ANGLO-SAXON APPROACHES TO STUDENTS' FREEDOM OF SPEECH AND CYBERBULLYING: CONSTITUTIONAL FOUNDATIONS FOR A COMPARATIVE ANALYSIS

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Abstract

In our globalized world the internet enmeshes every-day life with all of its advantages and pitfalls, and it does so especially in the school environment, where it is used for many positive and negative purposes; however, students' speech might often become offensive, vulgar, lewd, or harassing, and we can calmly say, that some peers might bully each other verbally and physically.
Bullying exists since the first school was established;[1] the peers picked on each other, made fun of the weaknesses of their classmates already back then. We all went through these kinds of situations, but these stopped, when we arrived home. Nevertheless, since the internet appeared, bullying does not finish at the school or in the schoolyard, but does continue at home via electronic devices. Cyberbullying is a phenomenon, but we cannot define it properly, and this is exactly what points to the biggest problem: namely this type of activity does not have a general and widely accepted definition, but approaches thereto vary in the legal cultures and in the different states.
In my article, I researched the collision of cyberbullying activities with freedom of speech, especially in terms students' freedom of expression. In the first part of my essay I will highlight definitions from United States state laws, and briefly analyze the crucial elements apparent in these regulations.
Moreover, in the second part I briefly summarize the main finding of leading US precedent, the *ratio decidendi* of which guides the judiciary in developing standards. The *Tinker* or the *Fraser* cases and the relevant tests forged by the United States Supreme Court are examples to these precedents used herein. Therefore, these decisions will clarify the reasons why the definition of cyberbullying represents a great and burdensome task for the legislator. Furthermore, through the case law analyzed, we will face the question, whether the *Tinker* and other students' free speech landmark cases and their conclusions are applicable to different forms of electronic expression in the online environment as well. Moreover, we shall further address the problem of off-campus speech. In light of the current situation in the US, those affected by cyberbullying await the decisions of the Supreme Court, who - to this date - remains reluctant to review this issue.

Keywords: cyberbullying, definition, students' freedom of speech, Supreme Court of the United States, *Tinker* standard, *Fraser, Layshock, Kowalsky,* schoolhouse gate

[1] MCCARTHY 2014 p. 806

In our globalized world the internet enmeshes every day life with all of its advantages and pitfalls. The virtual world creates a host of possibilities in private and professional, business life, but in addition to these great benefits, many pitfalls – elaborated herein – fine-tune the picture. In the school environment, the internet is used in many ways: for communication between students and teachers; homework assignments are dispatched and sent via e-mail (or via social media) between students and teachers; many schools have their own online or off-line journals, where pupils have the opportunity to express themselves and replenish their personalities, etc. However, students' speech often becomes vulgar, lewd, offensive[2], or harassing, and we can calmly say, that the peers bully each other verbally and physically as well. What is bullying? It is a phenomenon that exists since the first school was established[3]; the peers picked on each other, made fun of the weaknesses of their classmates, and this still is the case at present as well. We all went through these kinds of situations, but these at least stopped, when we arrived home. Nevertheless, since the internet appeared, bullying does not finish at the school or in the schoolyard, but continues at home via electronic devices.

What does cyberbullying mean and how should we regulate it?

Cyberbullying deserves our attention as a complex phenomenon overarching several branches of law, but we cannot give an exact answer as to what regulation would best fit the purpose of prevention. What exemplifies one of the most important problems of this activity is that it does not have a widely accepted and crystallized definition neither on the international nor on the national level. However, there are some crucial elements, such as: (i) the act of bullying being committed in the virtual world, (ii) repetition, (iii) offensiveness.

In my article, I researched the collision of cyberbullying activities with students' freedom of speech. Many cases throughout the world (USA, Australia, and United Kingdom, Ireland) prove that this is a problem and issue, which still remains unresolved.

In the first part of my essay I will highlight definitions from United States state laws, and briefly analyze the crucial elements thereof.

Moreover, in the second part I looked briefly through the leading US precedent, such as the *Tinker* or the *Fraser* cases and the relevant freedom of speech tests created by the Supreme Court of the United States (SCOTUS). Therefore, these decisions will clarify the reasons why the definition of (and the creation of all-encompassing protections against) cyberbullying represents a great and burdensome task to the legislator. Furthermore, through the case law analyzed, we will face the question, whether the *Tinker* and other students' free speech landmark cases are analogically applicable to different forms of electronic expression as well. The issues of off-campus speech will also be addressed.

