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Layshock *ex rel.* Layshock v. Hermitage School District

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I. INTRODUCTION

From the very inception of our nation, freedom of speech has been a fundamental right in American society.[1] However, this does not mean that freedom of speech is absolute or unlimited in all circumstances.[2] An example of speech that can be proscribed is student speech in the school setting. The U.S. Supreme Court has consistently held that student speech within "the schoolhouse gate" may be limited or punished if it causes or reasonably may cause a substantial disruption to the normal functioning of the school, or if it is lewd or obscene.[3] However, the development and spread of the Internet and social networking communications have blurred the lines of what constitutes "on-campus" speech subject to permissible regulation by school officials under First Amendment jurisprudence.[4] Internet-based speech cannot easily be classified as either on-campus or off-campus under the traditional tests that focus on the "geographical origination" or the "directionality of speech."[5] Because Internet speech can be created, edited, and perpetuated nearly anywhere, and accessed on or off school grounds just as ubiquitously, it is often difficult, if not impossible, to objectively pinpoint where Internet speech "originates," or who the intended audience

1. "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

2. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (stating that the First Amendment right to free speech "is not absolute at all times and under all circumstances."); Schenck v. United States, 249 U.S. 47 (1919) (holding that if speech had a tendency to cause the violation of the law it may be punished).

3. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008) (holding that a school may discipline a student for posting offensive remarks on her blog from her home computer); Morse v. Frederick, 551 U.S. 393 (2007) (holding that a school may discipline speech that is lewd, vulgar, or offensive at school-related or -sanctioned events); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (holding that a school may censor speech at school-sponsored activities as long as the censorship is reasonably related to legitimate pedagogical concerns); Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675 (1986) (holding that a school may discipline on-campus speech that is lewd, vulgar, or offensive); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (holding that speech may be limited if it causes a substantial or foreseeable disruption to the school environment).

4. Stephanie Klupinski, *Getting Past the Schoolhouse Gate*: *Rethinking Student Speech in the Digital Age*, 71 Ohio St. L.J. 611, 625 (2010) ("With no clear understanding of when and how to evaluate Internet speech, the courts . . . have used an inconsistent application of standards and tests to the cases before them."); *see, e.g.*, Buessink v. Woodland R-IV Sch. Dist., 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (holding in favor of a student who had been disciplined for creating a website from his home that criticized his principal and teachers); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (holding that a student's Internet speech made off-campus could be considered student speech in a case where the student made a website that contained derogatory comments and accusations about one of his teachers, and elicited donations in order to hire a hitman to have the teacher killed).

5. The "geographical origination of speech" test considers the location of where the speech was originally uttered or reproduced in determining whether the speech is on-campus student speech. *See* Layshock v. Hermitage School Dist., 496 F. Supp. 2d 587, 598 (W.D.Pa. 2007); *see also* D.O.F. v. Lewisburg Area School Dist. Board of School Dir Directors, 868 A.2d 28 (Pa. Commw. 2004). The "directionality of speech" considers the intended audience and content (i.e. whether or not it would likely come to the attention of the school community) of the speech in determining whether the speech is on-campus speech. *See* Doninger v. Niehoff, 527 F.3d 41 (2d Cir. 2008); Wisniewski v. Board of Education, 494 F.3d 34 (2d Cir. 2007); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847.

actually is. As a result, the Internet and new forms of social networking devices associated with Internet-based speech have created confusion among the various courts regarding where the schoolhouse gate now lies and when it is appropriate for schools to limit or punish the speech of its students.[6] To best balance our First Amendment principles with school administrators' need to maintain healthy and effective school environments, the courts need to either adapt existing tests, or create a new test, to develop a unified standard for determining whether Internet-based speech may be limited or punished in public school settings in a manner consistent with the First Amendment.

In *Layshock ex rel. Layshock v. Hermitage School District*, the Third Circuit addressed whether a school district can punish a student for Internet speech that was created off-campus when that speech did not disturb the school environment and was not related to any school-sponsored event, but was directed to the school community and propagated on campus by the student.[7] Justin Layshock, a high-school student, made a profane webpage from a home computer that insulted a school official and was suspended by the school's administration for doing so.[8] In the ensuing litigation, the district court and court of appeals explored the extent to which Layshock's Internet communication did or did not pass through "the schoolhouse gate" and whether the First Amendment permits a school district to proscribe off-campus Internet speech by a student that is lewd, vulgar, or offensive. Using tests formulated by the Supreme Court in *Tinker v. Des Moines Independent Community School District*[9] and *Bethel School District No. 43 v. Fraser*,[10] the Third Circuit sitting en banc affirmed the lower court's decision, holding that Layshock's Internet communication, which had originated outside of the school, was off-campus speech.[11] Furthermore, it held that Layshock's speech did not cause a substantial or foreseeable disruption to the school environment that would permit his suspension under the

6. Klupinski, *supra* note 4; *see also* Samantha M. Levin, *School Districts as Weathermen: The School's Ability to Reasonably Forecast Substantial Disruption to the School Environment from Student's Online Speech*, 38 Fordham Urb. L.J. 859, 870 ("Given the Supreme Court's lack of direction on the school speech matter, the lower courts' decisions lack any sense of uniformity.")

7. 593 F.3d 249 (3d Cir. 2010), *aff'd en banc*, Layshock *ex rel.* v. Hermitage Sch. Dist., 650 F.3d 205 (3d Cir. 2011).

8. *Id.* at 254–55. The summary of the facts and portions of the procedural history included in this case comment are drawn from the Third Circuit panel opinion. *See Layshock*, 593. F.3d at 252–54. The en banc opinion discussed the facts and proceedings below. *See Layshock*, 650 F.3d at 207–10.

9. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969). In *Tinker,* a seminal First Amendment case, students were disciplined for wearing black armbands in protest of the Vietnam War. The Supreme Court held that student speech could be limited or disciplined if it is likely to cause a substantial or foreseeable disruption to the school environment. *See id.* at 513–14.

