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HEY! TEACHER, LEAVE THEM KIDS ALONE: EXPLORING THE REGULATION OF STUDENT SPEECH MADE OUTSIDE OF SCHOOL ON SOCIAL NETWORK SITES

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INTRODUCTION

Social network sites (SNSs) have become more and more popular, and studies estimated that there were approximately 350 million active users on Facebook at the end of 2009. Facebook allows students to stay in contact with each other and gives them the ability to talk in a social setting when they otherwise lack the ability to talk face-to-face. SNSs are a way for

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1 Pink Floyd, Another Brick in the Wall, Part II (Columbia Records 1979) (quotation marks omitted).


3 SNSs like Facebook and MySpace allow users to create a profile to share information about themselves with friends, family, or people they invite to view their profile. Facebook,
people to quickly share information about themselves. These sites are also important outlets for members to socialize with friends.

There are two important cases in the Third Circuit that explored off-campus student speech on SNSs: *Layshock v. Hermitage School District* and *J.S. v. Blue Mountain School District*. Despite having substantially the same underlying facts, including the schools’ imposed punishments, the court initially decided the cases in two different ways. The Third Circuit vacated both opinions and re-heard them en banc. On re-hearing, the Third Circuit unified their opinion in *Layshock* with their previous *J.S.* opinion when it decided that the students’ First Amendment rights were violated when the school punished them for their speech made outside school grounds on MySpace.

The court in *J.S.* and *Layshock* was always consistent in ruling that the parents’ due process rights to regulate and punish their children were not violated by the school’s disciplinary measures. For the protection of First Amendment rights of SNS material created outside schools, parents are in the best position to regulate their children, not the schools or courts. There is some tension between the school acting *in loco parentis* and the parent’s right to parent. Students should have the same free speech rights as every other citizen. However, in


5 See *id.*

6 593 F.3d 249 (3d Cir. 2010).

7 593 F.3d 286 (3d Cir. 2010).

8 See *infra* Subsection I.C.2.

9 *Layshock*, 593 F.3d at 249 (stating that rehearing en banc was granted April 9, 2010); *see also* Martha McCarthy, *Cyberspeech Controversies in the Third Circuit*, 258 W. EDUC. Law REP. 1, 10 (2010).


11 *Layshock*, 593 F.3d at 264; *J.S.*, 593 F.3d at 304-05.

12 See *infra* Section II.B.

13 *Id.*
the unique school environment, the right to free speech needs to be balanced with the school’s ability to foster a safe atmosphere for its students.15 The school should not regulate student speech on SNSs, but instead the parents should control student speech on SNSs when the speech is created off campus.16 This Note will show the best way to ensure that these two goals are met is for the school to allow student speech on SNSs unless such speech constitutes a substantial threat to the security of other students or the school itself, and to allow parental discipline for speech created on an SNS, unless permission is given for school disciplinary actions, when that speech is primarily created off campus.

Part I of this Note explores the first issue with student speech on an SNS: whether the school may restrict student speech when it is made on an SNS outside of school? Part I will explain what an SNS is and how these sites are used, and will explore the history of student speech in case law. This Part will also advocate the position that the Court needs to place more importance on student speech rights and only allow restriction of the speech when it constitutes a substantial threat. Part II explores the other issue with student speech on an SNS: who is in the best position to regulate a student’s speech when it is created off school grounds? This Part will provide a history of how the Court has traditionally viewed the parent’s role in educational decisions. It will also advocate for schools to take a more hands-off approach to student speech on SNSs and instead reserve punishment of the speech for the parents when the majority of the student’s speech was created off campus.

14 See infra Subsection I.C.1.
15 See infra Section I.G.
16 See infra Section II.B.
I. SCHOOL V. STUDENTS

Student speech is not a new issue. The courts in the United States have made many decisions regarding student speech over the last fifty years.\textsuperscript{17} However, the way student speech is disseminated has changed greatly from the Court’s first significant student speech decision to the lower courts’ more recent decisions. Since SNSs are significantly different from past methods of speech, it is important to explore how the Court’s tests for the regulation of student speech should change to meet the unique challenges that speech on SNSs present. In order to analyze the more recent decisions and explore what tests would be better, it is important to have a general understanding of what SNSs involve.

A. Purpose of Social Network Sites

SNSs are defined as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system.”\textsuperscript{18} These sites are truly unique in that the users are not communicating with strangers, but are communicating with people who are part of their real-world social network.\textsuperscript{19} The sites are set up as egocentric networks by placing the user in charge of his or her social community.\textsuperscript{20} People that use these sites are able to talk and engage with friends even

\textsuperscript{17} See infra Section I.C.
\textsuperscript{18} Danah M. Boyd & Nichole B. Ellison, Social Network Sites: Definition, History, and Scholarship, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2007), available at http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html. Additionally, Boyd and Ellison point out that:
[they] use the term ‘social network site’ to describe this phenomenon, the term ‘social networking sites’ also appears in public discourse, and the two terms are often used interchangeably. [They] chose not to employ the term ‘networking’ for two reasons: emphasis and scope. ‘Networking’ emphasizes relationship initiation, often between strangers. While networking is possible on these sites, it is not the primary practice on many of them.
\textit{Id.}
\textsuperscript{19} \textit{Id.}
\textsuperscript{20} \textit{Id.} at 219.
when they are unable to gather face-to-face. Online interaction allows an individual to keep in contact with a wider range of his or her extended social network, and not just the people they interact with on a day-to-day basis.

The National School Boards Association conducted a study that found ninety-six percent of students that have access to the Internet have reported that they use some kind of social network technology. Additionally, of those students that use social network technologies, fifty-nine percent of them report using SNSs to talk about education topics, with more than fifty percent of the use being directly related to schoolwork. SNSs are still being explored as educational assets, and many are skeptical of the technology’s value in education. However, “only a minority of students has had any kind of negative experience with social networking.” Most of these negative experiences are similar to those you would find with any other type of media that the student would use or view. SNSs are still relatively new technologies with the first known site to have launched in 1997, which makes such media prime for First Amendment analysis.