CYBERBULLYING LAWS (IN THE UNITED STATES)

In the United States all but one (Montana) states enacted anti-bullying laws, and out of these 22 concerns cyberbullying *expressis verbis*.[4]

[2] See HOSTETLER 2014 p. 2 note 4
[3] See *supra* note 1
[4] HINDUJA-PATCHIN 2015 p. 1

In the following, I will introduce some examples of said legislation to show how they define cyberbullying. No clearly established federal law exists in the United States and Canada to protect against these activities, state jurisdictions and jurisprudence govern protections on a daily basis.

Legislation in Massachusetts was introduced by reason of the Phoebe Prince[5] case, resulting in the suicide of a victim of cyberbullying; thus it seems appropriate to begin the mapping of legal regulation with this state. On 3 May 2010, the governor approved the Act Relative to Bullying in Schools, which defines bullying, including cyberbullying and separately defines cyberbullying as well, as follows:

"Cyber-bullying", bullying through the use of technology or any electronic communication, which shall include, but shall not be limited to, any transfer of signs, signals, writing, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photo electronic or photo optical system, including, but not limited to, electronic mail, internet communications, instant messages or facsimile communications. Cyber-bullying shall also include (i) the creation of a web page or blog in which the creator assumes the identity of another person or (ii) the knowing impersonation of another person as the author of posted content or messages, if the creation or impersonation creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying. Cyber-bullying shall also include the distribution by electronic means of a communication to more than one person or the posting of material on an electronic medium that may be accessed by one or more persons, if the distribution or posting creates any of the conditions enumerated in clauses (i) to (v), inclusive, of the definition of bullying."[6]

This definition is a very detailed one, which attempts to cover all online activities that might lead to online bullying. However, cyberbullying is a special type of bullying[7], as we can realize from the above quoted legislation. In the above-cited Massachusetts Act bullying is defined through some very important key elements such as repeated use, substantial disruption of the education process, or the infringement of the rights of the victims at school[8] (I will deal with these later on in detail). In the context of the present topic, bullying and cyberbullying are in a very close connection: cyberbullying is bullying online. This is why, when talking about the different definitions of cyberbullying, I need to focus also on the qualifying elements of bullying as well. With this method, the differences and specific attributes of the online type of bullying become clearly visible.

In North Carolina, the General Statutes (GS) define cyberbullying in § 14-458.1:

"[I]t shall be unlawful for any person to use a computer or computer network to do any of the following: (1) With the intent to intimidate or torment a minor: a. Build a fake profile or Web site; b. Pose as a minor in: 1. An Internet chat room; 2. An electronic mail message; or 3. An instant message; c. Follow a minor online or into an Internet chat room; or d. Post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor. (2) With the intent to intimidate or torment a minor or

[5] See MCCARTHY 2014 p. 811

[6] Act Relative to Bullying in Schools Section 5.

[7] See HOSTETLER 2014 p. 2

[8] *supra* note 6

the minor's parent or guardian: a. Post a real or doctored image of a minor on the Internet; b. Access, alter, or erase any computer network, computer data, computer program, or computer software, including breaking into a password protected account or stealing or otherwise accessing passwords; or c. Use a computer system for repeated, continuing, or sustained electronic communications, including electronic mail or other transmissions, to a minor. (3) Make any statement, whether true or false, intending to immediately provoke, and that is likely to provoke, any third party to stalk or harass a minor. (4) Copy and disseminate, or cause to be made, an unauthorized copy of any data pertaining to a minor for the purpose of intimidating or tormenting that minor (in any form, including, but not limited to, any printed or electronic form of computer data, computer programs, or computer software residing in, communicated by, or produced by a computer or computer network). (5) Sign up a minor for a pornographic Internet site with the intent to intimidate or torment the minor. NC General Statutes - Chapter 14 Article 60 6 (6) Without authorization of the minor or the minor's parent or guardian, sign up a minor for electronic mailing lists or to receive junk electronic messages and instant messages, with the intent to intimidate or torment the minor."[9] (In 2012, Senate Bill 707[10] extended cyberbullying protections to school employees – such as teachers – as well[11]).

In the Senate Bill bullying is also defined, but I just want to highlight some crucial points of this long conception herein: (i) the creation of a hostile environment by substantially interfering with or impairing a student's educational performance, (ii) taking place on school property or at a school-sponsored function, etc.[12] In this cyberbullying concept, repetition is a qualifying factor, contrary to the Massachusetts definition, which is a significant difference between these two state laws, which also demonstrates the different and divergent approaches to the topic on the state level. In North Carolina, the infringements of the rights of other students are not regulated; however, it is an important standard in the SCOTUS case law, as we will see below in *Tinker*, in relation to cyberbullying.

