Constitutional Law—Third Circuit Holds First Amendment Protects Off-Campus Internet Speech from School Discipline—*Layshock ex rel. Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011).

Although the First Amendment protects the right of free speech, the Supreme Court of the United States has held that certain types of speech made by students on campus may be restricted in public schools.[1] The Court has not addressed, however, student speech originating off campus on the internet, requiring the circuit courts to develop and apply methods of dealing with this type of speech, including the Second Circuit's approach, commonly referred to as the *Tinker* test.[2] In *Layshock ex rel. Layshock v. Hermitage School District*,[3] the Court of Appeals for the Third Circuit considered whether the Hermitage School District could discipline a student, Justin Layshock, for creating an offensive profile on the social-networking website, MySpace, while off campus.[4] The court held that the school district could not regulate Layshock's speech because not one of the limited circumstances permitting regulation—as prescribed by the Supreme Court—was present.[5]

---

1. *See* U.S. CONST. amend I ("Congress shall make no law . . . abridging the freedom of speech . . . ."); *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508, 513 (1969) (holding student speech protected unless material and substantial disruption or reasonable risk of substantial disruption). In so holding, the Court adopted the standard used by the Fifth Circuit in *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 505 (1969). In *Tinker*, school officials created a policy banning armbands after learning that a group of students planned to wear armbands to protest the Vietnam War. *Id.* at 504.

2. *See* Wisniewski *ex rel* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-39 (2d Cir. 2007) (establishing two-part test based on *Tinker* for unprotected student speech); *see also* Doninger v. Niehoff, 642 F.3d 334, 347 (2d Cir. 2011) (referring to decision in *Wisniewski* as "*Tinker* Test"), *cert. denied*, 132 S. Ct. 499 (2011). The Second Circuit based its decision on the language in *Tinker* and a footnote in an earlier Second Circuit student-speech case that suggested a situation under *Tinker* in which school officials could restrict off-campus expression. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979) ("We can, of course, envision a case in which a group of students incites substantial disruption within the school from some remote locale."); *see also* Lee Goldman, *Student Speech and the First Amendment: A Comprehensive Approach*, 63 FLA. L. REV. 395, 405 (2011) (describing lower courts "ad hoc" determination of whether to apply *Tinker*). Although courts have generally applied *Tinker* to off-campus, student speech on the internet, several commentators question whether *Tinker* even should apply and if not, what would be appropriate in lieu of *Tinker*. *See, e.g.*, Goldman, *supra*, at 398 (arguing off-campus student speech should receive full First Amendment protection); Allison Belnap, Comment, Tinker *at a Breaking Point: Why the Specter of Cyberbullying Cannot Excuse Impermissible Public School Regulation of Off-Campus Student Speech*, 2011 BYU L. REV. 501, 524-25 (2011) (rejecting *Tinker*'s current application to off-campus internet speech in favor of true-threat approach); Harriet A. Hoder, Note, *Supervising Cyberspace: A Simple Threshold for Public School Jurisdiction Over Students' Online Activity*, 50 B.C. L. REV. 1563, 1595-96 (2009) (arguing for "control and supervision" test to replace material and substantial disruption standard).

3. 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mtn. Sch. Dist. v. Snyder, 132 S. Ct. 1097 (2012).

4. *See id.* at 207 (setting issue before court).

5. *See id.* at 219 (holding that no authority existed to support punishment in present case). The court

In December 2005, Layshock, a Hickory High School student, created a profile that mocked his Principal, Eric Trosch, on MySpace.[6] Layshock created this profile using his grandmother's computer, at her house, during nonschool hours.[7] Layshock granted access to fellow students, and, not surprisingly, news of the profile "spread like wildfire" spawning at least three copycat profiles.[8] Layshock did access the profile he created twice at school, but school officials took action based on the belief that Layshock's speech was entirely off campus.[9]

On December 21, school officials learned that Layshock may have created one of the false profiles and decided to call Layshock and his mother to a meeting with the Superintendent.[10] At that meeting, Layshock admitted to creating the profile and, without any prompting, walked to Principal Trosch's office to apologize.[11] School officials took no disciplinary action at the meeting; however, in January 2006, school officials held a disciplinary hearing concluding Layshock had violated the school's discipline code and instituted various punishments, including a ten-day suspension and placement in an alternative education program.[12]

On January 27, 2006, the Layshocks filed a three-count complaint alleging that the school district had violated Layshock's First Amendment right to free speech.[13] The district court granted summary judgment in favor of Layshock

noted that MySpace "is a popular social-networking website that 'allows its members to create online "profiles," which are individual web pages on which members post photographs, videos, and information about their lives and interests.'" *Id.* at 208 (quoting Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 845 (W.D. Tex. 2007)).