B. The Rule

The First Amendment says “Congress shall make no law... abridging the freedom of speech.” The Framers enacted this Amendment in order to ensure that the people were placed in a role of greater importance than that of its rulers. The importance of the Amendment’s

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21 Id. at 221.
22 Id.
24 Id.
25 Id. at 6-7.
26 Id. at 5.
27 Id.
28 Boyd, supra note 18, at 214.
29 U.S. CONST. amend. I.
30 JEROME A. BARRON & C. THOMAS DIENES, FIRST AMENDMENT IN A NUTSHELL 5 (4th ed. 2008) (citing ZECHARIAH CHAFFEE, FREE SPEECH IN THE UNITED STATES 2 (1941)).
ratification was to ensure that there was another limit on congressional powers.\textsuperscript{31} The freedom of speech was placed in the First Amendment of the Bill of Rights, which should indicate the significance some of the Framers placed on this freedom.\textsuperscript{32}

The basis for the freedom of speech came from the trial of John Peter Zenger, conducted in 1735.\textsuperscript{33} Zenger published articles in the \textit{Weekly Journal} that were critical of the governing policies of then New York governor William Cosby.\textsuperscript{34} Cosby threatened Zenger with a libel suit and with threats of burning his press so he could no longer publish articles, but finally brought a sedition charge against him.\textsuperscript{35} Zenger was tried and acquitted by a jury, which indicated that a free and unfettered press was an important right.\textsuperscript{36} The Zenger trial began the entrenchment of free speech values in American society, and the rule became a freedom of speech without restrictions.\textsuperscript{37} However, the rule did not stay this way for long, and Congress created exceptions in their laws and the Court created exceptions in its decisions.\textsuperscript{38} In the context of student speech, the Court’s first exception to the freedom of speech was made in \textit{Tinker v. Des Moines Independent Community School District}.\textsuperscript{39}

C. The Exceptions

There are exceptions to most rules. The rule, free speech for all citizens, is written into the Constitution, which is interpreted by the courts.\textsuperscript{40} The exceptions to the free speech rule are found in the courts’ opinions. The courts have found a specific exception to freedom of speech

\begin{itemize}
  \item \textsuperscript{31} Id. at 5.
  \item Id.
  \item Id.
  \item Id.
  \item See id.
  \item ACLU, supra note 36.
  \item 393 U.S. 503 (1969).
  \item See supra Section I.B.
\end{itemize}
for students because the function of schools is so important. The following cases explain the free speech exception and show its evolution through time.

1. *The Supreme Court*

In the Court’s first case, *Tinker*, students wore black armbands to school to protest the Vietnam War. The school learned that the students were planning on wearing the armbands and adopted a policy to suspend any student that refused to remove the armband. Two high school students and a junior high school student came to school wearing the armbands, refused to remove them, and were suspended until they agreed to come back without the armbands. Their fathers sued the school on their behalf over the suspension.

The Court decided that a school could not ban student speech simply because the school had a desire to avoid the discomfort of the students voicing their unorthodox opinions. The schools may regulate student speech only if the school could establish facts that would substantially disrupt or material interference with a school’s activities. Famously, the Court stated, “[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.”

In *Bethel School District v. Fraser*, decided about twenty years after *Tinker*, a high school senior gave a sexually graphic and offensive speech at a school assembly nominating a candidate for student elective office. Students whose ages ranged from fourteen to eighteen

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41 See discussion infra Subsection I.C.1.
42 *Tinker*, 393 U.S. at 504.
43 Id.
44 Id.
45 Id.
46 Id. at 509.
47 Id. at 514.
48 Id. at 506.
49 478 U.S. 675, 677-78 (1986). The content of the speech was: "I know a man who is firm-he's firm in his pants, he's firm in his shirt, his character is firm-but most...of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack
attended the speech, which caused many different reactions. Some students caused a disturbance with their reaction, while others were embarrassed and puzzled. This caused one teacher, the next day, to forgo her lesson to talk about the speech.

The Court decided that it is appropriate for schools to restrict their students from using vulgar or offensive terms. Further, the Court distinguished students from adults by stating that a public school presents a different setting for language than those that are frequented by adults. The Court concluded that the First Amendment does not keep school officials from regulating speech they determine is vulgar and lewd speech because such speech would undermine the school’s educational operations. The Court’s conclusion, though it may seem inconsistent with Tinker, is actually in line with the substantial disruption test. The Fraser decision started to move the substantial disruption test towards a more content-based inquiry, where the court gave the school more discretion.

In Hazelwood School District v. Kuhlmeier, decided just two years after Fraser, the school principal pulled two student articles from the school newspaper. The articles were about three students’ experiences with pregnancy and the impact of divorce on a student. Because the students were easily identified in the articles, the principal refused to approve

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Id. at 687 (Brennan, J., concurring) (quoting Fraser’s original speech).

50 Id. at 678.
51 Id.
52 Id. at 683.
53 Id. at 682.
54 Id. at 685.
55 Barron, supra note 30, at 312-13; see also James E. Ryan, The Supreme Court and Public Schools, 86 Va. L. Rev. 1335, 1357 (2000) (asserting that there was a connection between Fraser’s speech and the school, which is in line with Tinker’s substantial disruption test).
56 Barron, supra note 30, at 313-14.
58 Id.
publishing the articles. The principal made the decision to pull the articles because he believed that there was no time to change the article before the paper went to publication. Participation on the school newspaper was considered a school activity, because the school board funded the creation of the paper and the students received class credit for it.

The Court held that the Tinker standard was not appropriate because the intention for the standard was for regulating independent student expression, and in this case the newspaper was a school-funded activity, which the school had a right to regulate. Additionally, as long as the regulation of student expression was related to legitimate pedagogical concerns, the Court determined that the school may exert editorial control of the content and style of a student’s speech if it is done within school-sponsored activities. This case further shows the eroding of the Tinker standard by giving schools even more discretion to decide to punish a student for their speech when it is contrary to what the school believes proper speech should be.

The Supreme Court’s most recent school-speech case, Morse v. Frederick, dealt with speech made outside the boundaries of the school’s campus. During a school-supervised event, a student, Frederick, unrolled a banner that stated, “BONG Hits 4 JESUS.” The principal asked Frederick to take down the banner, and he refused. The principal confiscated the banner and suspended Frederick. The Court decided that the school could restrict Frederick’s free speech because schools do not have to tolerate speech that advocated the use of illegal drugs to

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59 Id. at 262-63.
60 Id. at 263-64.
61 Id. at 262-63.
62 Id. at 272-73.
63 Id. at 273.
64 Barron, supra note 30, at 317.
65 551 U.S. 393 (2007). Though the event did occur off school grounds, across the street, the Court still considered it to be in-school speech since it was a school-sponsored event. Id. at 400-01.
66 Id. at 397.
67 Id. at 398.
68 Id.
other students.\textsuperscript{69} The Court further claimed that the school had a compelling interest in deterring its students from advocating for or using drugs.\textsuperscript{70} This case severely undermines the \textit{Tinker} standard and further expands giving schools discretion for punishing student speech schools do not agree with.\textsuperscript{71}