The next state, which I examined was Missouri, because this state does not define what cyberbullying means (and Megan Meier committed suicide in Missouri as a result of online bullying, just like Phoebe Prince in Massachusetts[13]), only includes bullying in the statutory definition:

'"Bullying" means intimidation or harassment that causes a reasonable student to fear for his or her physical safety or property. Bullying may consist of physical actions, ***including*** *gestures, or oral,* ***cyberbullying****, electronic, or written communication, and any threat of retaliation for reporting of such acts."*[14]

In this solution, cyberbullying is not defined, thus the schools concerned are left without any guidelines and in case of this the persons responsible for preventing and handling the cyberbullying cases in school have no clarified measures, protocols or steps to follow. This

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[9] North Carolina General Statutes Chapter 14 Article 60 §14-458.1.

[10] North Carolina Senate Bill 707 Section 4.

[11] MCCARTHY 2014 p.812-813

[12] North Carolina Senate Bill 526 Section 1.

[13] LIPTON 2012-2013 p. 100

[14] Missouri Revised Statutes, Chapter 160 (160.775) ***emphasis added***

fact causes diverging practices among the different schools in the state of Missouri, which, in my opinion, could and shall be avoidable.

Due to the dimensional limitations of this article, I only highlighted the statutes of these three states, but I hope that these enlightened very well, how cloudy and ambiguous cyberbullying regulation generally is.

Below, I will introduce the cyberbullying definition of the Cyber-Safety Act of Canada from Nova Scotia: *‘"cyberbullying" means any electronic communication through the use of technology including, without limiting the generality of the foregoing, computers, other electronic devices, social networks, text messaging, instant messaging, websites and electronic mail, typically repeated or with continuing effect, that is intended or ought reasonably be expected to cause fear, intimidation, humiliation, distress or other damage or harm to another person's health, emotional well-being, self-esteem or reputation, and includes assisting or encouraging such communication in any way;’’*[15]

The Nova Scotian regulation defines cyberbullying in less detail than its US counterparts, but it focuses on the virtual environment, where this phenomenon arises and the consequences it has for the real world and the every-day life of the victims. Repetition as a qualifying factor also appears here, just like in the North Carolina Act.

In Canada, in 2011, a law (Bill C-13) to protect children from online bullying was attempted to be adopted but eventually failed. What primarily led to the failure of establishing legal protections for cyberbullying was that Government and law enforcement (police) would have received a right to monitor online activities without any warrant, so that they can gather personal information more easily. Growing distrust in Government agencies during that time also contributed to the failure, by reason of the spying, wiretapping cases with the United States.[16]

In light of these facts and despite Amanda Todd’s 2012 suicide due to cyberbullying, which shocked the world news at that time, the Canadian Parliament could still not adopt the Act on cyberbullying, only the Nova Scotian legislature succeeded in doing so. As far as I am concerned the Canadians should enact a law, before a similar tragedy occurs. Besides the US and Canada, going through the Anglo-Saxon approaches to the topic as indicted in the title of this paper, Australia also does not have any specific laws against cyberbullying.[17] They believe in strict sectorial protection and resolve cases of cyberbullying through the consistent application of criminal law, which is specifically characteristic to the Australians as a preventive measure.[18]

Lastly, I would like to call attention to the fact that this issue does not only constitute a challenge for overseas (Anglo-Saxon) countries, but it is also heavily present in the current problems facing European, continental, civil law jurisdictions as well. In Europe, still adhering to Anglo-Saxon points of view on cyberbullying and freedom of speech, we need to talk about a few tragedies that occurred in the United Kingdom and Ireland by reason of cyberbullying. To name a few of the victims: Daniel Parry (17) from Scotland, Joshua Unsworth (15) from England, Ciara Pugsley (15) and Erin Gallagher (13) both from

[15] Cyber-safety Act (2013) Nova Scotia, Canada 3 (1) (b)

[16] Cyberbullying laws in Canada http://nobullying.com/cyberbullying-laws-in-canada/

[17] LANGOS 2014 p. 74

[18] GALLAGHER-WATSON 2014

Ireland committed suicide due to exposure to severe online bullying. In spite of these terrible and shocking cases, the UK and Ireland still did not recognize the need to enact any laws concerning this issue. In the UK, on the one hand they try to resolve this problem by applying already existing statutory norms, such as the Protection from Harassment Act 1997, the Malicious Communications Act 1988, Communications Act 2003 and Public Order Act 1986.[19] I am of the opinion that attention should be paid to create dedicated sectorial protection to try to prevent cyberbullying through laws specifically designed to counter conduct that is able to realize cyberbullying. On the other hand, the Education and Inspections Act 2006 gives the power to the head teacher *„encouraging good behaviour and respect for others on the part of pupils and, in particular, preventing all forms of bullying among pupils"*.[20]