10. Bethel Sch. Dist. No. 402 v. Fraser, 478 U.S. 675 (1986). In *Fraser*, a student brought a First Amendment claim against his school after the administration disciplined him for making a student government nomination speech that was littered with sexual innuendos. *See id.* at 677–79. The Supreme Court held that student speech could be limited or disciplined if it is lewd, vulgar, or offensive and is expressed on school grounds. *See id.* at 676.

11. Layshock *ex rel.* v. Hermitage Sch. Dist., 650 F.3d 205.

applicable case law and the First Amendment.[12] In addition, the Third Circuit determined that since Layshock's Internet speech could not be considered on-campus student speech, it could also not be subject to limitation or punishment even though it was of a lewd, obscene, or offensive nature.[13] By holding that Internet speech that is created off-campus cannot be considered on-campus student speech, the Third Circuit distinguished cases that address Internet speech as on-campus student speech, and therefore missed an opportunity to analyze when such speech should may be restricted.[14] As Judge Jordan stated in the concurrence in to the en banc decision:

> For better or worse, wireless internet access, smart phones, tablet computers, social networking services like Facebook, and stream-of-consciousness communications via Twitter give an omnipresence to speech that makes any effort to trace First Amendment boundaries along the physical boundaries of a school campus a recipe for serious problems in our public schools.[15]

This case comment contends that, given the unique nature of Internet speech as compared to more traditional forms of speech and expression, the Third Circuit erred in its holding in *Layshock* because it did not consider alternative tests for best determining whether Layshock's speech was on- or off-campus for First Amendment purposes. The court erroneously distinguished the school district's cited support on the grounds that the final holding in each of those cases rested on a *Tinker* finding of substantial or foreseeable disruption that was not present in *Layshock*.[16] In neglecting to fully analyze the cited cases that establish potential situations when off-campus Internet speech may be considered on-campus student speech, the court also ignored an opportunity to clarify an area of law that has recently troubled lower courts. This case comment argues that the court should have modified the current test to better speak to the reach and ubiquity of Internet speech. A modified test would allow school administrators to punish or censor speech when it is most necessary due to its disruptive, lewd, or otherwise inappropriate nature while also still respecting First Amendment principles guaranteeing freedom of speech. In doing so, the court could have best achieved a fair and effective decision without

12. *Id.* at 206.

13. *Id.* at 219. Lewd, obscene, or offensive language may be punished or limited if it is spoken on campus, or at a school related event, as explained throughout this case comment. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988); *Fraser*, 478 U.S. at 675.

14. *Layshock*, 650 F.3d at 217–18 (distinguishing *Layshock* from Wisniewski v. Board of Education, 494 F.3d 34 (2d Cir. 2007), Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007), and J.S. *ex rel.* H.S. v. Bethlehem Area School District, 807 A.2d 847 (Pa. 2002)).

15. Layshock *ex rel.* v. Hermitage Sch. Dist., 650 F.3d 205, 219 (3d Cir. 2011) (Jordan, J., concurring). Though Judge Jordan's concurrence argues that the *Tinker* "substantial or foreseeable disruption" test should be applied to off-campus Internet speech, *id.* at 220–21, the same logic can and should be applied to the "lewd, vulgar, or offensive language" test set forth in *Fraser* and *Morse*. For more information about the proceedings related to the *Layshock* en banc opinion, see *infra* notes 59–62 and accompanying text.

16. *Layshock*, 650 F.3d at 217–19.

"sidestepp[ing] the central tension between good order and expressive rights by leaning on property lines."[17]

This case comment will explain the relevant facts and procedural history of the case, followed by an analysis of the Third Circuit's decision and how it reached its conclusion. This analysis will include a review of cases with similar facts and analyses of other courts' legal reasoning. Lastly, it will propose a modified test for the analysis of cases where First Amendment rights and students' off-campus-created Internet speech are implicated. This test, when applied to the facts of *Layshock*, illustrates how a modified test would be beneficial to future First Amendment jurisprudence.

The Third Circuit erred in its decision in *Layshock* in multiple aspects. The court should have first analyzed how and under what conditions off-campus Internet speech might be considered on-campus student speech. Then the court should have applied a test that modifies the existing standard and takes into account the totality of circumstances to determine whether, through his or her words and actions, the student intended the speech to be "on-campus" speech.[18] By looking to the student's individual actions and purpose in propagating speech, rather than concentrating only on the effects of the speech or its use by others (i.e., whether the speech causes or may reasonably cause a substantial disruption of the school's environment), the court could better balance our nation's profound interest in the freedom of speech with public schools' goal of educating youth in a manner that promotes respect, propriety, and responsibility for one's own actions. The modified test would in turn consider both a geographical test (i.e., where Internet speech is considered on-campus merely if it is accessed on school grounds) and a directionality test (i.e., where Internet speech is considered on-campus if there is a substantial nexus between the content of the speech and the school, or the speech is directed at the school community). However, the modified test would expand on those past approaches, making them more subjective in order to determine whether a student may be punished or censored based on his or her own actions and purposes, and not on the arbitrary actions of others. Factors in such a test might include whether and how often a student accessed the Internet speech on school grounds, whether the student actively promoted access to the Internet material by others while they were on-campus, and whether the student attempted to contain or limit access to the Internet speech by the general school community. The implementation of such a test would allow schools to punish or censor students when their speech warrants such actions without greatly infringing on students' First Amendment rights. Perhaps most importantly, in formulating this

17. *Layshock*, 650 F.3d at 221 (Jordan, J., concurring).

18. *See* Vivian Lei, *Students' Free Speech Rights Shed at the Cyber Gate*, 16 Rich. J.L. & Tech. 7, 39 (2010) ("[C]ourts should focus on the role of the student author of that Internet speech in disseminating the content of that speech on-campus to determine whether a student speech that occurred on the Internet is subject to the school's discretion."); *see also* Alexander G. Tuneski, *Online, Not on Grounds: Protecting Student Internet Speech*, 89 Va. L. Rev. 139, 178 (2003) (stating a proposed test where "student speech taking place off-campus would remain protected [by the First Amendment] as long as [the student] did not take steps to actively bring their speech to campus").

modified test for Internet speech, the court could have clarified this issue and unified case law in this area of law.