2. \textit{Third Circuit}

The \textit{Layshock} and \textit{J.S.} decisions are some of the first to explore students’ rights in the context of SNSs.\textsuperscript{72} \textit{Layshock} involved a high school senior, Justin Layshock, who created a MySpace profile impersonating his principal while he was at his grandmother’s home — off school grounds.\textsuperscript{73} The profile made fun of the principal and alluded to him using drugs and engaging in sexual activity.\textsuperscript{74} Layshock invited friends to view the profile, and showed the profile to other students at school, but did not acknowledge that he had created it.\textsuperscript{75} School administrators eventually restricted access to MySpace during school hours, and Layshock was afforded an informal disciplinary hearing.\textsuperscript{76} He was found guilty of creating the offensive profile and causing a class disruption, and was given a ten-day out-of-school suspension.\textsuperscript{77} He was also

\begin{itemize}
\item \textit{Id.} at 410.
\item \textit{Id.} at 407 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).
\item McCarthy, \textit{supra} note 9, at 10.
\item Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 252 (3d Cir. 2010).
\item Id. at 252-53.
\item Id. at 253.
\item Id. at 253-54.
\item Id. at 254. The class disruption came from accessing the profile twice during the school day and showing it to other students. \textit{Id.} at 253. The offensiveness of the profile was contained in a question and answer section called “tell me about yourself.” \textit{Id.} at 252. Layshock answered the questions as follows:
\begin{itemize}
\item Birthday: too drunk to remember
\item Are you a health freak: big steroid freak
\item In the past month have you smoked: big blunt
\item In the past month have you been on pills: big pills
\item In the past month have you gone Skinny Dipping: big lake, not big dick
\item In the past month have you Stolen Anything: big keg
\item Ever been drunk: big number of times
\end{itemize}
\end{itemize}
put in an Alternative Education Program for the rest of the school year, banned from all extracurricular activities, and forbidden to participate in his graduation ceremony. The Third Circuit agreed with the district court, and held that Layshock’s speech on the MySpace profile did not cause a substantial disruption to the school environment. The court did not rule out future regulation of online speech, and stated that there could be circumstances where schools could punish online speech. However, the court failed to outline these circumstances in its opinion.

The second case, J.S., involved a fourteen year old girl who created a MySpace profile impersonating her principal, which contained sexually explicit content and alluded to pedophilia by the principal. The profile was originally public, but she set it private and invited twenty-two other students to view it. The students could not view the profile at school because the school

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Ever been called a Tease: big whore
Even been Beaten up: big fag
Ever Shoplifted: big bag of kmart
Number of Drugs I have taken: big

Under ‘Interests,’ Justin listed: ‘Transgender, Appreciators of Alcoholic Beverages.’

Id. at 252-53.

78 Id. at 254.
80 Id. at 263.
81 J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 291 (3d Cir. 2010). The offensive content of J.S.’s profile was contained in the “Interests” and “About me” sections on MySpace, and read as follows: General detention. being a tight ass. riding the fraintrain. spending time with my child (who looks like a gorilla). baseball. my golden pen. fucking in my office. hitting on students and their parents. . . . HELLO CHILDREN yes. it’s your oh so wonderful, hairy, expressionless, sex addict, fagass, put on this world with a small dick PRINCIPAL I have come to myspace so i can pervert the minds of other principal’s to be just like me. I know, I know, you’re all thrilled Another reason I came to my space is because-I am keeping an eye on you students (who i care for so much) For those who want to be my friend, and aren’t in my school I love children, sex (any kind), dogs, long walks on the beach, tv, being a dick head, and last but not least my darling wife who looks like a man (who satisfies my needs) MY FRAINTRAIN.

Id.

82 Id. at 292. SNSs such as MySpace or Facebook offer their users the ability to restrict the content that other users see on their profiles. FACEBOOK, http://www.facebook.com/privacy/explanation.php (last visited Jan. 19, 2011); see also How do I Control my Privacy on MySpace, MYSPACE, http://www.myspace.com/help (last visited Feb. 24, 2011) (describing how change a profile’s privacy settings on MySpace). Most of the time, if you are invited by a person to be their “friend” you are able to view that persons profile if it is set to private. Id. Some users
blocked access to MySpace on school computers; however, students were able to access the site from their home computers.\textsuperscript{83} J.S. was given a ten-day out-of-school suspension, and was prohibited to attend any school functions during that time.\textsuperscript{84} The Third Circuit concluded that even though the Constitution gives J.S. freedom of speech, the speech she placed on the MySpace page went so beyond criticism, or protected speech, that it became unprotected speech because of its vulgar and offensive nature.\textsuperscript{85} The court also expanded the reach of \textit{Tinker} to off-campus speech that had the potential to substantially disrupt the school environment.\textsuperscript{86}

While the MySpace profile pages in \textit{Layshock} and \textit{J.S.} were substantially similar, there were a few differences.\textsuperscript{87} There was a difference in the age of the students; J.S. was fourteen years old and in middle school while Justin Layshock was seventeen years old and a senior in high school.\textsuperscript{88} The content of J.S.’s posting contained references to the principal as a pedophile and hitting on students, while Layshock’s posting contained references to the principal using drugs and abusing alcohol as well as referencing the size of the principal’s penis.\textsuperscript{89} Finally, the punishment given to Layshock was much harsher than the punishment the school district gave to J.S.\textsuperscript{90}

The Third Circuit in its en banc opinion looked at two key issues.\textsuperscript{91} The first issue it dealt with was that there was not a sufficient nexus between the speech and the school to bring it

\begin{footnotesize}
83 J.S., 693 F.3d at 292.
84 Id.
85 Id. at 308.
86 Id. at 307.
87 McCarthy, \textit{supra} note 9, at 10-11.
88 Id.
89 Id.
90 Id.
91 Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 205 (3d Cir. 2011).
\end{footnotesize}
within the district’s authority to regulate.\textsuperscript{92} The second issue was that the school could not punish the speech simple because it was about the school.\textsuperscript{93} The court stated that “[its] willingness to defer to the schoolmaster’s expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate,” and it concluded that Layshock’s speech was beyond the schoolhouse gate.\textsuperscript{94}

3. \textit{Other Lower Court Decisions}

Decisions by U.S. district courts and state Supreme Courts are also important in predicting the direction the law is heading. On a local level, these cases are good law since the U.S. Supreme Court has not issued a decision on the regulation of student speech on SNSs. These cases create local precedent that schools may look at to determine if they are acting constitutionally.\textsuperscript{95}

A case heard by the Pennsylvania Supreme Court, \textit{J.S. v. Bethlehem Area School District}, involved a middle school student who created a website in which he expressed a desire to kill his math teacher, and even solicited funds for a hit man.\textsuperscript{96} Multiple students accessed the website at the school.\textsuperscript{97} The court, applying \textit{Tinker}, concluded that there was an actual and substantial disruption to the school day and that the speech was threatening and should not be accorded First Amendment protection.\textsuperscript{98} The standard for threatening speech is an objective standard, in which a threat would be one that a speaker would reasonably foresee that his or her listener would interpret, reasonably, as an intention to inflict harm.\textsuperscript{99} Since the court determined the speech was

\begin{itemize}
\item \textsuperscript{92} Id. at 214-15.
\item \textsuperscript{93} Id. at 216.
\item \textsuperscript{94} Id. at 219 (quoting Thomas v. Bd of Ed., Granville Central Sch. Dist., 607 F.2d 1043, 1045 (1979)).
\item \textsuperscript{95} McCarthy, supra note 9, at 10.
\item \textsuperscript{96} 807 A.2d 847, 851 (Pa. 2002).
\item \textsuperscript{97} Id. at 851-52.
\item \textsuperscript{98} Id. at 869.
\item \textsuperscript{99} Id. at 858.
\end{itemize}
both disruptive and threatening, it upheld the school’s disciplinary action of suspending the student.