In Ireland *"there is no specific legislation here which deals with this issue. Bullying and cyber-bullying need to be defined and penalties around such need to urgently be introduced here"*.[21] The Irish system works with the same solution as the UK, namely it applies already existing statutory frameworks, such as the Children's Act and the Education Act, as is argued by David Fagan, cited above. In my opinion, this cannot be the solution to the problem. Teenagers died and many students still suffer from daily cyberbullying. I accept and acknowledge that an Act will not solve this phenomenon like magic, because in the US cyberbullying is still an existing and ever growing problem, even though there is legislative effort to minimize the harm done. However, said legislative signifies that the legislator recognized the importance of the problem[22] and tries to come up with solutions.

We could continue enumerating solutions by the different US states and other Anglo-Saxon countries, but one issue remains crystal clear: there is no generally accepted and used formula to define cyberbullying, or its elements. In addition to legislators, legal scholarship and academia unsuccessfully tried to find the perfect definition for this issue.[23]

There are crucial elements, as I wrote above, that make cyberbullying especially dangerous in the information society, such as it is being committed (i) in a repeated fashion, (ii) via electronic devices, (iii) in an offensive, aggressive, hurtful, often vulgar manner (as to form of speech). In the next part, I shall focus on the legal collision of students' free speech protected by the First Amendment and the schools' duty to ensure a safe educational environment in the United States.[24] This comparison serves the purpose of highlighting concurrent interests and values and I intend to point out that students' speech protected by the First Amendment leads to an unreasonable protection of free speech in this very delicate context, and even though the courts try to provide protections for the victims and the schools (by focusing on their rights and duties), the "overly mystified" First Amendment creates a great obstacle in terms of limiting students' speech realizing cyberbullying. As Jacqueline Lipton says: *"[w]hen the First Amendment is added into the*

[19] DEPARTMENT FOR CHILDREN, SCHOOLS AND FAMILIES 2007

[20] Education and Inspections Act 2006 89 (1) (b)

[21] SLATER 2014, cites David Fagan, who is a health and safety law expert.

[22] VUOLO 2012 p. 91

[23] See LANGOS 2014; LIPTON 2012-2013; MCCARTHY 2014; VUOLO 2012; RODKIN-FISCHER 2012; HO 2012

[24] VUOLO 2012 p. 91

mix as a concern for legislators, it becomes almost impossible to create effective and constitutionally sound laws for the regulation of cyberbullying".[25]

STUDENTS' FREE SPEECH IN LIGHT OF THE SCOTUS DECISIONS

As I wrote above in the introduction the second part of my article deals with First Amendment issues concerning cyberbullying. It seems appropriate and necessary to clarify one crucial point, namely that SCOTUS still has not decided in any cyberbullying case involving the possible limitations of students' free speech. Given this lack of guidance, the schools bear the responsibility to find the best methods to handle this issue. Consequently, practices to avoid cyberbullying vary state by state. In almost all of the states there are Anti-Bullying Acts already in place, with some of them covering cyberbullying protections, and many school districts, District Courts and Circuit Courts decisions tried to create precedents, but the problem.

In the following I will shortly introduce some landmark cases related to students' free speech and its curtailment. The greatest problem with these cases is that they were born before the blasting spread of the internet, thus nowadays the courts try to apply the *ratio decidendi* and the tests created in these old decisions. This transposition is not always successful.

Firstly, the most important case in students' free speech is *Tinker*.[2627] John Tinker, a 15-year-old student decided during the holidays to wear a black armband to express his support for a truce in the Vietnam War. When the school board heard about his plan, they adopted a policy, in which they prohibited wearing these kinds of armbands and suspended the students until they wore them. In light of this policy, when Tinker and his friends appeared in the school with these armbands, the principals sent them home until they reconsidered wearing the accessory. On appeal to the District Court's decision, the Court of Appeals for the Eighth Circuit decided on the issue and the case made its way to SCOTUS. The central issue of the case was identified by the SCOTUS as follows: *"Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities".*[28] (This question is also central to my paper as well.)

