome in this case through a foreseeable disruption to the school, the doctrine did not go far enough to define the content within its intended scope. Imagine if a student wrote a post speaking out against the morality of abortion and encouraged other students to speak out in the same way. The school in this case could ban this speech by referencing the precedent of *Doninger*[19] to conclude that there was reasonable foreseeability that the speech would cause a substantial disruption to the school. However, political speech is an important type of speech that has traditionally been protected. The isolated usage of the reasonable foreseeability doctrine is flawed precisely because it does not define the type of speech that one could reasonably foresee as causing a substantial disruption (Schroff 2020). As a result, it limits more speech than what is necessary to achieve the interests of schools.

Second, the reasonable foreseeability doctrine alone gives school administrators an excess of subjective discretion because what is foreseeable to one school administrator may not be foreseeable to another.[3] For example, in *S.J.W. ex rel. Wilson*[28] two students were suspended because they designed a website with racist and sexual content regarding other students at their school. Since the website contained a foreign domain, United States citizens could not find the website through a simple online search. Only if a person knew the exact domain address, then they could access the website. Even though only a few students were aware that the website existed, the Eighth Circuit Court decided that it was reasonably foreseeable that "any online speech pertaining to a student, teacher, or anything in relation to the school will reach school grounds."[28] The discretion granted to the school administrators in *S.J.W. ex rel. Wilson*[28] through a broad application of the reasonable foreseeability doctrine alone is excessive. This amount of

discretion compromises the protection granted by the First Amendment by greatly limiting the free speech rights of students on all social media platforms, including the internet.

Lastly, the reasonable foreseeability doctrine does not alone and in itself provide sufficient protection for online speech because any type of online speech could inevitably end up on school grounds due to the expansiveness of the internet.[3] It follows that spoken or written speech is afforded more protection than online speech, including speech occurring through social media, because the internet is so vast.

The “sufficient nexus test”, which has only been adopted by the Fourth Circuit Court, is also not a sufficient substitution for the Third Circuit’s intent requirement. Although it is not as broad as the doctrine of reasonable foreseeability, the sufficient nexus threshold is still too broad and does not define the extent to which the interests of the school warrant the discipline of off-campus, online speech.[3] The sufficient nexus threshold equips schools with the power to justify the suppression of student speech by allowing them to propose any interest that encourages learning and protects the safety of the students (Schroff 2020). For example, the school administrators justified suspension of a student social media account in *Kowalski*[26] by claiming an interest in the health and safety of students facing cyberbullying. Through this threshold, school administrators can choose any vague interest to justify the restriction of student speech. Additionally, there is no specific guidance to suggest what types of conduct can be restricted by the sufficient nexus threshold. This lack of guidance will create an inconsistent application of the threshold and contribute to the already existing disarray of student free speech jurisprudence.

The “identifiable threat of violence” test engendered by the Ninth Circuit Court affords more protection for student speech and limits the authority of school administrators. However,

the court does not explicitly define "violence". In *Wynar*[31], this test applies to the threat of a school shooting, suggesting that "violence" refers to physical violence. What about cyber bullying? This test fails to determine whether or not the "violence" can be mental, such as the harm incurred by cyberbullying. Since this is a content-based restriction, it requires strict scrutiny. When students are disciplined for speech on social media containing an "identifiable threat of violence", this discipline must achieve a compelling interest. Violence is a compelling interest, however the Ninth Circuit Court never defined the boundaries of identifiable threats of violence. Thus, this test is also not the most preferable approach to solving off-campus student speech cases.

Similar to the identifiable threat of violence threshold, the "true threat" doctrine reduces the ability of school administrators to regulate student speech on social media. In *Emmett v. Kent School District* (2000)[34], a student was expelled for producing a website containing mock obituaries for other students. Emmett[34] argued that students should only be punished for off-campus speech that incites a "true threat". The Court held that the speech in *Emmett* did not constitute a true threat. While the Court ambiguously maintained that speech amounting to a "true threat" is outside of the protection of the First Amendment, the Court did not explicitly define which speech is considered "true threat". In 2003, Justice O'Connor interpreted "true threat" speech as "threatening violence to a particular individual or group."[35] In his dissent of *Elonis v. United States* (2015)[36], Justice Alito defined "true threat" as a statement expressing "an intention to inflict evil, injury, or damage on another."[36] According to Justice Alito's interpretation, one must knowingly communicate a plan to inflict harm upon others for the speech to constitute a "true threat" (Weeks 2012).

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[34] *Emmett v. Kent School District,* 92 F.2d (2d Cir. 2000).
[35] *Virginia v. Black,* 538 U.S. 343 (2003).
[36] *Elonis v. United States,* 575 U.S.__ (2015).

The "true threat" doctrine is problematic for the same reasons that the "identifiable threat of violence" test is problematic. The failure to define a universal definition of what constitutes a "true threat" creates too much room for subjectivity. One administrator may perceive a certain expression of speech as a "true threat" while another administrator may not perceive that same expression as a 'true threat".