6. *Id.* at 207.

7. 650 F.3d at 207. Layshock created the profile using a photograph of Trosch that he obtained electronically by "cut[ting] and past[ing]" from the school's website and followed a theme of "big" because the principal was a large man. *Id.* at 208.

8. *Id.* On December 12, Trosch asked the technology director to disable access to MySpace; however, students found ways to access the profiles. *Id.* School officials were unable to effectively block access to MySpace because the school's technology director was on vacation on December 16th. *Id.* at 209. The school limited access until the beginning of Christmas recess by cancelling computer-programming classes and restricting computer use only to the library where officials could monitor what the students were viewing. *Id.*

9. *Id.* School officials did not learn that Layshock had accessed the profile on campus until the following week. *Id.*

10. *Id.* at 209.

11. 650 F.3d at 209.

12. *Id.* at 209-10. The school district imposed the following punishment:

> In addition to a ten-day, out-of-school suspension, Justin's punishment consisted of (1) being placed in the Alternative Education Program (the "ACE" program) at the high school for the remainder of the 2005-2006 school year; (2) being banned from all extracurricular activities, including Academic Games and foreign-language tutoring; and (3) not being allowed to participate in his graduation ceremony.

Id. at 210. The school district also informed Layshock and his parents that they were considering expelling him. *Id.*

13. *Id.*; *see also* 42 U.S.C. § 1983 (2006) (outlining circumstances when suit may be brought for

because the school district failed to demonstrate a sufficient nexus between the profile Layshock made and a substantial disruption at the school.[14] A three-judge panel from the Third Circuit affirmed on appeal; however, the Third Circuit vacated this decision and that of a factually similar, yet differently decided, case, *J.S. ex rel Snyder v Blue Mountain School District*,[15] opting to rehear both en banc to resolve the apparent intracircuit split.[16] After the rehearings, the court reversed *J.S.* and reaffirmed the earlier holding in *Layshock*, that the regulation of Layshock's speech violated the First Amendment.[17]

The Supreme Court first considered the extent of student free-speech rights in *Tinker v. Des Moines Independent Community School District*,[18] but was careful to note, "[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."[19] The Court determined that student speech that "materially [or] substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" may be prohibited.[20] The Court discussed two other

infringement of constitutional rights).

14. *See* Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2007) (holding insufficient nexus because school officials could not demonstrate Layshock's profile caused disruption), *aff'd en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mtn. Sch. Dist. v. Snyder, 132 S. Ct. 1097 (2012).

15. 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, 650 F.3d 915 (3d Cir. 2011), *cert. denied*, 132 S. Ct. 1097 (2012).

16. Layshock v. Hermitage Sch. Dist., 593 F.3d 249 (3d Cir. 2010), *vacated*, 2010 U.S. App. LEXIS 7362 (3d Cir. Apr. 9, 2010), *aff'd en banc*, 650 F.3d 205 (3d Cir. 2011), *cert. denied sub nom.* Blue Mtn. Sch. Dist. v. J.S. *ex rel* Snyder, 132 S. Ct. 1097 (2012); *see also* Carolyn Joyce Mattus, Legal Update, *Is It Really My Space?: Public Schools and Student Speech on the Internet After* Layshock v. Hermitage School District *and* Snyder v. Blue Mountain School District, 16 B.U. J. SCI. & TECH. L. 318, 318 (2010) (describing actions by Third Circuit to address divergent rulings on substantially similar facts).