After SCOTUS defined the problem, they analyzed the situation and delivered a landmark decision about this passive, non-aggressive *"pure speech"*[29], which established the basic test to handle students' free speech and its collision with the rules imposed by school authorities. Moreover, *Tinker* created the often cited "schoolhouse gate" formula, meaning that "*either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate".*[30] This phrase will have significant importance in any electronic speech cases, because at any time, when students' speech takes place outside the

[25] LIPTON 2012-2013 p. 121
[26] Tinker v. Des Moines School District, 393 U.S. 503 (1969)
[27] See also MCCARTHY 2014; HOSTETLER 2014
[28] Id. *supra* note 26 p. 507
[29] Id. p. 508
[30] Id. p. 506

school(house gate) the problem of location appears (e.g. off-campus speech could become on-campus) and in almost every case then, courts should recall the "schoolhouse gate" doctrine.

Nevertheless, *Tinker* created an extremely important standard:

"The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."[31]

The *Tinker* standard created two prongs: it *"**reasonably forecast(s) a substantial disruption** because of the expression, or it **collides with the rights of others**."*[32] As we can see, these two elements are not conjunctive, thus the standard gives two options for courts in their future decisions. However, we should keep in mind, that in 1969 the internet did not even exist as it does today, so the *reasonably forecast substantial disruption* element of the *Tinker* test was much easier to define than it is now, with the spreading of social media sites, smart phones and free Wi-Fi systems.

The relevance and the importance of the *Tinker* standard will be more understandable later on, when I will introduce some cyberbullying cases, where *Tinker* prongs were used to delineate students' free speech and schools duties to protect victims.

Furthermore, following the development of cases dealing with the above-mentioned First Amendment issues, I now present the core of the *Fraser* doctrine. This standard was created in *Fraser*,[3334] where a high school student (Matthew N. Fraser) referred to his opponent with sexual metaphors during his speech in front of 600 other students in an educational program. On the next day the principal suspended him and removed his name from the candidates' list for graduation speaker at the school's commencement exercises, by reason of an alleged violated of the school's "disruptive conduct rules". Later the respondent filed suit in a Federal District Court for violating his free speech rights,[35] and the District Court and later the Court of Appeals for the Ninth Circuit held that the school's rule was *"unconstitutionally vague and overbroad"*[36]. The Ninth Circuit stated also, that the speech analyzed in *Tinker* is indistinguishable from the *Fraser* issue.[37] The SCOTUS opinion clarified some key elements of students' freedom of speech in connection with the *Tinker* case as well. First of all, they stated, there exists a difference between the constitutional protection of an adult's and a minor's, student's speech. In their words: *"simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. ... we reaffirmed that the constitutional rights of students in*

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[31] *Tinker* Id.

[32] MCCARTHY 2014 p.813 ***emphasis added***

[33] Bethel School District v. Fraser, 478 U.S. 675 (1986)

[34] See also MCCARTHY 2014; HOSTETLER 2014

[35] Id. *supra* note 33

[36] Id. p. 679

[37] Id.

public school are not automatically coextensive with the rights of adults in other settings."[38] Second of all, the *Fraser* standard was set up, the core elements of which are the following: *"[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission"*[39].

Last but not least, a significant distinction can be seen from *Fraser* between two types of speech, a "*marked distinction between the* ***political "message" of the armbands*** *in Tinker and* ***the sexual content of respondent's speech*** *in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in Tinker, this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."*"[40] and *"[b]y glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students."*[41]

In light of these statements we can safely say that the vulgar, lewd or offensive speech is not protected by the First Amendment in a controlled, school environment; however, the same content could deserve the protection of the Federal Constitution in case such speech is delivered by adults.[42] Nevertheless we have to recall, that in those days, the internet was not at the general disposal of the population to exchange views, opinions and to exercise free speech. However, the basics of the legal collision between students' and school authorities' right and duties relating to free speech were as much established in *Fraser* as in *Tinker*.

Furthermore, the last case, although not directly relevant to the issue of cyberbullying, is the *Morse*.[4344] In this case a sort of "Morse-code" was created by SCOTUS, based on the following fact pattern. At a *"school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use",* and the principal (Morse) directed the students to take down the banner, but one of them refused, thus the principal suspended him.