In Coy v. Board of Education of the North Canton City Schools, a case from the United States District Court for the Northern District of Ohio, a middle school student created a website at home that contained offensive material pertaining to a skate boarding group called NBP.\textsuperscript{100} The website contained pictures of Coy and his friends, with insulting sentences below each of the photos.\textsuperscript{101} One of the sentences contained references to one of the boys being sexually aroused by his mother, and a couple of the pictures were of the boys flicking off the camera.\textsuperscript{102} However, none of this content reached the meaning of obscene as outlined by Ohio statute.\textsuperscript{103} He was suspended for violating the student code of conduct.\textsuperscript{104} The court ruled that the speech on the website failed to meet the Tinker standards of a substantial and material interference with the operation of the school.\textsuperscript{105} Therefore, the school was violating his First Amendment rights when it suspended him.\textsuperscript{106}

In a case from the United States District Court for the Eastern District of Missouri, Mardis v. Hannibal Public School District, a sophomore in high school was instant messaging at home with a friend when he threatened to kill another student.\textsuperscript{107} The court concluded that the First Amendment does not protect true threats, and therefore the school did not violate his rights when they suspended him.\textsuperscript{108} “[The] plaintiff would like to characterize the forwarding of his statements to other students and school administrators as unforeseen, accidental or unintended,

\textsuperscript{100} 205 F. Supp. 2d 791, 795 (N.D. Ohio 2002).
\textsuperscript{101} Id.
\textsuperscript{102} Id.
\textsuperscript{103} Id. (referring to OHIO REV. CODE § 2907.01 (2002)).
\textsuperscript{104} Id. at 796.
\textsuperscript{105} Id. at 801.
\textsuperscript{106} Id.
\textsuperscript{107} 684 F. Supp. 2d 1114, 1116 (E.D. Mo. 2010).
\textsuperscript{108} Id. at 1119.
the Court notes that in this digital age, a reasonable person could foresee the transmittal of Internet communications.”

Finally, a United States District Court for the Central Division of California case, *J.C. v. Beverly Hills Unified School District*, involved a video on YouTube posted by a high school student, which described a fellow classmate as a slut, spoiled, and “the ugliest person I’ve ever seen in my whole life.” She contacted other students at the school to view the video in their homes. Students at the school could not access YouTube because it was blocked on the school computers. The court held that the speech was brought to campus because the issue was raised to the administration, the subject of the video involved students in the school, and her father viewed the video on campus; therefore, the school had the ability to regulate the speech. However, the court held the speech did not substantially disrupt school activity, so the school did violate J.C.’s First Amendment rights when it punished her for the YouTube video. The court seemed to indicate if the school can demonstrate that the student had a history of disruptions, the school may be able to preemptively restrict a student from making or disseminating that speech on school grounds.

D. Deciding Current Student Speech Issues

Lower courts have applied the substantial disruption test to off-campus speech to justify regulating the speech, but the meaning of substantial is used in a much broader context in order

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109 *Id.* at 1120.
110 2010 WL 1914215 at *1-2 (C.D. Cal. 2010) (“YouTube is a publicly-available website where persons can post video clips for viewing by the general public.”).
111 *Id.*
112 *Id.* at *3.
113 *Id.* at *11-*12.
114 *Id.* at *15.
115 *Id.* at *20.
to make the courts’ decisions fit. Minor disruptions to the school day are being classified as substantial, which considerably undermines the use of Tinker’s substantial disruption test. These vague interpretations have a “chilling” effect on the ability of students to speak freely outside the confines of the school walls, and would allow for the school to regulate off-campus speech.

Some scholars argue that the Tinker test may be applied to off-campus speech because certain speech made off campus may constitute a disruption to students or teachers, which has the potential to teach uncivilized behavior. Mary A. Lentz posits that a school has a need to teach students what behavior is appropriate and what behavior is inappropriate. Lentz suggests that civility and respect are important lessons for teachers to teach without disruption, and the way this may be accomplished is by restricting the use of vulgar or obscene language from being disseminated in the school environment. She additionally outlines that schools have the right to regulate certain speech even if it was not a substantial disruption to the schools because of pedagogical concerns. Schools may make certain rules about what may be said within the walls of the school, as long as these rules are not overbroad or misunderstood.

116 Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 VA. L. REV. 139, 171-72 (2003); *see also* Bystrom v. Fridley High Sch., 686 F. Supp. 1387, 1390 (D. Minn. 1987) (holding that there was a substantial disruption when a teacher had to leave for the day and the speech caused minor classroom distractions); Beussink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (holding that there was a substantial disruption when a website was viewed in the classroom setting).
118 *Id*. at 174.
120 *Id*.
121 *Id*.
123 *Id*.
mission of schools is to teach their students and only in a highly regulated environment are they able to do so.\textsuperscript{124}

These concerns are understandable, however, as there are other ways to curb misconduct and potentially harmful speech than by restricting the students’ First Amendment rights.\textsuperscript{125} There are tort actions for damages such as defamation or slander that may be brought against a person engaging in harmful conduct or speech.\textsuperscript{126} Equitable relief in the form of injunctions or declaratory judgments may also be sought to regulate student misconduct.\textsuperscript{127} Restricting the speech of a student should only be used as a last resort. The restriction on the freedom of speech can be viewed as a slippery slope.\textsuperscript{128} Once the school is given the right to restrict some student speech that has occurred on an SNS outside the school walls, there is a danger that soon students will have a very limited freedom of speech.\textsuperscript{129}

1. \textit{Resolution of the Student Speech Issue by the Supreme Court}

As technology integrates more and more into our society, students are beginning to access and use new media to communicate.\textsuperscript{130} This integration leaves unanswered questions in the law about the potential regulation of the media and who is in the best position to supervise the behavior of those using these new forms of communication.\textsuperscript{131} If students truly have the right to free speech, then regulation of that speech may only be restricted by certain limited exceptions.\textsuperscript{132}
The Court should balance upholding the students’ free speech right as citizens with the schools’ need to protect their students and themselves from disruption and harm.\(^{133}\) The Court has not yet dealt with speech on new media, like SNSs or blogs, as most of cases on student speech have been in the form of traditional media such as, paper, words, and symbols.\(^ {134}\) So, “it seems assured that the Supreme Court eventually will have to deliver an opinion regarding the public school’s authority to punish students for their off-campus electronic expression.”\(^ {135}\)

The Supreme Court may have its first chance to hear the student speech on SNSs issue through the cases in the Third Circuit.\(^ {136}\) Though the final decisions in *Layshock* and *J.S.* are only applicable to the jurisdiction of the Third Circuit, the decision could have a great persuasive effect on other jurisdictions’ student speech cases.\(^ {137}\) Thus, it is probable that the en banc opinion may be the first SNS student speech case to reach the Supreme Court.

2. *How Morse Has Changed the Question of Student Speech*

There are inferences in the *Morse* opinion that the Court has not had its final say on the issue of student speech.\(^ {138}\) In his concurrence, Justice Thomas stated that he wants to overturn the *Tinker* standard because the substantial disruption test had no constitutional basis.\(^ {139}\) The majority opinion in *Morse*, written by Justice Roberts and joined by Justices Scalia, Kennedy, and Alito, seemed to indicate that these justices are willing to accept restrictions of student

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\(^{134}\) McCarthy, *supra* note 9, at 10.