17. *See* 650 F.3d at 219 (holding speech fell outside circumstances outlined by Supreme Court); J.S. *ex rel* Snyder v. Blue Mtn. Sch. Dist., 650 F.3d 915, 920 (3d Cir. 2011) (reversing on First Amendment issue), *cert. denied*, 132 S. Ct. 1097 (2012). The disparate holdings on seemingly indistinguishable facts caused confusion over what the standard for student internet speech made off campus was and created a need for unified reasoning. *See* Mattus, *supra* note 16, at 332 (discussing confusion created by opposite conclusions and importance of en banc rehearings). It was not a coincidence that the court decided to rehear these similar cases en banc, and issued decisions on the same day. *See* 650 F.3d at 219 n.1 (Jordan, J., concurring) (describing course of events as "no accident"). The newly unified reasoning of the Third Circuit will remain, for now, as the Supreme Court denied certiorari for both cases. *See* J.S. *ex rel* Snyder v. Blue Mtn. Sch. Dist., 132 S. Ct. 1097, 1097 (2012) (denying certiorari to respective school districts' joint appeal of *Layshock* and *J.S.* cases).

18. 393 U.S. 503 (1969).

19. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969) (recognizing Court's jurisprudence in public school constitutional rights cases for previous fifty years).

20. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512-13 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)) (adopting Fifth Circuit's holding in similar case). Although the Court did not define what constitutes a material and substantial disruption, the Court did cite *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), the sister case to *Burnside*, as an example of a material and substantial disruption. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969). The Fifth Circuit found a substantial disruption because "[t]here was an unusual degree of commotion, boisterous conduct, a collision with the rights of others, an undermining of authority, and a lack of order,

circumstances in which disciplining speech would not violate the First Amendment—first, when school officials could reasonably forecast the speech would cause a material disruption,[21] and second, when speech actually does cause this type of disruption even if the speech occurs off campus.[22]

Following *Tinker*, the Court carved out three additional circumstances in which school officials can prohibit student speech without a substantial disruption or a foreseeable risk of one.[23] In *Bethel School District No. 403 v. Fraser*,[24] the Court held that school officials could discipline a student for on-campus speech that was plainly offensive, lewd, or vulgar.[25] Just two years later, the Court issued its next exception in *Hazelwood School District v. Kuhlmeier*,[26] allowing school officials to exercise editorial control over "the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[27] Most recently, the Court held that school officials had a compelling interest in preventing messages that promote illegal drug use.[28]

discipline and decorum." Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966). Commentators have called for a clear definition of substantial disruption if *Tinker* is applicable to off-campus, internet speech. *Compare* Andrew B. Carrabis & Seth D. Haimovitch, *Cyberbullying: Adaptation from the Old School Sandlot to the 21st Century World Wide Web—The Court System and Technology Law's Race to Keep Pace*, 16 J. TECH. L. & POL'Y 143, 156-57 (2011) (explaining need for clear standard when applying *Tinker* to off-campus speech), *with* Stephanie Klupinski, Note, *Getting Past the Schoolhouse Gate: Rethinking Student Speech in the Digital Age*, 71 OHIO ST. L.J. 611, 652 (2010) (arguing courts should focus not on crafting internet-specific doctrines, but clarifying existing standards).

21. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969) (holding school officials may regulate speech based on reasonable forecast of disruption).

22. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) ("But conduct by the student, in class or out of it, which for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech."). *Tinker* provides the framework for addressing a wide variety of student speech, but whether it applies to online speech is an unresolved question. *See* Hoder, *supra* note 2, at 1572 (noting Supreme Court has not yet addressed online student speech).

23. *See* Goldman, *supra* note 2, at 400-04 (describing further exceptions Court created following *Tinker*).

24. 478 U.S. 675 (1986).

25. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986) (holding vulgar or plainly-offensive speech unprotected in public school setting). Schools may prohibit vulgar and offensive speech in public discourse because student rights are "not automatically coextensive with the rights of adults in other settings." *See id.* at 682 (discussing protected speech in public settings versus unprotected student speech in school settings). The Court distinguished its earlier holding in *Cohen v. California*, 403 U.S. 15 (1971), explaining that just because an offensive form of expression conducted by an adult receives First Amendment protection, it does not follow that a student conducting offensive expression would receive the same protections. *See id.* at 682 ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.").

26. 484 U.S. 260 (1988).

27. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) (excepting school-sanctioned, expressive activities from First Amendment consideration). The Court distinguished *Tinker* by stating that the standard for determining when school officials may punish students for speech is not the same as determining when the school may decline to "lend its name and resources to the dissemination." *Id.*at 272.