In the opinion of the Ninth Circuit, the principal violated the student's freedom of speech, but SCOTUS reversed the decision of Ninth Circuit. In their reasoning, SCOTUS concluded that the principal's measures exemplified how seriously the school took the dangers of illegal drug use. Moreover, as they argued, *„[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."*[45] As far as Martha McCarthy stated in one of her articles: „*promoting illegal drug use could be curtailed without the link to a disruption*"[46] and *„the Court in Morse*

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[38] *Fraser* Id. p. 682
[39] Id. p. 685
[40] Id. p. 680 ***emphasis added***
[41] Id. p. 683
[42] See MCCARTHY 2014 p. 814
[43] Morse v. Frederick 551 U.S. 393 (2007)
[44] See also MCCARTHY 2014; HOSTETLER 2014
[45] Id. *supra* note 43 IV.
[46] Id. p. 814

created a new standard excluding expression from constitutional protection based on „student welfare."[47]

These three SCOTUS landmark decisions – *Tinker*, *Fraser* and *Fraser* - actually even four with *Hazelwood*,[4849]that remained unaddressed in this paper – constitute the basics that enable us to understand the problems around cyberbullying and students' free speech.

The main reason, why I analyzed and introduced these cases is that many cyberbullying cases making their way through the court system were decided upon these standards, thus it seemed appropriate to highlight the crucial elements of these opinions in a logical framework underlying the analysis of the Anglo-Saxon (US) approaches to the topic.

CYBERBULLYING CASES IN THE US COURT SYSTEM

After having analyzed the problem of the definition of cyberbullying in the previous parts, and introduced the relevant students' free speech cases, now I shift my focus to electronic speech, and relevant cyberbullying cases in United States court jurisprudence. In this topic, there are three very crucial differences between the previously analyzed cases and these ones, but in this essay I will focus only on the first two.

(i) First of all, does electronic speech bear the same characteristics as offline expression, thus can we apply the *Tinker* or *Fraser* standards for these situations?

(ii) Second of all, there is the question of location (from where the electronic speech originates), leading us to the issue of off-campus and on-campus speech, and whether an off-campus expression could be considered as on-campus speech, if it affects the school environment[50].

(iii) Third of all, the question of anonymity[51] arises as well. Anyone from anywhere all around the globe has a possibility to create a webpage, a blog or a Facebook profile anonymously, send or deliver hurtful, offensive etc. messages, videos and so on, with any kind of electronic devices in a nameless way. The point is, anonymity is an immanent and inherent characteristic of the internet and the online environment, but it bears many dangers in itself. However, I shall no longer deal with this question in this essay.

In the following, I will introduce a few cases about cyberbullying, in which I will present the reasoning of the courts in giving answers to the first two issues I addressed above (concerning the possibility to apply the *Tinker* and *Fraser* doctrines to the changed context of cyberbullying, and regarding the origin of the speech).

Firstly, in *Layshock*,[5253] the Third Circuit defined the main issues as follows: *„we are asked to determine if a school district can* ***punish a student for expressive conduct that originated outside of the classroom****, when that* ***conduct did not disturb the school***

[47] MCCARTHY 2014 p. 814 note 33.

[48] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988) was also a very important case in the evolution of students' freedom of speech. See MCCARTHY 2014

[49] See in detail also MCCARTHY 2014; HOSTETLER 2014

[50] See VUOLO 2012 p. 92

[51] See LIPTON 2012-2013 p. 106

[52] United States Court of Appeals for the Third Circuit No. 07-4465

[53] See MCCARTHY 2014 p. 819 HOSTETLER 2014 p. 17-18

environment [under *Tinker*] *and was not related to any school sponsored event"*[5455] [under *Fraser*].

As far as we can see, *Layshock* concerned the question of location: where the expression originated. The background story of this case was quite simple, Justin Layshock via his grandmother's computer created a fake profile on a social media website in the name of his school's principal outside school hours, in his free time. On this profile he posted vulgar expressions and linked the principal with drugs, sexual abuse and others.[56] As a retaliation, the school principal placed Layshock into an Alternative Education Program, banned him from extracurricular activities and from participation at the graduation ceremony,[57] all of which caused problems for Layshock, who (through his parents) filed suit in a District Court, which affirmed, that his First Amendment rights were violated. Then the principal appealed to the Third Circuit, which defined the problem as mentioned above. The Third Circuit mentioned the landmark cases of students' free speech, such as *Tinker*[58], *Fraser*[59], *Hazelwood*[60], *Fraser*[61]. At the end, the Circuit held that the school violated Layshock's free speech rights, by stating: „*we will not allow the School District to stretch its authority so far that it reaches Justin while he is sitting in his grandmother's home after school."*[62]