II. FACTS AND PROCEDURAL HISTORY[19]

In 2005, Jason Layshock, a seventeen-year-old senior in the Hermitage School District located in Hermitage, Pennsylvania, created a fake profile on MySpace.[20] Layshock created this profile of his high school principal, Eric Trosch, while at his grandmother's house during non-school hours sometime between December 10 and14, 2005.[21] Layshock copied-and-pasted a picture of Trosch from the school district's website for use in the MySpace profile and falsely answered the survey questions that MySpace asks when users are creating profiles.[22] Some of the information that Layshock supplied in creating the profile was as follows: "Birthday: too drunk to remember"; "Are you a health freak: big steroid freak"; "In the past month have you smoked: big blunt"; "In the past month have you been on pills: big pills"; "In the past month have you gone Skinny Dipping: big lake, not big dick"; "Number of Drugs I have taken: big."[23] Furthermore, under the "interests" category, Layshock entered "Transgender, Appreciators of Alcoholic Beverages," and that Trosch belonged to a club called "Steroids International."[24] Layshock made the profile accessible to other students in the school; news of the profile spread rapidly and a majority of the student body had knowledge of it within days.[25] Around the same time, three other students created similar profiles of Trosch on MySpace, each more vulgar and offensive than the last.[26]

On December 12, 2005, Trosch, having heard of the profiles, informed his superiors and attempted to have access to the websites blocked within the school.[27] Trosch himself viewed the parody-profile Layshock made on December 15.[28] This profile upset Trosch, who found it to be demeaning, degrading, and harmful to his reputation.[29] Layshock showed other classmates the profile from a school computer on December 15, and attempted to access the profile on December 16, allegedly to

19. As noted *supra* note 8, the discussion of the facts and portions of the procedural history are based on the Third Circuit's 2010 panel opinion.

20. *Layshock*, 593 F.3d at 252 (noting that MySpace is a social networking website that allows individuals to create and share user profiles).

21. *Id.*

22. *Id.*

23. *Id.* at 252–53.

24. *Id.* at 253.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

delete it.[30] Though the school tried to limit access to MySpace on school computers, it was impossible to restrict access completely, and school officials caught various students viewing the parody profiles in both the library and computer labs.[31]

The school investigated the situation and concluded that Layshock might have created one of the profiles. On December 21, the school called him and his parents in to meet with Trosch and other school officials.[32] Without being prompted, Layshock admitted to making the profile and apologized to Trosch.[33] The school district sent a letter to the Layshocks stating its intention to hold an informal hearing on the matter.[34] At the hearing, Layshock was found guilty of violating the Hermitage School District Discipline Code for his activities relating to the creation of the parody profile.[35] The school district sentenced Layshock to a ten-day out-of-school suspension, placed him in the school's Alternative Education Program, which is designed for students who have chronic absences or behavioral problems, banned him from all extracurricular activities, including academic games and foreign-language tutoring, and did not allow him to participate in his graduation ceremony.[36]

In January 2006, Layshock's parents filed a complaint in the Western District of Pennsylvania under 42 U.S.C. § 1983.[37] The complaint was filed individually and on Layshock's behalf against the Hermitage School District, Trosch, and various other school officials.[38] Count I of the complaint alleged that the school district's punishment of Layshock violated his First Amendment rights.[39] The Layshocks' motions for a temporary restraining order and preliminary injunction were denied and withdrawn, respectively.[40] After discovery was completed, both sides moved for summary judgment.[41]

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30. *Id.*

31. *Id.*

32. *Id.* at 254.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* The statute states that any person deprived "of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C. § 1983 (2006). In the case at hand, the Layshocks claimed that their son's right to free speech, as well as their right to raise and discipline their child as they see fit, were infringed upon. *See Layshock,* 593 F.3d at 255.

38. *Id.* at 254. "The Layshocks also filed a motion for a temporary restraining order and/or preliminary injunction" of the school's punishments. *Id.* at 254–55.

39. *Id.* at 255. Count II alleged that the district's policies and rules relating to students' Internet speech were unconstitutionally vague or overbroad, both on their face and as applied to Layshock. *Id.*

40. *Id.* "On March 31, 2006, the district court denied the District's motion to dismiss the Layshocks' claim." *Id.*

41. *Id.*

The district court entered judgment for Layshock on his First Amendment claim against the school district.[42] It reasoned that Layshock's "speech" originated outside of the school because he had created the MySpace page at his grandmother's house and because the school district "could not 'establish a sufficient nexus between Justin's speech and a substantial disruption of the school environment.'"[43]

On appeal to the Third Circuit, the school district argued that there was a sufficient nexus between Layshock's "vulgar and defamatory profile of Principal Trosch and the School District to permit the School District to regulate this conduct."[44] The school district contended that Layshock's access of the school website to use Trosch's picture was the same as Layshock making in-school speech.[45] Furthermore, the school district argued that Layshock's speech should be considered on-campus student speech because he both accessed and displayed the profile while on school grounds and directed his speech at the school community, making it reasonably foreseeable that the speech would come to the attention of school community and officials.[46] The school district relied on *Fraser* and *Saxe v. State College Area School District*, two cases in which the courts upheld the school's right to discipline students who expressed lewd and vulgar speech off-campus.[47]

But the district court held that there was not a sufficient nexus between Layshock's speech and a substantial or foreseeable disruption of the school environment (i.e., that there were no suitable grounds on which to punish Layshock under the *Tinker* standard).[48] Furthermore, the court rejected the school district's argument that Layshock's use of a picture from its website was equivalent to his entering the school's property, stating that "equat[ing] Justin's act of signing onto a web site with the kind of trespass he would have committed had he broken into the principal's office or a teacher's desk" was unpersuasive, at best.[49] The court relied on *Thomas v. Board of Education* to justify its reasoning.[50]

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42. *Id.*

43. *Id.* at 258 (quoting Layshock v. Hermitage Sch. Dist., 496 F. Supp. 2d 587, 600 (W.D. Pa. 2006)). The district court held that the remaining school district defendants were entitled to summary judgment based on qualified immunity and "on the vagueness/overbreadth challenge and the parents' substantive due process claims." *Id.* at 255 n.10. Qualified immunity is "[i]mmunity from civil liability for a public official who is performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights." Black's Law Dictionary 1877 (9th ed. 2009).

