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How a high school cheerleader's Snapchat could inform DoD social media policy

Matt Fitzgerald

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On June 25, 2007, the Supreme Court held that public school administrators could limit students' speech, even if made off-campus, when that speech could reasonably be understood as advocating for illegal drug use.[1] At the same time, the Court acknowledged "uncertainty at the outer boundaries" of student speech, whether geographic or otherwise.[2]

Four days later, Apple released the original iPhone.[3] The advent and widespread distribution of smart phones, coupled with a commensurate rise in digital social media, fundamentally altered interhuman communication.[4] Although several Article III courts subsequently explored and shaped the contours for students' speech rights against the backdrop of modern digital social media,[5] the Supreme Court took up the issue, for the first time, in 2021.

Mahanoy v. B.L. revolves around a student's single outburst on the mobile app Snapchat: "Fuck school fuck softball fuck cheer fuck everything."[6] When a fellow student viewed the message and showed her mother, who happened to be a cheerleading coach, B.L. received a year-long suspension from the cheer team. B.L. brought, suit alleging a violation of her right to freedom of expression. Now, the Supreme Court is set to reconsider how public school administrators may limit their students' off-campus speech. It will do so based on communications that took place entirely through social media, on a weekend, without the use of school resources, and against a backdrop of ubiquitous digital social media.

Like high school students, the vast majority of service members use at least one digital social medium. The Constitutional limits to the scope and reach of the Uniform Code of Military Justice (UCMJ) and other policies governing service members' speech differ from those affecting students, but rest on similar underlying justifications.[7]

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[1] *Morse v. Frederick*, 551 U.S. 393 (2007).
[2] *Morse v. Frederick*, 551 U.S. 393, 401 (2007).
[3] Peter Cohen, *Apple Updates iTunes for the iPhone*, PCWorld (June 29, 2007), https://www.pcworld.com/article/133590/article.html.
[4] *See e.g.* Monica Anderson & Jingjing Jiang, *Teens, friendships and online groups*, Pew Research Center, (Nov. 28, 2018), https://www.pewresearch.org/internet/2018/11/28/teens-friendships-and-online-groups/.
[5] *See e.g. Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379 (5th Cir. 2015) (*en banc*); *Munroe v. Cent. Bucks Sch. Dist.*, 805 F.3d 454 (3d Cir. 2015); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, (3d Cir. 2011) (*en banc*); *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) (*en banc*).
[6] *B.L. v. Mahanoy Area Sch. Dist.*, 376 F. Supp. 3d 429 (M.D. Pa. 2019).
[7] *Compare Brown v. Glines*, 444 U.S. 348, 354 ("the special character of the military requires civilian authorities to accord military commanders some flexibility in dealing with matters that affect internal discipline and morale"); *Solorio v. United States*, 483 U.S. 435, 439-41 (1987); and *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991) ("Military necessity, including the fundamental necessity for discipline, can be a compelling government interest warranting the limitation of the right of freedom of speech") *with Morse v. Frederick*, 551 U.S. 393, 412 (2007) (Thomas, J., concurring) (justifying diminished or non-existent student speech rights where, historically, "Teachers did not rely solely on the power of ideas to persuade; they relied on discipline to maintain order"); *Tinker et al. v. Des Moines*

Regardless of reasoning and purported scope, the Supreme Court's eventual holding in *B.L.* will identify, or at least signal the Court's position on how social media might enable or preclude a speaker from operating within a siloed identity. This will have a ripple effect, potentially including the scope of military commanders' authority over subordinates' social media activities.[8]

Speech, students, and soldiers.

The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech."[9] As a general rule, this means that the government "has no power to restrict expression because of its message, its ideas, its subject matter, or its content."[10] Moreover, government-imposed prior restraints on speech warrant a "heavy presumption against [their] constitutional validity."[11] Against this backdrop, the Supreme Court has identified modern digital social media as a "quintessential" public forum,[12] "the most important [forum] for exchange of views."[13]

Despite the First Amendment's liberal thrust in safeguarding freedom of expression, several groups relinquish some rights in light of their position in society.[14] For example, students at public schools may face regulation to the extent that their expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[15] This "substantial disruption" test originates from *Tinker et al. v. Des Moines Independent Community School District et al.*, but myriad progeny have upheld the notion that a student's on-campus speech warrants less-than-full First Amendment protection.[16]

Independent Community School District et al., 393 U.S. at 505-06 (noting public schools' "special characteristics[,]" such as the need for discipline in the operation of the school, that create allow for diminished First Amendment protections therein).

[8] Petitioner in *B.L.* has already acknowledged a desire for this formulation to flow in reverse, identifying ways in which the military is a "closely related context" to schools and arguing that reasoning governing deference to military should convey to Respondent's conduct. Brief for Petitioner at 23-25, *Mahanoy Area Sch. Dist. v. B.L.*, No. 20-255 (U.S. Feb. 22, 2021) [Hereinafter Petitioner's Brief].