They considered the „schoolhouse gate" element expressed by SCOTUS in *Tinker*, but held that in this case it would be very dangerous in the future, if an off-campus speech, where there is no reasonably foreseeable substantial disruption, would be considered as falling in the purview of school authority. Further, the Third Circuit affirmed the District Court's opinion, that this fake profile did not mean any substantial disruption (under the *Tinker* standard's first prong) to the school environment; therefore, this speech cannot be assessed as on-campus speech.[63] The Third Circuit also examined whether the speech of Layschock could be excluded under *Fraser*[64], but refused to do so, because it affirmed the District Court's argumentation: *"[t]here is no evidence that Justin engaged in any lewd or profane speech while in school."*[65]

This case exceedingly exemplifies how difficult it is to decide whether an (off-campus) speech could qualify as on-campus speech, even if it originates outside the school. I agree with this decision, because a fake profile, which contains less vulgar or offensive speech, without the intention to harm anyone, cannot cause substantial disruption in the context of the school environment, even though its content might be referring to a school employee. However, if this case would need to be interpreted under North Carolina law, the

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[54] Id. *supra* note 52 p. 5 ***emphasis added***

[55] There was another main question, about the due process rights violation, but it will not be analyzed in this article.

[56] McCarthy 2014 p. 819

[57] United States Court of Appeals for the Third Circuit No. 07-4465 p. 15-16

[58] Id. p. 21-22

[59] Id. p. 24-25

[60] Id. p. 26-27

[61] Id. p. 28-29

[62] Id. p. 36

[63] Id. p. 47

[64] Id. p. 38-39

[65] Id. p. 38

cyberbullying definition applied in that state would allow it to be classified as a misdemeanor under Section 4 §14-458.2. (b) (1) a. of the General Statutes, stating that cyberbullying encompasses *building a fake profile*. Under the GS, North Carolina law also requires intent to classify such conduct as a misdemeanor; however, in *Layshock*, no intent was proven based on the evidence put on record.

Secondly, *Kowalski*[66] is another important case, in which the Fourth Circuit held that a social media page violated both of the *Tinker* prongs, albeit the speech at issue originated off-campus.[67] Kara Kowalski was a senior student in a high school in Berkeley County (CA), and got suspended for creating the webpage „S.A.S.H." The acronym for the webpage had two concurrent interpretations by the parties: Students Against Sluts Herpes or Students Against Slay's Herpes. This is important, because Slay was a fellow student and this webpage certainly was targeting her as a form of cyberbullying.

In fact, Kara Kowalski created a group (S.A.S.H.) on Myspace (social media website) and invited approximately one hundred friends to talk about Slay (the targeted student). Posts, comments, pictures were also used to mock Slay. By reason of this webpage Slay did not want to attend her classes on the next day.[68] Kowalski was suspended for 10 days and banned from attending any school events for 90 days.[69] Kowalski filed a complaint to the District Court for violating her First Amendments rights,[70] but the Court did not hold in her favor, resulting in her appeal to the Fourth Circuit. The connection between this case and the *Layshock* is that Kowalski argued during the whole process, that her actions constituted off-campus and non-school-related speech, so the school had no authority to discipline her.[71] The Fourth Circuit's opinion concerned the origin of the speech, and it held, albeit the conduct took place off-campus, she could have reasonably expected that its impact would materialize beyond her home (and let me add: realize the substantial disruption of the school environment).[7273] For this reason, this expression was accepted as on-campus speech, also being lewd and vulgar, thus the *Fraser* doctrine was also applicable. Therefore, the regulation by the school was permissible as well, not just under *Fraser* but under *Tinker* as well.[74]

At the end, the Fourth Circuit concluded that the internet was a tool to execute a targeted attack on a classmate of hers and held – citing *Tinker*, that the substantial disruption of the school environment was realized: „*Kowalski used the Internet to orchestrate a targeted attack on a classmate, and did so in a manner that was sufficiently connected to the school environment as to implicate the School District's recognized authority to discipline speech which "materially and substantially interfere[es] with the requirements of appropriate discipline in the operation of the school and collid[es] with the rights of others." Tinker v.*

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[66] United States Court of Appeals for the Fourth Circuit No. 10-1098

[67] MCCARTHY 2014 p. 820-821; HOSTETLER 2014 p. 12

[68] See MCCARTHY 2014; HOSTETLER 2014

[69] Id. *supra* note 66 p. 5

[70] She also alleged, that her rights under Fifth, Eighth and Fourteenth Amendment was violated. Id. p. 8

[71] Id. p. 9

[72] Id. p. 13

[73] Fourth Circuit Court using the phrase „schoolhouse gate" as well, which means another strong connection between the *Tinker* landmark case and the present one.