44. *Layshock,* 593 F.3d. at 259 (citations omitted).

45. *Id.*

46. *Id.*

47. *Id.* at 261. In *Saxe*, the guardian of two students challenged a school's anti-harassment policy, claiming that it was constitutionally overbroad in violation of the First Amendment. The Third Circuit held that the policy was indeed overly broad because it potentially encompassed speech that was neither substantially nor foreseeably disruptive to the school environment, nor lewd, vulgar, or offensive. *See* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

48. *Layshock*, 650 F.3d at 214.

49. *Layshock,* 593 F 3d at 259.

50. *Id.* (citing Thomas v. Bd. of Educ., 607 F.2d 1043 (2d Cir. 1979)).

In *Thomas*, a group of students was suspended for publishing and distributing a satirical magazine that included lewd and vulgar content.[51] Some of the initial content for the magazine was planned after school hours in a classroom, a teacher was consulted "for advice on isolated questions of grammar and content," "an occasional article was composed or typed within the school building," and the finished magazine was stored in a classroom closet with the teacher's permission.[52] Despite the activities that the students conducted on school grounds, they were careful to distribute the magazine completely off of school grounds.[53] The Second Circuit concluded that the students' activities, although on school grounds in many respects, were not sufficiently related to the school to justify the school's use of authority.[54] The Third Circuit considered Layshock's alleged activities on school grounds to be even more attenuated than the circumstances in *Thomas* and decided that the school district's argument, that Layshock's speech was effectively on school grounds, was flawed.[55]

Unlike other cases where courts allowed schools to have authority over off-campus speech, the Third Circuit justified its reasoning that Layshock could not be punished by the school district because, although his lewd and vulgar speech was directed at the school community, there was no substantial or foreseeable disruption of the school environment.[56] Unlike *Fraser*, where a student made a sexually explicit speech while nominating a classmate for student office, Layshock's speech was conducted, in the court's view, completely off-campus.[57] As a result, the Third Circuit decided that the school district's reliance on *Fraser* and *Thomas* to justify its use of authority was misguided.[58] Due to a conflicting decision issued by another panel of the Third Circuit on the same day, the court vacated the *Layshock* opinion and held a consolidated en banc rehearing in June 2010; in June 2011 the Third Circuit published its en banc opinion, which was unanimous and accompanied by a single concurrence.[59]

51. *Thomas,* 607 F.2d at 1045.

52. *Id.*

53. *Id.*

54. *Id.* at 1050.

55. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 260 (3d Cir. 2010), *aff'd en banc*, 650 F.3d 205 (3d Cir. 2011).

56. *Layshock*, 650 F.3d at 213–15.

57. *Id.* at 216–17.

58. *Id.* at 215–16.

59. *Id.* at 207, 219–20. The panel decision in *Layshock* was published on February 4, 2010. On the same day, a different panel of the Third Circuit published an opinion concerning a case that was factually nearly identical to *Layshock*. *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286 (3d Cir. 2010), *rev'd en banc*, 650 F.3d 915 (3d Cir. 2011). However, unlike the *Layshock* panel, the panel in *Snyder* held in favor of the school district on the grounds that a paper copy of the website, which contained lewd, vulgar, and offensive speech, had been brought on-campus and viewed by the principal. *See id.* Because the cases were so factually similar and confusion ensued, the Third Circuit vacated both opinions and held a rehearing of the consolidated cases en banc on June 3, 2010. The Third Circuit published its opinions following the consolidated en banc rehearing on June 13, 2011. While the *Layshock* decision was upheld under similar reasoning to the original Third Circuit opinion in the case, 650 F.3d 205 (3d

The majority held, much like the original Third Circuit panel, that the school district did not preserve the issue of whether there was a substantial or foreseeable disruption on appeal under *Tinker*, and that Layshock's speech could not be considered on-campus speech subject to regulation under *Fraser*.[60] As a result, the Third Circuit held that the school district violated Layshock's First Amendment rights by punishing him for the MySpace profile that he created off-campus.[61] The concurrence attempted to establish that a school district may discipline off-campus student speech if it causes a substantial or foreseeable disruption to the school environment, an issue on which the majority declined to comment.[62]

III. ANALYSIS

A. Summary of the Argument

This case comment contends that the Third Circuit erred in *Layshock* because it should have considered alternatives to the court's current strictly geographical or strictly directional analytical approaches in light of the nature of Internet speech. When considering Internet-based speech, notions of geographical location of speech or intended audience of speech become blurred; the speech may be distributed globally and, as a result, in many cases an "intended direction or audience" can include unanticipated individuals. This comment argues that there is not one strict approach that should be used with respect to Internet speech; rather, a combination of approaches should be used in order to subjectively determine the speaker's actions and purpose in propagating the speech. The Third Circuit focused on the school district's argument that Layshock's use of a picture of Trosch from its website equated to an entrance onto school grounds when it should have instead more thoroughly analyzed how Layshock's Internet speech may be considered on-campus student speech because it "was aimed at the school district community and the Principal and was accessed on campus by Justin."[63] Analyzing Internet student speech under the same standard as more traditional student speech may cause the courts and school administrators to punish students in either overly broad or overly narrow manners, thereby either inappropriately infringing on First Amendment rights or allowing deleterious speech to go unpunished. The court should have adopted the approach taken in other cases that first determines whether Internet speech is on- or off-campus. The court's analysis should have considered whether Layshock's personal actions and purpose in propagating the speech, such as whether he shared the website with others on school grounds or promoted its viewing in other school-related forums,

Cir. 2011), the *Snyder* decision was reversed after the full court held that the Internet speech involved did not cause a substantial or foreseeable disruption and never became on-campus speech for the purposes of a *Fraser* analysis, 650 F.3d 915, 932–33 (3d Cir. 2011).