28. *See* Morse v. Frederick, 551 U.S. 393, 408 (2007) (holding school officials may regulate physically off-campus, student speech in limited circumstances). Although the petitioner, Frederick, had unfurled a

Application of *Tinker* to off-campus speech had its beginnings in the Second Circuit, where the court held school officials could not discipline students for an off-campus, underground newspaper because the speech was beyond *Tinker*'s "schoolhouse gate."[29] The court recognized the possibility that school officials could discipline a student for off-campus expression, provided the off-campus speech caused a material disruption on campus.[30] Nearly thirty years later, the Second Circuit dealt with this possibility and created a two-prong reasonable-foreseeability test to address off-campus student speech.[31] In *Doninger v. Niehoff*,[32] the Second Circuit applied this test and held that school officials could regulate the student's internet speech originating off campus.[33] Finally, prior to the development of the reasonable-foreseeability test, the Supreme Court of Pennsylvania considered the off-campus internet speech as "on campus" because there was a sufficient nexus between the speech and the school.[34] Despite several cases from separate circuits addressing off-campus,

banner reading "BONG HiTS 4 JESUS" across the street from the high school, the Court found that this was not off-campus because he was attending a school-sanctioned event, during school hours that teachers and administrators supervised. *See id.* at 397, 400 (rejecting argument that speech occurred off campus). However, in a concurring opinion, Justice Alito joined the majority with the understanding that the holding went no further than allowing school officials to restrict speech that promotes illegal drug use because to allow school officials to restrict any speech that interferes with the "educational mission" could result in dangerous manipulations. *Id.* at 422-23 (Alito, J., concurring). With the Court extending school authority to include off-campus school events, there is increased uncertainty because "today's online world is a wholly unpredictable space for students. They need to be able to discern what might rub their teachers or school administrators the wrong way, remain aware that the law is uncertain in this area, and keep attuned to the possible consequences of their actions." *See* Michael W. Macleod-Ball, *Student Speech Online: Too Young to Exercise the Right to Free Speech?*, 7 I/S: J. L. & POL'Y FOR INFO. SOC'Y 101, 131 (2011) (observing analogies between situation in *Morse* and internet speech made off campus).

29. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1050 (2d Cir. 1979) (holding school officials lack authority to discipline students for off-campus expression).

30. *See* Thomas v. Bd. of Educ., 607 F.2d 1043, 1052 n.17 (2d Cir. 1979). In a concurring opinion, Judge Newman furthered this principle stating, "territoriality is not necessarily a useful concept in determining the limit of [a school's] authority." *Id.* at 1058 n.13 (Newman, J., concurring).

31. *See* Wisniewski *ex rel* Wisniewski v. Bd. of Educ., 494 F.3d 34, 38-39 (2d Cir. 2007) (holding speech reasonably foreseeable to reach school and cause material and substantial disruption not protected). To satisfy both prongs, a court must find that the speech was reasonably foreseeable to reach the school, and there was a reasonable likelihood the speech would cause a material and substantial disruption. *See id.* (describing when school officials may discipline student internet speech originating off campus). This approach has become known as the "*Tinker* test." *See* Doninger v. Niehoff, 642 F.3d 334, 347 (2d Cir. 2011) (identifying "so-called *Tinker* test employed in *Wisniewski"*), *cert. denied*, 132 S. Ct. 499 (2011). *But see* Belnap, *supra* note 2 (rejecting application of *Tinker* to off-campus internet speech in favor of true-threat approach).

32. 642 F.3d 335 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

33. *See Doninger v. Niehoff*, 642 F.3d 335, 348-49 (2d Cir. 2011) (noting undisputed facts demonstrated reasonable foreseeability and both potential and actual disruption), *cert. denied*, 132 S. Ct. 499 (2011). The court reasoned that Doninger met the first prong of foreseeability to reach the school by targeting the school with her comments, and she met the second prong of reasonable risk for a material and substantial disruption because she had invited other students to engage in disruptive behavior. *Id.*