\(^{135}\) *Id.* at 14.


\(^{138}\) McCarthy, *supra* note 9, at 14.

speech by schools based on the content of the speech.\textsuperscript{140} Justices Ginsberg and Breyer do not favor content-based restrictions for student speech, and still advocate for using the substantial disruption test as set forth in \textit{Tinker}.\textsuperscript{141} However, the \textit{Tinker} standard should not and was never meant to apply to off-campus speech, e.g., the type of speech published by a student on an SNS.\textsuperscript{142} Thus, there is still some uncertainty as to how the current Court would decide the issue of schools restricting student speech made on an SNS. To speculate how the Court may decide on the regulation of student speech on SNSs, it is important to look at its most recent student speech case, \textit{Morse v. Fredrick}.\textsuperscript{143} The \textit{Morse} Court indicated its lack of deference to the \textit{Tinker} standard.\textsuperscript{144} However, the continual patchwork interpretation of \textit{Tinker} leaves questions unanswered as to when students have a right to free speech and when they do not. As Justice Thomas put it: “[O]ur jurisprudence now says that students have a right to speak in schools except when they don’t — a standard continuously developed through litigation against local schools and their administrators.”\textsuperscript{145} It has, in the past, been the Supreme Court’s position that while values are important free speech is more important and should not be restricted based on the content of the speech, unless the speech falls within a specifically protected right.\textsuperscript{146} The \textit{Morse} Court turned the idea of deregulating content-based speech on its head.\textsuperscript{147}

\textsuperscript{140} \textit{Id.} at 409-10 (majority opinion) (arguing that schools should not have to tolerate speech advocating drug use).
\textsuperscript{141} \textit{Id.} at 436 (Stevens, J., dissenting). Additionally, Justices Sotomayor and Kagan have not decided this issue.
\textsuperscript{142} Tuneski, \textit{supra} note 116, at 140.
\textsuperscript{143} \textit{See supra} Subsection I.C.1.
\textsuperscript{144} \textit{Morse}, 551 U.S. at 410 (Thomas, J., concurring) (advocating for the overturning of \textit{Tinker}); \textit{see also id.} at 405 (majority opinion) (“[T]he mode of analysis set forth in \textit{Tinker} is not absolute.”).
\textsuperscript{145} \textit{Id.} at 418 (Thomas, J., concurring).
\textsuperscript{146} \textit{Tinker} v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969); Nairn, \textit{supra} note 71, at 246-47.
\textsuperscript{147} \textit{See} Nairn, \textit{supra} note 71, at 246.
The Morse decision currently causes confusion over what speech is still free speech for students.148 The Court granted the school a substantially greater ability to regulate student speech, and said speech promoting the use of illegal drugs was inappropriate for school.149 The Court limited its decision to just speech that promotes drug use, but seemed to imply that content-based speech restriction based on other conduct that a school deems inappropriate may be okay.150 Curbing drug use can hardly be used to squash the student’s rights as a citizen of the United States even though it may be an important school objective.151 In fact, as Justice Stevens stated in his dissent in Morse, “punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid.”152 In Morse, it is unclear that the banner was actually provoking students to use drugs.153 It cannot be adequately argued that upon seeing the sign, students were sufficiently enticed to go out and do bong hits.154

Furthermore, the Court leaves the door wide open for lower courts to decide what other content based speech may be restricted.155 The Court also failed to clarify what counts as a school activity in order to consider speech sufficiently disruptive enough to regulate it.156 This creates ambiguity of what disruptive speech is in an off campus context, and especially in an online context, and a restriction by the school of off-campus speech may violate a student’s constitutional right to free speech.157

148 Schiffhauer, supra note Error! Bookmark not defined., at 749.
149 Morse, 551 U.S. at 410.
150 Nairn, supra note 71, at 252.
151 Morse, 551 U.S. at 434 (Stevens, J., dissenting).
152 Id., at 436.
153 Id. at 434-35.
154 Id. at 444.
155 Nairn, supra note 71, at 252.
156 Morse, 551 U.S. at 401.
E. Scholarly Tests

There are five theories or tests that scholars have advocated for the Court to use when deciding current student speech issues when the speech is made off campus, all of which fall short. The first is the relational approach.\textsuperscript{158} This test calls for the court to determine what relationship the student had to the speech; whether the student was speaking as a citizen or student.\textsuperscript{159} The relational test looks to the relationship between the student and the school when determining if the school may regulate the student’s conduct.\textsuperscript{160} If the student was speaking as a student, then the school may regulate the speech, if the student was speaking as a citizen, it would be unconstitutional for the school to regulate the speech.\textsuperscript{161} In theory, the relational approach would work to protect the student’s speech outside of school.\textsuperscript{162} The relational approach avoids geographic distinction (e.g. on- or off-campus speech), it supports the socialization of student by protecting their speech, and it would place boundaries on the school to only act if the student is in the role of a student.\textsuperscript{163}

The second is the personal jurisdiction test.\textsuperscript{164} The personal jurisdiction test determines whether the school can regulate the speech if the student passes the “minimum contacts test” of personal jurisdiction found in civil procedure jurisprudence.\textsuperscript{165} This premise looks at the location and intent of the student.\textsuperscript{166} The strongest case for school regulation is if the student is on campus and using the school’s computers to create or make the speech.\textsuperscript{167} If the student’s

\textsuperscript{158} Heidlage, supra note 71, at 594.
\textsuperscript{159} Id. at 575.
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id. at 594.
\textsuperscript{163} Id. at 595.
\textsuperscript{164} Kyle W. Brenton, Bonghits4Jesus.com? Scrutinizing Public School Authority Over Student Cyberspeech Through the Lens of Personal Jurisdiction, 92 MINN. L. REV. 1206, 1209 (2008).
\textsuperscript{165} Id. at 1234.
\textsuperscript{166} Id. at 1234-37.
\textsuperscript{167} Id. at 1234.
speech is made strictly off-campus, the court still needs to determine if the student “purposefully availed herself [or himself] of the school environment.” Additionally, if the student has not used the school’s equipment to view or make the speech, an invasion of the school environment may still occur if there was intent by the student to cause harm within or to the school.

The third approach, deference to state law, gives schools the right to regulate student speech and determine what kind of speech is protected and is not protected. The regulation is left in the hands of the school to set the standards for what speech it may be punished. The court would be given very little discretion under this test, and would defer any restrictions on student speech to the schools. The school would have the power to decide what speech is protected and unprotected under the First Amendment.

The fourth test looks at traditional speech restriction tests. It advocates the use of the Holmes and Hand speech tests to apply to student speech, giving broader freedom to student speech. These tests are the “clear and present danger” test and the “express advocacy” test. The Holmes theory requires that the speech is only to be regulated if it presents a “clear and present danger” to the educational system. These approaches would require the court to look at the intent or consequences of the student’s speech and, depending on which the courts prefer, advocate using a more subjective or objective test. The author suggests that the “clear and present danger” test is a more appropriate approach.