60. *See Layshock*, 650 F.3d 216–17.

61. *See id.*

62. *Id.* at 219–20 (Jordan, J., concurring).

63. *Id.* at 214 (citing *Layshock*, 593 F.3d at 259).

indicated that he intended to assert on-campus speech. In making a determination about whether Laysock intended his speech to be on-campus, the court could then more effectively decide when Internet speech may be considered on- or off-campus speech. This modified standard would better uphold First Amendment interests and principles while also allowing public schools to censor or punish deleterious speech when it is most appropriate and necessary.

This case comment contends that the court should have found that Layshock's Internet speech was on-campus student speech under a modified *Fraser/Morse* standard because he made the profile accessible to other students and the school community in general, encouraged other students to view the website on-campus, accessed the profile while on-campus himself, and intended the profile to be a source of entertainment for students at school. The court, however, erroneously distinguished cases involving Internet-based speech on the grounds that the final holding in each of the cases rested on a *Tinker* finding of substantial or foreseeable disruption that was not present in *Layshock*.[64] As a result, the *Layshock* court concluded that whether the speech was physically accessed on school grounds was irrelevant and that the students in each case were validly subject to punishment or censorship.[65] However, in *Layshock*, the court should have analyzed whether Layshock's actions and purpose in propagating the speech made it unprotected, on-campus student speech. Under the modified standard proposed here, speech may be punished or limited if the speech is lewd, obscene, or offensive, regardless of whether a foreseeable or substantial disturbance of the school environment occurred, if, based on a totality of circumstances, the student speaker's own actions and purpose in propagating the speech subjectively indicate an intent to assert on-campus speech.

B. What the Third Circuit Should Have Done: A Modified Test

Layshock makes clear that the issue of whether Internet speech that originates outside of school grounds is student speech presents an area of the law that needs to be explored and refined. While the court's interpretations of the landmark Supreme Court cases of *Tinker*, *Fraser*, and *Morse* were accurate when assuming that Layshock's Internet speech was off-campus speech, the issue of whether off-campus Internet speech is student speech should be distinguished under the traditional analysis within First Amendment jurisprudence. To allow the test for Internet speech to be equated to earlier generations' concepts of speech's originating geography or objective directionality ignores the dynamic nature of Internet speech. Indeed, "[today's] students are connected to each other through email, instant messaging, blogs, social networking sites, and text messages. . . . Off-campus speech can become on-campus speech with the click of a mouse. . . . First Amendment jurisprudence will need to evolve in order to address this new environment."[66] Such an analytical evolution

64. *Id.* at 217–19.

65. *Id.*

66. Doninger v. Niehoff, 594 F. Supp. 2d 211, 223 (D. Conn. 2009).

would help to unify the approaches that different courts have taken, while also providing guidance to schools and students concerning the limitations on Internet-based speech.

In *Layshock*, the Third Circuit sitting en banc started by discussing *Tinker*, in which the Des Moines Independent Community School District decided that it would suspend any student who refused to remove a black-armband that the students wore in protest of the Vietnam War.[67] Using *Tinker*, the Third Circuit in *Layshock* explained that a school may limit or punish a student's free speech or expression, whether on- *or* off-campus, when the speech or expression "materially and substantially disrupt[s] the work and discipline of the school."[68] The court also relied on *Fraser* and its progeny, which hold that a school can punish a student's *on-campus* (but not off-campus) speech if it is vulgar, lewd, or offensive.[69] The last essential case that the court relied upon is *Morse v. Frederick*, where the Supreme Court determined that out-of-school speech could be limited or punished if the message that the speech encourages (in this case, a sign reading "Bong Hits 4 Jesus") goes against a compelling public interest and occurred at a school-related or -sanctioned function or event.[70]

The court used the above cases as a legal backdrop to analyze the facts of *Layshock*. The district court had held that punishing Layshock under *Tinker* would be inappropriate since it found that there was not a sufficient nexus between his speech and a substantial disruption of the school environment; the school district did not dispute this point on appeal.[71] On appeal, in reference to the *Fraser* and *Morse* line of cases, the Third Circuit held that Layshock's speech could not be considered on-campus speech based on the fact that he took a picture from the school district's website or accessed the MySpace profile while on school grounds.[72] As a result, the court held that the school could not discipline Layshock, even though his speech was lewd, vulgar, and offensive, because it did not fit within the *Fraser/Morse* criteria.[73]

The Third Circuit's analysis, however, is flawed because it did not properly distinguish *Layshock* from the above cases. Specifically, none of the aforementioned cases dealt with speech that originated off-campus, came on-campus, and did not cause a substantial or foreseeable disruption, but was still lewd, vulgar, or offensive. For instance, *Tinker* stands for the principle that off-campus speech may be limited if it causes a substantial or foreseeable disturbance to the school environment.[74]

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67. *Layshock,* 650 F.3d at 211–12 ; *see also* Tinker, 393 U.S. 503 (1969).

68. *Layshock,* 650 F.3d at 211–12.

69. *Id.* at 216–19 (citing Bethel Sch. Dist. No. 43 v. Fraser, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281–82 (1988); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 213 (3d Cir. 2001)).

70. *See Layshock,* 650 F.3d at 213 (citing Morse v. Frederick, 551 U.S. 393 (2007)).

71. *Id.* at 214.

72. *Id.* at 214–16.

73. *Id.* at 218–19.

74. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

While a substantial or foreseeable disruption to the school environment may occur with off-campus Internet speech, it does not speak to whether Internet speech that is created off-campus may become on-campus student speech that may then be sanctioned or censored for its lewd, vulgar, or offensive nature, and not solely for its potentially substantial or disruptive nature.