As a result of these flawed approaches, the most reasonable approach to regulating off-campus student speech is the inseparable two-pronged approach of the Third Circuit Court. By enforcing both the reasonable foreseeability threshold and evaluating the intent of the student, the Third Circuit Court adequately protects the free speech rights of students in a digital age. It has already been established that the reasonable foreseeability threshold alone is too broad, grants school administrators too much subjective discretion, and does not sufficiently protect free speech. However, the addition of the element of intent to the application of the reasonable foreseeability threshold sufficiently protects free speech and reduces the discretion of school administrators. This two-pronged approach compels the court to consider whether it is reasonably foreseeable that the speech will reach school grounds and cause a substantial disruption by examining whether the student intended for the speech to make it to the school grounds and whether the student intended for the content of the speech to be taken seriously (Sheridan 2015). Thus, to satisfy the requirement of intent, schools must prove that the student intended for his or her speech to reach the school. It is unlikely that a student would admit that his or her speech was intended to reach school grounds, which is why the evidence must suggest the intent of the student in most cases. Without clear evidence of an intent to disrupt the school, school administrators are limited in their ability to suppress off-campus speech in the form of social media. For example, the speech in the aforementioned case of *S.J.W. ex rel. Wilson*[28]

concluded that it was reasonably foreseeable that the content of the website would reach the school grounds due to the vastness of the internet. However, this speech would have been protected under the consideration of the student's intent since the student took numerous precautions to ensure the privacy of the website. These precautions are evidence to suggest that the student did not intend for the speech to reach the school.

This evidentiary standard produced by the precursor of intent contradicts the leeway given to school administrators through the reasonable foreseeability threshold. As a result, intent and reasonable foreseeability together create a balance that "allows students to speak on social media platforms about controversial topics without fear of being punished, so long as the speaker does not intend for the speech to cause a substantial disruption in school" (Ferry 2019). The formerly mentioned "three general features of off-campus speech" developed in *Mahanoy*[1] reflect the constitutionality of off-campus student speech in the form of social media in most circumstances. Since schools typically do not stand *in loco parentis* in regard to off-campus social media posts composed by students, regulating off-campus speech includes the full 24 hour day, and schools have an interest in protecting unpopular expression, off-campus student social media posts should be protected by the First Amendment. However, it is clear that school administrators also possess regulatory interests, such as maintaining their educational goals and preventing bullying. Thus, the exception to this First Amendment protection should be speech that does not withstand the two-pronged approach of the Third Circuit Court. Only if there is evidence to prove that the intent of the student is for his or her speech to reach the school and there is reasonable foreseeability to suggest that the speech will create a substantial disruption within the school, then the speech should be regulated. This approach should be applied universally to every lower court in an effort to end the inconsistent application of the *Tinker*[2]

doctrine until the Supreme Court grants *certiorari* to a subsequent case to clearly define the boundaries of on and off campus speech as it pertains to social media.

XII. The Duty of Schools to Educate Students on Proper Social Media Usage

In *Mahanoy Area School District v. B.L.*[1], the interest of the school to prohibit vulgarity was considerably weakened because Mahanoy Area High School did not make any effort to prevent vulgarity on behalf of the students prior to Brandi Levy's off-campus Snapchat post. Since American schools are the "nurseries of democracy"[1] and possess an interest in protecting the marketplace of ideas within the education system, schools also have a duty to educate students on proper media usage. It is imperative for schools to host seminars, speakers, and interventions dedicated to fostering an environment in which students can exercise their First Amendment right to the freedom of speech on social media without fear of punishment. Schools should not restrict the free speech rights of their students without first making a genuine effort to educate them. Schools should educate students on proper social media usage by teaching them which forms of speech are usually not protected by the Constitution, such as "fighting words" and obscenity. Students should be aware of the rights they hold as American citizens, although schools have a duty to instruct students that their rights are limited within the schoolhouse gates. When schools provide transparent guidance to students regarding their rights on social media, students are more aware of what they can and cannot post. Furthermore, if a student does post something contentious on social media despite educational seminars or interventions at school, the school has leverage to argue that the student was aware of his or her legal rights at the time that the post was concepted.

XIII. Conclusion

The ability of American students to express popular and unpopular speech alike through social media applications is unprecedented. Although the Framers of the Constitution established the First Amendment right to free speech, constitutional jurisprudence has limited the extension of this right to students in public schools. As a result, students generally retain greater protection of the right to free speech outside of the schoolhouse gate. The ruling in *Mahanoy v. B.L.* (2021)[1] exemplified the role of social media as a form of constitutionally protected off-campus student speech in a digital age. The ruling in *Mahanoy*[1] is significant because the Court provided three general features of off-campus speech, which suggest that off-campus social media posts are a constitutionally protected form of student speech in most circumstances. Since schools generally do not stand *in loco parentis* in regard to off-campus social media posts, speech includes the full 24 hour day, and schools have an interest in protecting unpopular expression, the interests of the students generally outweigh the interests held by schools. While schools do possess certain regulatory interests, they usually do not hold jurisdiction over off-campus social media posts composed by students.

While the Court in *Mahanoy*[1] provided these features of off-campus speech, the Supreme Court failed to specify the classifications of on and off campus speech with regard to social media and the internet. The lack of explicit guidance from the Supreme Court will allow district and federal appellate courts to continue implementing a wide array of approaches in an effort to solve off-campus student speech questions. The inseparable, two-pronged approach of the Third Circuit Court should be adopted by all lower courts in effort to establish uniformity until the Supreme Court grants certiorari to a subsequent student free speech case. The two-prong approach of reasonable foreseeability and intent of the speaker adequately protects student

speech and grants schools administrators an avenue for regulating student speech in certain circumstances. Furthermore, schools have a right and a duty to educate students on proper social media usage. Social media education on behalf of the school administrators will encourage students to exercise the First Amendment right to the freedom of speech on social media in accordance with the interests of schools to maintain an environment that is conducive to education.

Mahanoy Area School District v. B.L. (2021)[1] will serve as precedent for the next generation of student free speech cases seeking to expand or limit the rights held by students on social media. While the Court in *Mahanoy*[1] left some questions unanswered, it is likely that the language of the Court will be re-used in subsequent cases to defend the constitutional rights held by students off-campus. *Mahanoy Area School District v. B.L.* (2021)[1] is an important win for student free speech in the United States that will continue to shape the role and development of social media as a constitutionally protected form of off-campus student speech for many years.

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