[9] U.S. CONST. AM. I.

[10] *United States v. Stevens*, 559 U.S. 460, 468 (2010) (internal quotation marks omitted).

[11] *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (internal quotation marks omitted).

[12] *Carey v. Brown*, 447 U.S. 455, 461 (1980).

[13] *Packingham v. North Carolina*, 137 S. Ct. 1730, 1735 (2017); *see also Reno v. American Civil Liberties Union*, 521 U.S. 844, 868 (1997) (recognizing, twenty years prior to *Packingham*, the "vast democratic forums of the Internet").

[14] These groups include, among others, students, *Tinker et al. v. Des Moines Independent Community School District et al.*, 393 U.S. 503 (1969); incarcerated persons, *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1997) and *Thornburgh v. Abbott*, 490 U.S. 401 (1989); government employees unless speaking as citizens on matters of public concern, *Garcetti v. Ceballos*, 547 U.S. 410 (2006); and members of the military, *Parker v. Levy*, 417 U.S. 733, 758 (1974).

[15] *Tinker et al. v. Des Moines Independent Community School District et al.*, 393 U.S. 503, 513 (1969).

[16] 393 U.S. 503 (1969); *see e.g. Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (upholding a school principal's editorial control over student articles in a school newspaper); *Dariano v. Morgan Hill Unified School District*, 767 F.3d (9th Cir. 2014) (*reh'g denied*) (upholding a school official's direction that students conceal or remove American flag t-shirts during a Cinco de Mayo celebration); *see also Morse v. Frederick*, 551 U.S. 393 (2007) (holding a student's suspension constitutional where that student erected

Like students in public schools, members of the military enjoy diminished protections under the First Amendment relative to their civilian counterparts.[17] Indeed, the Supreme Court has recognized

> [w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for *obedience*, and the consequent necessity for imposition of *discipline*, may render permissible within the military that which would be constitutionally impermissible outside it.[18]

Military courts have also applied a permissive lens to commanders' authority, upholding restrictions that meet the threshold of "military necessities," such as good order and discipline.[19] Stated differently, service members' free speech rights "must be brought into balance with the paramount consideration of providing an effective fighting force for the defense of our Country."[20] In most instances, courts have afforded deference to the military commander seeking to impose restrictions.[21]

Consider, as an additional example, Article 134, Uniform Code of Military Justice. This provision criminalizes "disorders and neglects to the prejudice of good order and discipline in the armed forces" and "all conduct of a nature to bring discredit upon the armed forces[.]"[22] The exorbitant breadth of the latter clause facially includes conduct which might be considered expressive, invites viewpoint discrimination, and yet has been upheld where the prosecution demonstrates a " 'reasonably direct and palpable' connection between an appellant's statements and the military mission."[23] Article 134

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a "BONG HiTS 4 JESUS" banner at an event that was off-campus but within eyeshot of the school and attended by many students).

[17] Consider that the Uniform Code of Military Justice purports to apply to all federalized service members "in all places." 10 U.S.C. §§ 802, 805; *see Solorio v. United States*, 435 U.S. 435-36 (1987); *but see Larrabee v. Braithwaite*, No. 19-654-RJL (D.D.C.); *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008).

[18] *Parker v. Levy*, 417 U.S. 733, 758 (1974) (italics added).

[19] *United States v. Wilson*, 33 M.J. 797, 799 (A.C.M.R. 1991) ("Military necessity, including the fundamental necessity for discipline, can be a compelling government interest warranting the limitation of the right of freedom of speech."); *see e.g., United States v. McFarlin,* 19 M.J. 790 (A.C.M.R.1985), *pet. denied,* 20 M.J. 314 (C.M.A.1985) (government's interest in preventing unprofessional fraternization justifies incursion into privacy right).

[20] *United States v. Zimmerman*, 43 M.J. 782, 785 (A.C.C.A. 1996) (citing *United States v. Priest*, 45 C.M.R. 338 (CMA 1972)).

[21] For a useful primer, see VanLandingham, Rachel, The First Amendment in Camouflage: Rethinking Why We Criminalize Military Speech (February 20, 2018). Ohio State Law Journal, Forthcoming, Southwestern Law School Research Paper No. 2018-02, Available at SSRN: https://ssrn.com/abstract=3155459.

[22] 10 U.S.C.A. § 934.