A similar issue arose in *Fraser*, where a student made a sexually explicit speech at a school-wide assembly. In *Fraser*, the Court held that student speech may be punished or limited if it is lewd, vulgar, or offensive, but only if it is deemed to be on-campus student speech; however, the *Fraser* Court did not provide further elucidation of what "on-campus" student speech might be in non-traditional situations where the speech originated outside of school grounds, but later becomes on-campus speech, as in many Internet speech situations.[75] *Morse* extended *Fraser* to find that speech that runs contrary to a school's public policy is unprotected. In *Morse*, a student was punished when he held up a sign that read, "BONG HiTS 4 JESUS"; the school disciplined the speech on the grounds that it promoted illegal drug use. The Court allowed the school's punishment and held that schools could sanction student speech that is contrary to the school's mission and public policy, but only if the student's speech occurred on school grounds or at a school-related or -sanctioned event.[76]

Finally, *Thomas*, the case that the Third Circuit most heavily relied upon, is also factually distinguishable from *Layshock*. In *Thomas*, even though a group of students prepared lewd speech on-campus, because they were careful to distribute the material off-campus and during non-school hours, the Second Circuit held that the First Amendment protected their speech.[77] Unlike in *Thomas*, Layshock's lewd and vulgar speech was prepared off-campus and during non-school hours, but was then "distributed" on-campus and during school hours when Layshock accessed the MySpace profile and showed it to other students in a school classroom.[78] Read this way, *Thomas* should favor interpreting Layshock's speech as unprotected under the First Amendment, and not the other way around as the court suggests.

More importantly, none of the aforementioned cases addresses the crucial issue in *Layshock* of whether Layshock's Internet speech that originated off-campus may be considered on-campus student speech due to the circumstances of its entrance onto school grounds through Layshock's actions on campus, as well as its content and Layshock's purpose in publishing the speech in the first place. Specifically, the Third Circuit rests its analysis on the fact that Layshock created the speech off-campus and that his taking a picture from the school district's website could not be equated to an

75. *Fraser*, 478 U.S. at 685; *see also Saxe*, 240 F.3d at 213.

76. *Morse*, 551 U.S. at 403–04 (addressing student speech promoting illegal drug use). It is also important to note that speech that conveys a political or religious message is exempted from this rule. *Id.*

77. Thomas v. Board of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043 (2d Cir. 1979).

78. Layshock *ex rel.* Layshock v. Hermitage Sch. Dist., 593 F.3d 249, 253 (3d Cir. 2010), *aff'd en banc*, 650 F.3d 205 (3d Cir. 2011).

entrance onto school grounds.[79] However, various federal district and appellate courts, and at least one state supreme court, have held that Internet speech that originates off-campus may still be considered on-campus student speech under certain circumstances.[80] By acknowledging such distinctions and formulating an appropriate test to determine when such circumstances are present, the court would strike a balance between the necessary order that school administrators seek to maintain and the free speech rights that all Americans treasure, while also alleviating the confusion that has arisen as a result of disparate lower court opinions in similar situations.[81]

In *Layshock*, the school district cited three cases in which various courts explored the notion of off-campus Internet speech that was, nevertheless, held to be on-campus speech for the purposes of First Amendment jurisprudence: *J.S. ex rel. H.S. v. Bethlehem Area School District*, *Wisniewski v. Board of Education of Weedsport Central School District*, and *Doninger v. Niehoff*. In *Bethlehem*, a student created a website that contained derogatory and offensive statements about his algebra teacher and elicited donations in order to hire a hitman to kill her.[82] The Supreme Court of Pennsylvania held that even though the student created the website at home, the student's display of the website to other students in school rendered the speech on-campus speech and therefore was subject to on-campus student speech tests.[83]

In *Wisniewski*, a student was suspended when the school discovered that the student had created a messaging icon from his home that promoted the killing of one of his teachers.[84] The Second Circuit held that since the speech "cross[ed] the boundary of protected speech and constitute[d] student conduct that pose[d] a reasonably foreseeable risk that the icon would come to the attention of school authorities," it was punishable or could be limited under a *Tinker* analysis.[85] Finally, in *Doninger*, a student was banned from running in a student election for referring to

79. *Layshock*, 650 F.3d at 214–15.

80. *See* Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34 (2d Cir. 2007) (affirming the district court's proposition that, though the student in the case designed and published a web image outside of school property, the nature of the image was such that it was reasonably foreseeable that it would come to the attention of school authorities and students, and the student, therefore, was not insulated from school discipline); Doninger v. Niehoff, 514 F. Supp. 2d 199 (D. Conn. 2007) (holding that since the student designed her created blog that contained lewd, offensive and vulgar language to reach within the school, that off-campus created Internet expressive conduct could be considered punishable on-campus speech); J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847 (Pa. 2002) (Holding that where a student made an off-campus website that was accessed on school grounds, there was a sufficient nexus between the website and the school to consider the speech to be on-campus. Factors included in the analysis were that the student shared the website with a student while on-campus and informing fellow students of the websites existence while on-campus.).

81. *See, e.g.*, *Bethlehem*, 807 A.2d at 863–64.

82. *Id.* at 851.

83. *Id.* at 855–56.

84. *Wisniewski*, 494 F.3d at 36.