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168 Id. at 1234-35.
169 Id. at 1237.
171 Id. at 899.
172 Id. at 899-900.
173 Id. at 900.
175 Id.
176 Id. at 1312, 1314.
177 Id. at 1312.
178 Id. at 1312, 1314-15.
present danger” approach is close to the Tinker substantial disruption test because they both look at the consequences of the speech. The “clear and present danger” test gives much more deference to the school’s power to regulate students’ speech because the “clear and present danger” test is focused more on the outcome of the speech. Hand’s “express advocacy” test requires speech to be regulated and the student punished if it expressly advocated an illegal activity. This is an objective test, because the courts only need to determine if the speech is expressly advocating an illegal activity. If the speech is found to advocate an illegal activity, then schools may regulate the student’s speech. The “express advocacy” test gives more deference to judicial authorities because it requires an analysis of the speech based on its meaning.

Test five looks at an objective showing of educational harm by the speech. If the speech in some way causes harm to students or disrupts teachers when they are trying to teach, then the speech may be regulated or punished. This test is advocating an objective standard and would give the students greater free speech rights. The main basis for the test is that speech should not be regulated just because it is offensive. What is offensive to one person could be not offensive to another. Therefore, regulating speech based on its offensiveness is a very subjective standard. This objective theory works in the context of SNSs because the

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179 Id. at 1312.
180 Id.
181 Id.
182 Id. at 1314.
183 Id. at 1315.
184 Id. at 1314-15.
185 Mollen, supra note 71, at 1527.
186 Id.
187 Id. at 1528.
188 Id. at 1530.
189 Id. at 1535.
190 Id. at 1505.
information disseminated on these media may be considered offensive to those in a position of authority.\textsuperscript{191}

F. How the Tests Fall Short

However, each of the scholars’ tests would either continue to support the ambiguities present in the \textit{Tinker} test or would not strike the proper balance between a student’s right to free speech and a school’s right to be secure against harm. The relational approach still gives the courts a great deal of discretion to determine what role the student is in, whereas a more objective test would give the court a standard that it may apply to all cases evenly.\textsuperscript{192} Additionally, in using the relational approach the student may even be unaware of the role he or she is in when making the speech.\textsuperscript{193} The approach gets further complicated because it disregards the geographical location of the student.\textsuperscript{194} A student may be at school, on an SNS, and could claim that he or she was not acting within their capacity as a student. The dichotomy of a student–citizen would provide confusion to the school authorities about when they have the ability to step in and would become especially problematic when the student is presenting a security threat to the school because of his or her speech.\textsuperscript{195}

The main problem with the personal jurisdiction test is that it gives the court an abundance of discretion to determine whether the student had minimum contact with the school, which leaves the teachers and administrators without a clear remedy in daily situations.\textsuperscript{196} A problem with the \textit{Tinker} standard is that substantial disruption has been expanded and incorrectly applied, and similar problems may occur with the personal jurisdiction theory, which may be

\textsuperscript{191} \textit{Id.}
\textsuperscript{192} Heidlage, \textit{supra} note 71, at 575.
\textsuperscript{193} \textit{Id.} at 603.
\textsuperscript{194} \textit{Id.} at 595.
\textsuperscript{195} \textit{Id.} at 606.
\textsuperscript{196} Brenton, \textit{supra} note 164, at 1242.
applied to aid the school at the expense of the student’s rights. Also, this theory encourages the court to decipher the intent of a student’s speech, which may be very hard to discern from the content.

There are plenty of posts on SNSs that speak to the momentary anger or frustration of a student, which may be misunderstood by school administrators or courts viewing the content. These students may be letting off steam or getting rid of stress rather than having a threatening intent to their words. The courts need an unambiguous definition to show when the speech has passed the point of self-expression and into the realm of threatening. It seriously damages the ability of the student to use the SNS as an outlet for their frustration or stress if the court views these words in a light that was never intended to be shed upon them.

The third test’s, the school discretion theory, problems lie within the extreme amount of control given to the school administrators. This theory undermines the fact that courts have long been the institution that David turns to when facing Goliath. Leaving discretion to the school forces the student to be punished and judged by the same authority, the school administration. There is a reason that judges are not also the police officers arresting the defendants; there needs to be a neutral third party reviewing the decisions of those who take away a person’s freedoms, and the school administrators should not have the ability to do both.

197 See supra Section I.D.
198 Brenton, supra note 164, at 1237.
200 Id. at 227-28.
201 Id.
202 Id.
204 Ianelli, supra note 170, at 900.
Though there may be state laws or school policies, the students need to have the opportunity to exert their freedoms. Furthermore, even if the student’s speech does fall under the categories of speech that a court would deem to be unprotected by the First Amendment, a court still has the duty to determine if the school had the authority to punish the student for the creation of the speech off campus.205 The courts may not have a perfect standard to apply, but they are still the best arenas for this dispute.206

The current ideology of the majority of the Court is leaning to the “express advocacy” test in the fourth theory, which is clear from the Morse opinion.207 However, SNSs present an interesting challenge to this theory because what is posted on an SNS may not necessarily mean what an outsider reading the speech thinks it means.208 Meaning and tone are hard to convey through the typed word. Deciphering what the student actually meant to convey is why judicial review is so important and why the decision should not be left to the school.209 The “clear and present danger” test may work, but it is so subject to discretion that the test is apt to be used to restrict a student’s rights rather than advocate for them.210 This discretion comes from the fact that the Court never sets out a clear definition of what a “clear and present danger” is.211 Neither of these tests is clearly developed in the context of student speech, which requires a delicate balance between a student’s rights and the school’s need for security.212

Finally, the objective showing would substantially limit the courts from expanding schools’ authorities to regulate the right of the students’ free speech.213 The theory is lacking in

205 See, e.g., Tuneski, supra note 116, at 177.
206 Id. at 175.
207 Nuttall, supra note 174, at 1314-15.
208 See Starrett, supra note 199, at 227.
209 Id. at 228.
211 Id.
212 Id. at 1318.
213 Mollen, supra note 71, at 1530.
how the schools would execute the objective showing. The author fails to present what would need to be shown in order for the court to regulate the behavior. Sometimes, the will of a child is to vent their frustrations about their authority figures, and this frustration does not necessarily lead to an anarchical intention.\textsuperscript{214} Indeed, most of the analysis revolves around one decision reached in the Ninth Circuit in regards to a student’s homophobic t-shirt.\textsuperscript{215} The idea needs to be given more context and expanded into a usable standard for courts to apply to the cases before them.

G. A New Approach

Any analysis of student speech needs to be done from an objective standpoint. Otherwise the hazards of eroding a student’s First Amendment rights are too great. The First Amendment is the rule, not the exception, and the courts should have great deference to the language of the First Amendment when deciding these issues.\textsuperscript{216} However, the Court has indicated with its decisions in \textit{Tinker}, \textit{Fraser}, \textit{Kuhlmeier}, and \textit{Morse} that there needs to be some regulation of student speech in order for the school to properly run.\textsuperscript{217} There needs to be a balance between these considerations, and a bright-line rule would best serve these important interests.\textsuperscript{218} The standard to determine if schools should have the authority to regulate student speech is a substantial threat test.\textsuperscript{219} If the speech or conduct substantially threatens harm or serious injury to another student, faculty member, or school citizen, then the regulation of the speech would be considered necessary, and student discipline would be warranted.