[23] *United States v. Wilcox*, 66 M.J. 442, 448 (C.A.A.F. 2008) (quoting *United States v. Priest*, 45 C.M.R. 338, 342 (1972)); *see also U.S. v. Brown,* 45 M.J. 389, 396 (C.A.A.F. 1996) ("[O]ur national reluctance to inhibit free expression dictates that the connection between statements or publications involved and their effect on military discipline be closely examined." (internal quotations omitted).

may be "unique" in nature,[24] but this opportunity to narrow by application also serves as a unique slight on the rights of servicemembers, as in other contexts the Court has stated that it "would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[25]

Although the jurisprudential landscapes that control public school students' and service members' speech differ in fact patterns and deference afforded, they rest on similar reasoning and justification. Student speech may be restrained where schools can show a "reasonable forecast of substantial disruption,"[26] that off-campus activity has a reasonably predictable "impact on the classroom environment,"[27] and where speech-chilling rules are "reasonably related to legitimate pedagogical concerns."[28] These justification map closely with the military's fundamental need to maintain obedience, order, and discipline. However, both *Tinker* and *Levy* predated widespread use of digital social media, which tends to obfuscate boundaries between private and professional spheres.

How *B.L.* might affect the military.

B.L. involves a public high school student who received a suspension from the school's cheerleading team following an expressive outburst, through a self-destructing medium (Snapchat), made off campus, and on a weekend. Although both parties frame the case in terms of student speech, it will be difficult for the Court to reach a coherent ruling without incidentally displacing a more reverberating issue: what factors influence when a private citizen's social media activity may be imputed to other, less-protected domains of that person's life?

Petitioner Mahanoy Area School District contends that the military is a "closely related context" to that of student speech regulation.[29] The school district also asks the Court to consider an exception for "pernicious" or harassing speech— a common rule in military domains for which there is, at most, a circuit split in school contexts.[30] Outside of military and student contexts, courts have often applied the balancing test elucidated in *U.S. v. Pickering* to align speech with a speaker's identity. However, for the military, as for the school context, the Court has avoided *Pickering* balancing in favor of domain-specific analyses.[31]

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[24] The Court of Appeals for the Armed Forces has embraced the "unique nature" of Article 134, justified by "the interests it seeks to protect." *United States v. Rapert*, 75 M.J. 164, 165 (C.A.A.F. 2016).
[25] *United States v. Stevens*, 559 U.S. 460, 480 (2010); *Cf. Whitman v. American Trucking Assns.*, Inc*.,* 531 U.S. 457, 473 (2001).
[26] *Melton v. Young* 465 F. 2d 1332 (6th Cir. 1972).
[27] *Bell v. Itawamba Cnty. Sch. Bd.*, 799 F.3d 379, at 400 (5th Cir. 2015).
[28] 484 U.S. 273.
[29] Petitioner's Brief at 25.
[30] Petitioner's Brief at 37; *see e.g.* U.S. ARMY, ARMY REGULATION 600-20, ARMY COMMAND POLICY (2014).
[31] *See* Linda Sugin, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855 (1987), https://ir.lawnet.fordham.edu/faculty_scholarship/803.

At a minimum, the Court must determine if *Tinker*'s standard applies to expressive content shared on social media from an off-campus location outside of school hours. If the Court applies *Tinker* under these circumstances, the ruling will tend to maintain the status quo ante, in which expression on social media that crosses domains may be imputed to a speaker's less-protected status, such as that of a student or service member. However, it will also provide judicial imprimatur to the idea that social media not only obscures barriers between one domains of a person's life, it tends to obliterate them.[32]

The easier, and perhaps most likely position for the Court to take would be to hold that *Tinker*'s envisioning of a "schoolhouse gate" does not extend to *B.L.*'s specific and narrow facts.[33] The Court could highlight the off-campus nature of the speech, the time during which it occurred, the lack of preservation intended by the speaker, and the desire to avoid equating a "heckler's veto" to legally-significant disruption of a learning environment.[34] A holding to this effect would reinforce the notion that a student or service member might effectively segregate their private from their professional persona for purpose of disciplinary codes.

Regardless of which direction the Court gravitates, *B.L*. will be hard to cabin to its facts, because its fact pattern is ubiquitous. This case stands to inform military leaders and lawyers alike. For the former, today's high school students are tomorrow's recruits. Their actions, values, and preferred communications media will shape the future of the nation's fighting force. For the latter, the Court's treatment of social media, whether as a controllable tool subject to siloed speech, or Pandora's box of responsibility, will shape the future of regulations governing that speech.

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[32] *See* Matthew Fitzgerald, *Thank Me for My Service: An Ethics Oversight in Department of Defense Social Media Policy*, HARV. NAT'L SEC. J. ONLNE (Mar. 2, 2021), https://harvardnsj.org/wp-content/uploads/sites/13/2021/03/Fitzgerald_Thank-Me-for-My-Service.pdf.

[33] *Tinker et al. v. Des Moines Independent Community School District et al.*, 393 U.S. 503 (1969).

[34] A "heckler's veto" arises when an *anticipated* or *forecasted* reaction gives rise to sanction, rather than a tangible and realized direct effect. *See Dariano v. Morgan Hill Unified School District*, 767 F.3d at 766–67 (9th Cir. 2014), *cert. denied*, (O'Scannlain, J., *dissenting from denial of rehearing en banc*).