85. *Id.* at 38–39.

school officials in her personal blog as "douchebags."[86] The district court in *Doninger* held that since "the content of the blog was related to school issues, and it was reasonably foreseeable that other [students at the school] would view the blog and that school administrators would become aware of it," this speech could be punished or limited under a *Fraser* analysis.[87] Of note in the district court's opinion is that it held, under *Fraser*, that Doninger's speech could be disciplined without any showing of substantial or foreseeable disruption to the school environment due to its vulgar and offensive nature.[88] The Second Circuit affirmed the lower court's holding, but found that a substantial disruption to the school environment had occurred, making Doninger's Internet speech unprotected under *Tinker*, and also making the geographical element of her speech irrelevant.[89] However, the Second Circuit also noted that if Doninger's Internet speech had become on-campus student speech, *Fraser* would apply, and the school would be allowed to discipline Doninger; yet the Second Circuit declined to engage in a *Fraser* analysis because it found grounds to settle the case on *Tinker* grounds.[90]

In each of the above three cases, at least one level of the reviewing courts, before engaging in either a *Tinker* or *Fraser* analysis, *first* determined whether the respective Internet speech, which originated outside of school grounds in each case, might still be considered on-campus student speech.[91] The lower courts in *Wisniewski* and *Doninger*, as well as the Pennsylvania Supreme Court in *Bethlehem*, concluded that speech might be considered student speech, either because it was accessed on school grounds or because the student should have reasonably foreseen that the Internet speech would come to the attention of the school community.[92]

In *Layshock*, the Third Circuit dismissed these three cases as inapplicable because they were all decided under a *Tinker* analysis and a substantial or foreseeable disruption to the school environment was present in each.[93] While this may be true, the court neglected the fact that, in addition to establishing that Internet speech may be punished or limited due to its disruptive nature under *Tinker*, *Wisniewski, Doninger*, and *Bethlehem* represent methods for determining whether or not Internet speech that originates outside of school grounds may be considered student speech in the first place. The *en banc* panel in *Layshock* stated:

> We believe the cases relied upon for the [School] District stand for nothing more than the rather unremarkable proposition that schools may punish

86. Doninger v. Niehoff, 527 F.3d 41, 45 (2d Cir. 2007).

87. Doninger v. Niehoff, 514 F. Supp. 2d 199, 217 (D. Conn. 2007).

88. *Id.* at 216–17.

89. *Doninger*, 527 F.3d at 53.

90. *Id.* at 49–50.

91. Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist., 494 F.3d 34, 38–39 (2d Cir. 2007); *Doninger*, 514 F. Supp. 2d at 217; J.S. *ex rel.* H.S. v. Bethlehem Area Sch. Dist., 807 A.2d 847, 855 (Pa. 2002).

92. *Wisniewski*, 494 F.3d at 38–39; *Doninger*, 514 F. Supp. 2d at 217; *Bethlehem*, 807 A.2d at 855.

93. 650 F.3d 205, 216–19 (3d Cir. 2011).

> expressive conduct that occurs outside of school, as if it occurred inside the "schoolhouse gate," under certain very limited circumstances, none of which are present here.[94]

The original panel, in nearly identical language, expressed this same sentiment.[95] The two factors the court referred to are the substantial or foreseeable disruption of the school environment test under *Tinker* and the lewd, obscene, or offensive on-campus language test under *Fraser/Morse*.

Analyzing the geography and directionality of speech tests discussed in *Bethlehem*, *Wisniewski*, and *Doninger* demonstrates that both of the factors that warrant a finding that Internet speech originating off-campus is on-campus student speech subject to punishment or limitation are present in *Layshock*, though in degrees that led both the original and en banc panels to hold in Layshock's favor. Geographically speaking, Layshock accessed the parody profile he created on school grounds and showed it to other students.[96] In terms of the directionality of the speech, the content of the parody MySpace profile is directly related to the school community (i.e., Principal Trosch). In addition, Layshock made it publicly available and encouraged members of the student body to view it, thus bringing it to the attention of the school community.[97] The combination of the geographical access of the MySpace profile and the directionality of Layshock's speech indicate an intention on his part that the speech go on-campus in a manner that could be limited or punished under a modified *Fraser/Morse* analysis.

Once viewed in this light, Layshock's Internet speech is student speech and thus may be punished or limited by the school district if it meets *either* the *Tinker* or *Fraser* standards—requiring *Tinker*-style substantial or foreseeable disruption or *Fraser*-style lewd, vulgar, or obscene language standard. Though the circumstances in *Layshock* do not meet the *Tinker* standard as both the Third Circuit held and the school district conceded, in terms of content it clearly meets the *Fraser* standard, as the speech was lewd, vulgar, and offensive.[98]

Moreover, the *J.S ex rel. Snyder v. Blue Mountain School District* case, decided by a different panel of the Third Circuit on the same day as *Layshock*, was factually nearly identical to *Layshock*. However, the court reached the opposite holding, which led the Third Circuit to vacate both opinions and rehear the cases en banc.[99] In *Snyder*, the lower court held that a sufficient nexus existed between the student's off-campus originating Internet speech to make it on-campus speech because, among other factors, it was about a school official and its intended audience was the school

94. *Id.* at 219.

95. 593 F.3d 249, 263 (3d Cir. 2010).

96. *Id.* at 253.

97. *Id.* at 253–54.

98. *See Id.* at 263.

99. The en banc rehearing opinions were both published on June 13, 2011. See *supra* note 59 for author's discussion.

community.[100] The lower court further concluded that the speech was not protected due to its lewd and vulgar content.[101] On appeal, in the *Snyder* en banc opinion that was published on June 13, 2011, the Third Circuit reversed the lower court's decision. Citing the previous lower court's decisions that "a substantial disruption so as to fall under *Tinker* did not occur,"[102] the court analyzed whether the student speech in question could be limited or punished under the *Fraser*/*Morse* standards.[103] Finding that the student in *Snyder* created the MySpace page outside of school and that a printout of the webpage was only brought to school at the request of the principle, the Third Circuit held that the speech could not be punished because it was off-campus speech.[104] Of specific note, the *Snyder* court mentioned that

> J.S. did not even intend for the speech to reach school—in fact, she took specific steps to make the profile "private" so that only her friends could access it. The fact that her friends happen to be Blue Mountain Middle School Students is not surprising, and does not mean that J.S.'s speech targeted the school.[105]

However, unlike in *Snyder* where the Internet speech *never* reached inside the school, in *Layshock* students viewed the MySpace profile while on school grounds. The *Snyder* court did not have to reach a determination of whether or not off-campus created Internet speech could become on-campus student speech, yet this determination should not have been avoided in *Layshock*.