34. *See* J.S. *ex rel.* v. Bethlehem Area Sch. Dist., 807 A.2d 847, 865 (Pa. 2002) (considering off-campus website on-campus speech because student targeted school and accessed website on campus). After an exhaustive survey of how other courts applied *Tinker* in the internet age, the court concluded that the speech created a material and substantial disruption because the speech "disrupted the delivery of instruction to the

internet, student speech in 2011—applying disparate standards under *Tinker*—the Supreme Court denied certiorari to each of these, leaving the circuits to continue to explore the limits of student First Amendment protections in the internet age.[35]

In *Layshock*, the Third Circuit considered the Supreme Court's jurisprudence and concluded that *Tinker*, and not *Fraser*, applied because the Supreme Court in *Morse* precluded *Fraser*'s application to off-campus speech.[36] Because the school district did not challenge the district court's finding that no material and substantial disruption had occurred, the court adopted the *Thomas* reasoning.[37] The school district argued that when Layshock took a picture of the principal from the district's website to use in the profile, the speech came on campus and created a nexus sufficient for the school to regulate the speech under *Fraser* because of the vulgar and defamatory nature of the profile.[38] The court rejected this argument and relied heavily on *Thomas*'s interpretation of *Tinker* because, as in *Thomas*, Layshock did not intend for the speech to come onto campus.[39]

students and adversely impacted the education environment." *Id.* at 869. The student frightened teachers and students by creating a website aimed at his teacher, soliciting money "to help pay for the hitman." *Id.* at 851-52.

35. *See* Blue Mtn. Sch. Dist. v. J.S. *ex rel* Snyder, 132 S. Ct. 1097, 1097 (2012) (denying certiorari to Third Circuit case extending First Amendment protection for student internet speech); Kowalski v. Berkeley Cnty. Sch., 132 S. Ct. 1095, 1095 (2012) (denying certiorari to Fourth Circuit case declining First Amendment protection for student internet speech); Doninger v. Niehoff, 132 S. Ct. 411, 411 (2011) (denying certiorari to Second Circuit case declining First Amendment protection for student internet speech). Hermitage High School and Blue Mountain School District petitioned jointly to the Court for a writ of certiorari. *See* Petition for Writ of Certiorari, J.S. *ex rel* Snyder v. Blue Mtn. Sch. Dist., 650 F.3d 915 (2011) (No. 11-502), at ii (describing single appeal of two en banc Third Circuit decisions from separate schools).

36. *See* 650 F.3d at 219 (recognizing *Fraser* inapplicable to off-campus speech). The court noted: "[H]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* (quoting Morse v. Frederick, 551 U.S. 393, 404 (2007)). Even though *Fraser* discussed the school's role to develop good citizens, it would be a stretch to say that this responsibility extended beyond school grounds. *See* Mattus, *supra* note 16, at 334 (describing *Fraser*'s intent, but arguing "[t]he line must be drawn somewhere."). Although the Supreme Court had not decided *Morse* at the time of the incident at Hermitage High School, many courts had already declined to extend *Fraser*'s lewd and offensive doctrine to off-campus speech. *See* Joseph A. Tomain, *Cyberspace is Outside the Schoolhouse Gate: Offensive, Online Student Speech Receives First Amendment Protection*, 59 DRAKE L. REV. 97, 134-38 (2010) (discussing cases that have declined to extend *Fraser* to off-campus, online speech). In the only opinion in *Layshock* other than the majority, Judge Jordan concluded that the court's unanimous endorsement of *Tinker*'s reasoning for internet speech—as opposed to the fractious conclusion in *Snyder*—demonstrated the position of the Third Circuit. 650 F.3d at 219-20 (Jordan, J., concurring). *Tinker* is the appropriate standard because, with the internet's omnipresence, school officials may regulate speech when it actually causes a material and substantial disruption, or when school officials can reasonably forecast that it would do so regardless of where the speech originates. *See id.* at 221 (Jordan, J., concurring) (discussing tools *Tinker* provides).

37. *See* 650 F.3d at 216 (noting *Thomas* reasoning prohibited discipline because school district had not challenged lower court finding).

38. *See id.* at 214 (outlining school district's argument). The court noted that the school district equated taking a picture from a website with breaking into the principal's office and summarily rejected this proposition. *Id.* at 214-15.