\textsuperscript{214} See Starrett, \textit{supra} note 199, at 233.
\textsuperscript{215} Mollen, \textit{supra} note 71, at 1514.
\textsuperscript{216} See \textit{supra} Section I.B.
\textsuperscript{217} See \textit{supra} Subsection I.C.1.
\textsuperscript{218} See Tuneski, \textit{supra} note 116, at 142.
\textsuperscript{219} See, \textit{e.g.}, Healy v. James, 408 U.S. 169, 189 (1972) (deciding if a college student group posed a substantial threat of material disruption on campus); McDaniel v. Paty, 435 U.S. 618, 631 n.2 (1978) (examining substantial threat in the context of the Free Exercise Clause).
There is a certain subjectiveness that may be read into the threat theory, because the courts and schools still have the responsibility to interpret what a threat is. However, to make it more objective a substantial threat should clearly be defined as a cognizable apprehension of serious bodily harm to a person, persons, or the school citizenship as a whole. This would allow schools and courts to distinguish between speech that is profane or embarrassing, and speech that would actually affect the wellbeing of the school environment. This test would give the schools the security it needs against credible threats. It would also allow students to be able to vent their frustrations about their everyday lives without fear of being permanently scarred by that speech through school sanctions and punishments that would affect their future.

The job of schools is not only to educate, but also to teach students how to become good democratic citizens.\textsuperscript{220} Educating students on democracy while lessening student’s freedoms is preposterous.\textsuperscript{221} The only acceptable situation to take away freedom is if there is a threat to someone else. The threat test is easy to follow, and schools would know when they would be allowed to restrict or punish a student for their speech. This would allow schools to have some authority to regulate substantially threatening speech made off campus, but does not give the school the authority to regulate non-threatening speech made off campus.

The substantial disruption test from \textit{Tinker} is too subjective and too vague to be properly applied to off-campus speech.\textsuperscript{222} The courts are taking more and more liberty with their interpretation of substantial disruption, and are beginning to classify even minor disruptions in the flow of the school day as substantial.\textsuperscript{223} Whereas the substantial threat test would better
balance a student’s free speech rights and a school’s concern over security, especially when coupled with parents’ responsibility to regulate student conduct on SNSs.

II. SCHOOLS V. PARENTS

When students create their speech outside of school, schools may not be in the best position to regulate or punish student speech. Parents may then need to play a greater role in the restriction or punishment of student speech made off campus, especially when it is created within the home. The Court has generally restricted the rights of parents when it comes to interfering with important school functions. However, parents need to play a greater role in the regulation and punishment of student speech when that speech is created off campus, and especially when it is created in the home.

A. Court Precedent on Parent’s Rights

In order to determine who might be the best source to regulate the speech of students outside of school, it is helpful to look at how the Supreme Court views a parent’s right to direct the education of their children. The following cases demonstrate how the Supreme Court has viewed the interaction between the parent and the school when it comes to a student’s educational choices. The cases are also helpful to show what role the parent plays in the student’s educational development.

In *Meyer v. Nebraska*, a school-teacher was charged with teaching the German language in violation of a Nebraska statute requiring a student to have passed the eighth grade before they are taught German. The child was being taught the language at the urging of the parents, whose native language was German. According to the Court, the reasons the parents had for

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224 See *Prince v Massachusetts*, 321 U.S. 158, 166 (1944); *Fields v Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir. 2005); *Parents United for Better Sch., Inc. v. Sch. Dist. of Philadelphia Bd. of Educ.*, 148 F.3d 260 (3d Cir. 1998).


226 *Id.* at 397-98.
wanting their child taught German were reasonable to understand the child’s culture.\textsuperscript{227} The Court seemed to take the stance that the State has the general right to choose curriculum and run schools, but there are limitations to their rights.\textsuperscript{228} The Court held that “[n]o emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed.”\textsuperscript{229} It also held the statute was unconstitutional and had no “reasonable relation to any end within the competency of the state.”\textsuperscript{230}

In another Supreme Court case, Pierce v. Society of Sisters, there was a challenge to Oregon’s Compulsory Education statute that required children between the ages of eight and sixteen to attend public schools.\textsuperscript{231} The Society of Sisters raised orphaned children and provided care and schooling for them.\textsuperscript{232} It also maintained interdependent primary, high school, and junior colleges for these children, as well as children from the surrounding community.\textsuperscript{233} The Society of Sisters contended that the statute interferes with a parent’s right to choose where to send their children to school.\textsuperscript{234} The Court held that the statute “interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”\textsuperscript{235} The Court additionally said that “[t]he child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”\textsuperscript{236}

\textsuperscript{227} Id. at 400.
\textsuperscript{228} Id. at 402-03.
\textsuperscript{229} Id. at 403.
\textsuperscript{230} Id.
\textsuperscript{231} 268 U.S. 510, 531 (1925).
\textsuperscript{232} Id. at 531-32.
\textsuperscript{233} Id. at 532.
\textsuperscript{234} Id.
\textsuperscript{235} Id. at 534-35.
\textsuperscript{236} Id. at 535.
In Wisconsin v. Yoder, the Yoders were members of the Amish religion, which required that children begin work as farmers after they complete the eighth grade.\textsuperscript{237} This tradition violated Wisconsin’s compulsory education attendance statute, which required children to be schooled until the age of sixteen.\textsuperscript{238} The Court acknowledged that in the past it had upheld the “traditional concepts of parental control over the religious upbringing and education of their minor children.”\textsuperscript{239} Further, “[t]he history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”\textsuperscript{240} The Court declared the Wisconsin compulsory education attendance statute was an unconstitutional infringement upon the Yoders’ rights.\textsuperscript{241} The decision shows that the Court does acknowledge parent rights in certain circumstances.