Considering the current trend of the courts, it is understandable that the court in *Layshock* would find in favor of Layshock and not the school district. Had the Court found in favor of the school district on the grounds of *Fraser*, it would first have had to set forth a test for determining when Internet speech originating off-campus may nevertheless be considered on-campus student speech. Creating a clear test for when Internet speech originating off-campus is actually on-campus for First Amendment purposes is a daunting task. A test that allows Internet speech to be considered on-campus speech in a categorically broad manner could lead to dangerous infringements of First Amendment rights that are unacceptable to our basic constitutional tenets.[106] Yet at the same time, a test that is too narrow ties the hands

100. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07CV585, 2008 WL 4279517, *7 (M.D. Pa. Sept. 11, 2008).

101. *Id.*

102. *Id.*

103. J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 650 F.3d 915, 926–27 (3d Cir. 2011).

104. *See id.* at 929.

105. *Id.* at 930–31.

106. For instance, the en banc opinion in *Snyder* commented that to allow a school to punish a student for Internet speech that was created outside of school might set a precedent that could potentially allow school districts to punish students in arbitrary manners that would violate the jurisprudence and spirit of the First Amendment. Said the Third Circuit:

> Under the[] circumstances [present in *Snyder*], to apply the *Fraser* standard to justify the School District's punishment of J.S.'s speech would be to adopt a rule that allows

of school officials in punishing or limiting Internet speech that is lewd, vulgar, or offensive, and therefore deleterious to the school environment, even in the absence of a substantial or foreseeable disruption to the school environment.[107]

Nevertheless, the construction of such a balanced test is not impossible. For instance, rather than basing a test purely on a geographical analysis or on directionality of the speech,[108] the test should focus on the student's agency in promoting and disseminating the Internet speech.[109] In many ways, such a test would encompass both the geographical and directional approaches to take into account a totality of circumstances. Accordingly, if the student simply posts Internet speech to a website or a blog, but does not take further steps to encourage others from the school community to view it, the court can conclude that the student intended it to be off-campus speech.[110] In such cases, the student will likely not have accessed the Internet speech on campus—or at least will only have done so a minimal amount of times—and will not have purposefully directed the speech toward the school community. On the other hand, if a student is active in spreading the Internet speech to fellow students, it can be inferred that the student intended the speech to be on-campus speech that may be subject to school discipline and censorship if it is lewd, vulgar, or offensive under the *Fraser* standard. In such cases, the student may have accessed the Internet speech on-campus to some extent and will have purposely directed the speech at the school community.

Lastly, and perhaps most importantly, this test would not set any strict criteria for what may transform off-campus Internet speech into on-campus student speech; courts would take into account the totality of circumstances and determine outcomes on a fact-specific, case-by-case basis. The geographical location in which the Internet speech was created or accessed and the intended direction of the Internet speech based on the student speaker's own actions would be the primary factors, but the analysis would be more subjective, allowing both courts and school administrators to look at all of the actions and circumstances in question before permitting any censorship. In *Layshock*, the court may have noted that Layshock's speech referencing a school official was targeted at the school audience because it was a fake profile of the school's principal created for humorous or entertainment purposes; was accessible by all students; was actually accessed on school grounds by Layshock; and was

> school officials to punish any speech by a student that takes place at anywhere, at any time, as long as it is *about* the school or a school official, is brought to the attention of a school official, and is deemed "offensive" by the prevailing authority.
>
> *Id.* at 933.

107. *See* James M. Patrick, *The Civility-Police: The Rising Need to Balance Students' Rights to Off-Campus Internet Speech Against Schools' Compelling Interests*, 79 U. Cin. L. Rev. 855, 893 (2010). However, a test determining when Internet speech that originates off of school grounds may be considered on-campus student speech under *Fraser* would not limit a school district's ability to discipline or censor students under *Tinker*, where a substantial or foreseeable disruption to the school environment exists.

108. For definitions of these standards, see *supra* note 5.

109. *See* Lei, *supra* note 18, at 39; Tuneski, *supra* note 18, at 178.

110. *See* Lei, *supra* note 18, at 39; Tuneski, *supra* note 18, at 178.

accessed by a number of other students, in some cases at Layshock's encouragement. Such a modified test would allow school officials to punish and limit lewd, vulgar, or offensive school speech when it is most appropriate, but not to do so wantonly or simply because they do not like the kind of speech that is expressed.[111]

IV. CONCLUSION

Freedom of speech has long been of paramount importance to our nation and its citizens. However, courts have also realized the necessity of limiting certain speech that is detrimental in school settings. The court in *Layshock* leaves blurred an area of law that is in need of clarification. The test the court used relies too heavily on strict interpretations of a speech's geography or direction. As the concurrence to the en banc opinion notes, the Internet has made physical property lines arbitrary markers of where a school's power should start and stop.[112] Rather than abiding by these increasingly outdated constructs, the court should have instituted a modified test that looks at the geographical location and direction of the speech, but does so in a manner that takes both into account, along with other actions and the subjective intent of the speaker in order to find his or her purpose. If the totality of circumstances suggests that the speaker intended the speech to be on-campus, the court should allow a school to punish or censor the student if his or her speech is lewd, obscene, or offensive pursuant to the *Fraser/Morse* criteria. By adhering to the existing test, the court avoids both determining whether *Fraser* or *Morse* may apply in cases where off-campus Internet speech finds its way on campus or into the school community and setting forth any test that would determine whether Internet speech originating off-campus might be considered on-campus student speech for First Amendment purposes under certain circumstances. At a time when young Americans can recklessly engage in speech that is inappropriate, potentially dangerous, and may become ubiquitous with the touch of a button, elucidating and enforcing such a test is more important than ever, while ensuring it comports with the First Amendment.

111. *See* Patrick, *supra* note 107; Lei, *supra* note 18 ; Tuneski, *supra* note 18.

112. *See* Layshock *ex rel*. Layshock v. Hermitage Sch. Dist., 650 F.3d 205, 221–22 (3d Cir. 2011) (Jordan, J., concurring).