39. *Id.* at 215 (noting newspaper in *Thomas* designed to remain outside school property as Layshock

The school district offered similar cases in support, but the court distinguished *Layshock* because those cases involved off-campus expressive conduct that resulted in a substantial disruption.[40] First, the court distinguished *Layshock* from *J.S. ex rel H.S. v. Bethlehem Area School District*[41] because J.S.'s threatening, off-campus website had created a disruption of the educational environment that justified regulation of J.S.'s speech.[42] Second, the court distinguished Layshock's circumstances from *Wisniewski v. Board of Education of Weedsport Central School District*[43] because Wisniewski's icon depicting the killing of his teacher posed a reasonably foreseeable risk of a material and substantial disruption.[44] Finally, the court distinguished *Layshock* from *Doninger v. Niehoff*[45] because Doninger's off-campus blog post had created a foreseeable risk of a material and substantial disruption.[46] The court distinguished Layshock's actions from these three cases, but supported the underlying reasoning that school officials could regulate off-campus speech that causes, or is reasonably foreseeable to cause, substantial disruption.[47]

The Third Circuit resolved the internal split en banc by affirming *Layshock* and reversing *J.S.*.[48] The *Layshock* court confined its reasoning to the arguments of the school district and did not address whether the speech had been reasonably foreseeable to cause a material and substantial disruption.[49] The school district simplified this case for the court by challenging the district

intended here). The school district contended that because the speech met the first prong of the *Tinker* test and was "vulgar and defamatory," school officials did not violate the First Amendment by regulating the speech. *See id.* at 214 (explaining school district's arguments on appeal). Online speech is immune from *Fraser*'s holding because it lacks the captive audience and the need for the school to disassociate itself, necessary components under *Fraser*. *See* Tomain, *supra* note 36, at 150-51 (noting *Thomas* supports holding off-campus, offensive, student speech within protection of First Amendment).

40. 650 F.3d at 217.

41. 807 A.2d 847 (Pa. 2002).

42. *See* 650 F.3d at 217 (distinguishing present case from *Bethlehem*).

43. 494 F.3d 34 (2d Cir. 2007).

44. *See* 650 F.3d at 217-18 (distinguishing present case from *Wisniewski*).

45. 527 F.3d 41 (2d Cir. 2008), *rev'd on other grounds*, 642 F.3d 334 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).

46. *See* 650 F.3d at 218 (distinguishing present case from *Doninger*). The court noted in particular that it only had occasion to decide on the relatively minor penalty of stripping Ms. Doninger of her title as Class Secretary, whereas in the present case the student received a harsher penalty of suspension. *Id.*

47. *See id.* at 219 (finding "[n]o authority that would support punishment for creating such a profile unless it results in foreseeable and substantial disruption of school"). The court specifically declined to determine when school discipline could extend beyond the "schoolhouse gate," reasoning that it need only find that Layshock's use of the school district's website did not constitute entry into the school because the school district failed to challenge the district court's finding that no substantial disruption occurred. *Id.*

48. *See supra* note 17 and accompanying text (describing Third Circuit's en banc resolution of *Layshock* and *J.S.*).

49. *See* 650 F.3d at 214 (outlining school district's two-part argument). It was the school district's burden to demonstrate that a material and substantial disruption had occurred or was reasonably foreseeable to occur. *See* Mattus, *supra* note 16, at 333 (noting Third Circuit put burden on schools to demonstrate actual or potential substantial disruption).

court's holding that *Fraser* did not apply to off-campus speech and by admitting at oral argument that the school punished Layshock solely because of the offensive nature of the profile.[50] Because the court did not have to address the reasonable foreseeability of disruption, it was free to evaluate the "far more attenuated" situation of whether Layshock's conduct made the speech on campus by "entering" the school through the district's website.[51] The court realized a finding for the school district would set a dangerous precedent because school officials would now have the authority to control a student's off-campus expressive conduct.[52] The court applied common-sense reasoning by noting the absurdity of the school district's argument that Layshock had begun his speech on campus by "entering" the district's website and properly declined to extend *Fraser* to off-campus online expression.[53]