B. Parental Authority to Regulate Student Speech

Courts are less likely to give parents discretion when it comes to school regulation.\textsuperscript{242} The courts are giving more deference to the schools’ rights to educate in a manner and way they see fit.\textsuperscript{243} In J.S. and Layshock, the school did not usurp the parents’ power to discipline because they were still able to discipline their children.\textsuperscript{244} In Blau v. Fort Thomas Public Sch. Dist., a Sixth Circuit case, the parents of a middle school student challenged the school’s dress code.\textsuperscript{245} The court held that parents have a fundamental right to decide if they want to send their child to

\begin{itemize}
  \item \textsuperscript{237} 406 U.S. 205, 211 (1972).
  \item \textsuperscript{238} Id.
  \item \textsuperscript{239} Id. at 231.
  \item \textsuperscript{240} Id.
  \item \textsuperscript{241} Id. at 234-35.
  \item \textsuperscript{242} Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 264 (3d Cir. 2010); J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 304-05 (3d Cir. 2010).
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} 401 F.3d 381, 386 (6th Cir. 2005).
\end{itemize}
a public school, but they do not have a fundamental right to direct how a public school educates
students.\textsuperscript{246}

The lack of deference to the parents’ right to raise their children is a disturbing trend. The
courts have placed the authority of the government over that of the family when it comes to
the parent’s right to direct the education of their child.\textsuperscript{247} Rather than giving the parents the sole
right to punish their child in the manner they see fit, or work with the school on what the proper
form of punishment for the child is, the court decided that the school has the authority to
discipline a student for their speech out side of school.\textsuperscript{248}

However, parents truly are the ones who have the first exposure to their kids’ utilization
of SNSs, because SNSs are primarily accessed in the home.\textsuperscript{249} This first exposure would place
parents at the best advantage to regulate their child. If these actions are a cry for help, or an
adolescent prank, the parents should have the right to punish and regulate the behavior. Though
not all parents may be equipped to handle this responsibility, the school should be in a
partnership with them to help, not to take a role above the parent.

Most students are using SNSs in their homes because schools are blocking access to the
use of SNSs within the school environment.\textsuperscript{250} The schools’ regulatory bodies largely feel that
SNSs are more of a distraction to the students than an education tool.\textsuperscript{251} The creation of the
profiles and the words being disseminated to the kids’ friends are being done at home, on the

\textsuperscript{246} Id. at 396.
\textsuperscript{247} Ralph D. Mawdsley, Parents’ Right to Direct Their Children’s Education: Examining the Interests of
the Parents, the Schools, and the Students, 258 W. EDUC. L. REP. 461, 478-79 (2010) (exploring how the Liberty
Clause’s rights of parenting choices in education has been affected by judicial development of the constitutional
rights of students).
\textsuperscript{248} Layshock, 593 F.3d at 264; J.S., 593 F.3d at 304-05.
\textsuperscript{249} See VOCKLEY LANG, supra note 23, at 4-5.
\textsuperscript{250} Id.
\textsuperscript{251} Id. at 6-7.
home computer, or on a student’s personal computer.\textsuperscript{252} The principal, school board, or teachers are not at home with the student. The student’s parents are the only ones to share that intimate space with the student. To give the school the power to reach into the home and regulate the conduct of the student when in his or her bedroom or living room is a serious violation of a student’s right to privacy. The tentacles of government are reaching too far. The parents need to be the first responders to the bad behavior.

C. Parents Need More Authority, Not Less

Though the courts generally do give more deference to the schools, school regulation of speech created at home on an SNS is a distinguishable issue. The speech created within the home only involves a very remote connection to the school. The school acting as a \textit{in loco parentis} should not have greater rights than the actual parent when regulating a child’s behavior.

The Third Circuit’s opinion in \textit{Layshock} may have left the door open for more Due Process rights for parents in certain situations, which may protect the child from a school’s punishment for speech on an SNS.\textsuperscript{253} The opinion states that the Supreme Court has never defined the rights that the parents have to raise and educate their children.\textsuperscript{254} The court alludes to the fact that the parents would have to make a showing that the school substantially interfered with their right to raise or educate their son.\textsuperscript{255} The Layshocks were not able to make the proper connection between the school’s actions and their liberty interest in raising and educating their son.\textsuperscript{256}

The parents’ liberty interests should be paramount. The courts need to defer to the parents, and not the school. The parents have more access to the students and to their activity on

\begin{footnotesize}
\begin{itemize}
  \item[252] \textit{Id.} at 9.
  \item[253] \textit{Layshock}, 593 F.3d at 264.
  \item[254] \textit{Id.}
  \item[255] \textit{Id.}
  \item[256] \textit{Id.}
\end{itemize}
\end{footnotesize}
SNSs. If a school is disciplining a student, the court should be strictly scrutinizing whether the discipline would have been the authority of the parent and not the school. The court should be considering where the actions of the student originated. In Layshock and J.S., the actions originated at home.257

Furthermore, the content of the speech on the SNS was about the students’ principals, and the principals have the decision to bring legal action against the students if they truly felt the students were violating their rights.258 The school stepping in as the disciplinary figure is inappropriate when the speech was made online, off campus, and directed solely towards the principal. The profiles were not about the whole school, just the principals.259 The more appropriate course of action for the school would be to inform the parents and work with them on proper disciplinary measures rather than leaving them out of the loop. Even though the parents had the ability to discipline their children, the school still infringed upon the parents’ privacy interest in regulating their child’s conduct.

The parents have the right to direct the education and upbringing of their children, which should include being able to direct who should not be disciplining their child. Many states ban the use of corporal punishment in schools, and those states that do allow corporal punishment require that parental permission be given for its use.260 The use of corporal punishment is serious, but it is a form of discipline.261 If parental permission needs to be given for corporal punishment, then parental permission should be required for all school disciplinary actions against students for actions or speech made off campus. Parental permission would ensure that

257 Layshock, 593 F.3d at 252; J.S. v. Blue Mountain Sch. Dist., 593 F.3d 286, 291 (3d Cir. 2010).
258 See Bradley Kay, Extending Tort Liability to Creators of Fake Profiles on Social Networking Websites, 10 CHI.-KENT J. INTELL. PROP. 1, 5-6 (2010).
259 See supra Subsection I.C.3.
261 Id.
the liberty interest of the parents in directing the upbringing and education of their child is upheld. 

The major objection to parental permission to discipline for off campus actions would be an eroding of the school’s authority to run the school and control the students. If students thought they could get away with breaking the rules because the school only had the authority to punish them if their parent gave permission, chaos in the schools could ensue. However, the school’s threat to call the parents is still a very useful tool in their arsenal in regulating student conduct. If the students knew their parents would learn of their behavior, the majority of the students would be afraid of being disciplined at home, which would curb the likelihood of misconduct. In the instances where the parents failed to discipline the student for extreme conduct off campus that was brought to school, the school could always resort to the police or court system for support. The schools also have a great ally in their school counselors to have their students understand the full consequences of their actions. However, the parents are really in the best situation to discipline their child for his or her social network behavior.

CONCLUSION

The United States was built on a rich history of speech that at the time seemed outrageous or inflammatory. The citizens of this country have always been afforded the freedom to express themselves, and a great deference has been given to the First Amendment. Students should be no exception to this great history. Allowing a school to reach into a student’s home and parent a child by punishing them for speech made within that home is wrong. The courts should protect the student’s First Amendment right to free speech on SNSs and should allow the parents to regulate the conduct of their children at home.

Student speech should only be regulated or punished if it constitutes a substantial threat to the students or the school. There is no test that would better protect the student’s right to free
speech. This right is vitally important to rearing of a democratic adult. Parents also play a vital role in protecting these rights. Student speech made outside of school on an SNS should only be punished or regulated by a parent. When schools play more than a supporting role in the decision to regulate speech, it undermines the authority of the parent. The authority of the parent to rear their child is as important as a student’s right to free speech; neither should be undermined in a truly free society.