Even though the school district's first argument failed, the court—consistent with the Second Circuit and the Pennsylvania Supreme Court—could have accepted the *Tinker*-based arguments: that school officials could regulate the speech because Layshock targeted the school community, the speech was reasonably foreseeable to come to the attention of school officials, and the speech actually came onto campus when Layshock accessed it at school.[54] Even though the school district did not dispute that punishment of Layshock would have been inappropriate under *Tinker* and argued for application of *Fraser*, it pointed to three cases that purportedly established *Tinker* as the standard for addressing off-campus student expression.[55] The court distinguished *Layshock* from these decisions—doing so based on the facts of each case—noting that the respective courts had found either a material and substantial disruption consistent with *Tinker*, or that the speech had been reasonably foreseeable to cause one.[56] With respect to *Doninger*, and careful not to explicitly agree with the Second Circuit's holding, the court noted the harshness of the punishment that Layshock received without a campus disturbance as compared with Doninger's milder punishment for actual

50. *See* Tomain, *supra* note 36, at 157-58 (discussing district court's holding and admission by school district at oral argument).

51. *See* 650 F.3d at 215-16 (holding court could evaluate "entering" argument because no claim of substantial disruption made).

52. *See id.* at 216 (suggesting impact of school district not challenging district court's finding of no disruption). The court suggested that it may have decided this case differently had the school district challenged the district court's ruling that the speech did not cause a disruption. *Id.*; *see also* Mattus, *supra* note 16, at 329 (arguing key rationale for decision based on failure to challenge no disruption ruling).

53. *See* 650 F.3d at 214-15 (rejecting school district's argument); *see also* Tomain, *supra* note 36 and accompanying text (describing court's reasoning for rejecting school district's *Fraser* applicability to off-campus, offensive speech).

54. *See supra* notes 46-47 and accompanying text (describing other courts' approaches consistent with *Tinker* to regulate off-campus, disruptive, student speech).

55. *See* 650 F.3d at 216 (noting school district's reliance on other off-campus, internet cases).

56. *See id.* at 217-18 (distinguishing facts in present case from those in *Bethlehem*, *Wisniewski*, and *Doninger*).

substantial disruption.[57] In terms of off-campus internet student expression, the *Layshock* court was the first to extend First Amendment protection even though the speech seemingly met the criteria of *Tinker,* because of a concern over the dangerous precedent that would be set by allowing discipline in this case.[58]

After addressing the school district's primary arguments and distinguishing this case from other courts that allowed discipline of similar student expression, the court hedged by stating that the school district argued for authority based on the "unremarkable proposition that schools may punish expressive conduct that occurs outside of school, as if it occurred inside the 'schoolhouse gate.'"[59] The court then recognized that schools have limited authority, but missed an opportunity to set the standard in the Third Circuit behind a unanimous en banc decision by declining to define "when the arm of authority can reach beyond the schoolhouse gate."[60] Perhaps, this more moderate decision was the only unanimous one the en banc court could get because the case's lone concurrence, which established *Tinker* as the clear standard with well-defined parameters, garnered the support of only one other circuit judge.[61]

The Third Circuit did not split with the Second Circuit in this decision, but did raise the bar for when schools can discipline students for off-campus online speech. The Supreme Court will ultimately have to resolve the disparate rulings, but these cases will not form the basis of a decision, as the Court declined to hear any of the recent internet student speech cases.[62] Because there was no dispute over whether the speech created a material and substantial disruption, and no mention of any reasonable forecast of one, the *Layshock* court discarded the weak causal arguments of the school district, instead applying the Supreme Court's recent application of *Fraser*, and using the bench's own common sense in deferring to the First Amendment. By distinguishing the facts of the present case from those of other courts that had allowed discipline in similar scenarios, the Third Circuit established a higher bar for infringement of students' free-speech rights.

David C. Soutter

57. *Id.* at 218.

58. *Id.* at 216; *see also* Klupinski, *supra* note 20, at 613 (noting courts other than *Layshock*, including *Snyder*, found for schools in similar circumstances).

59. 650 F.3d at 219. The reasoning of the Third Circuit will remain in place as the Supreme Court denied certiorari for both the *Layshock* and *Snyder* cases. *See supra* note 35 and accompanying text (describing joint appeal by both schools and Supreme Court's denial of certiorari).

60. *See* 650 F.3d at 219 (declining to define "precise parameters" for when schools can discipline off-campus online expression).

61. *See id.* at 219-20 (Jordan, J., concurring) (declaring *Tinker* as standard for off-campus speech).

62. *See supra* note 35 and accompanying text (describing denial of certiorari to recent student speech cases).