[74] Id. *supra* note 66 p. 14

Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 513 (1969) (internal quotation marks omitted)"[75], furthermore, they affirmed that „*[w]e are confident that Kowalski's speech caused the interference and disruption described in Tinker as being immune from First Amendment protection".*[76]

From the comparison of *Layshock* and *Kowalski*, we can see that under certain circumstances an off-campus speech can qualify as on- and off-campus speech as well. Circuit Court decisions do not qualify as leading precedent, unfortunately, but nonetheless clarify the fact, that there are no clear guidelines whether and under which facts an off-campus speech can be assessed as on-campus speech. Legal scholars, judges[77] and the school employees concerned are still waiting for a SCOTUS landmark decision in this issue[78], just like the ones in *Tinker* or *Fraser*, but SCOTUS consistently refuses to review electronic speech cases. Consequently, school authorities, District and Circuit courts should decide these cases under the already existing students' free speech standards and their own conscious and deliberate judgments.

In light of the cases described above, it seems that the *Tinker* standard is widely used, however the courts are dealing mostly with the first prong and analyze the second less. The following decision that I will present herein will connect the two prongs to each other.

Wynar[79] deals with the issue of a student who sent instant messages to his friends about planning a shooting in their school. Landon Wynar was a high school student in Douglas High School, and he sent very violent and threatening messages to his friends about shooting specific classmates. These friends called the school authority, who temporarily expelled Wynar. The threat was real, because Wynar collected weapons, a semi-automatic rifle as well,[80] and he felt himself ignored, and also the messages became more and more violent on a daily basis. After the school expelled him, Wynar, with his father as a guardian, sued the school district at the District Court, and then they appealed against its decision to the Ninth Circuit Court.

The main conclusion by the Ninth Circuit was that *"the messages, which threatened the safety of the school and its students,* ***both interfered with the rights of other students*** *and made it* ***reasonable*** *for school officials* ***to forecast a substantial disruption*** *of school activities."*[81][82] This opinion expresses a connection between the two *Tinker* prongs[83], which means one kind of interpretation. In the previously analyzed decisions, the Third and the Fourth Circuit did not make such a connection between the two prongs of the *Tinker* standard. Therefore, it clearly shows the dissenting interpretations of *Tinker*[84] and by reason of this, it would be desirable that a SCOTUS decision unify these different applications of the test in a leading landmark case.

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[75] United States Court of Appeals for the Fourth Circuit No. 10-1098 Id. p. 3

[76] Id. p. 13

[77] United States Court of Appeals for the Ninth Circuit No. 11-17127 p. 8

[78] See MCCARTHY 2014 p. 805; HOSTETLER 2014 p. 25

[79] United States Court of Appeals for the Ninth Circuit No. 11-17127

[80] Id. p. 4

[81] Id. p. 2 ***emphasis added***

[82] See also id. p. 9

[83] See MCCARTHY 2014

[84] See HOSTETLER 2014 p. 11

CONCLUSION

In summary, we can conclude that cyberbullying is a pressing problem and omnipresent phenomenon in the Anglo-Saxon legal culture surrounded by many uncertainties. When even the proper definition of the problem causes such a great hurdle, how hard it will be to stop or just to decrease this activity. The already existing definitions try to cover any conduct of online bullying, but it is an impossible mission, because the variety of cyberbullying activities is basically unlimited. However, as far as I am concerned, adopting laws and creating definitions express the attention of legislators and their determination to handle this negative phenomenon, and we should stay on this track and continue the fight against cyberbullying.

Moreover, we face many unanswered questions in this regard, such as how to handle problems with the origin of the electronic speech, or how to apply existing students' free speech standards on their electronic speech.

In this article, I introduced three out of four landmark decisions of SCOTUS relating to students' freedom of speech, and presented electronic speech cases as well. Through this comparison, the above mentioned problems were – I hope, successfully – revealed. There are no clear guidelines on when and under what circumstances we can classify an off-campus speech as on-campus. Neither is there consensus regarding which actions could lead to a substantial disruption of the school environment, or what actions collide with the rights of other students. Shall we interpret these two prongs together, like the Ninth Circuit Court did, or just in a few cases, or these are separable prongs (when one is fulfilled, there is no necessity to examine the other one)? These are just two questions I mention, but there are many more, such as the issue of anonymity, the accountability of the person, who "cyberbullied" the victim, or the public forum question.

In this essay I focused solely on the United States practice; however, cyberbullying is not the only a characteristic problem in Anglo-Saxon legal systems, but also e.g. in Hungary[85] and Romania.[86] We should definitely keep in mind, that this phenomenon also exists in Hungary, thus in my opinion we should educate students from the first class in primary school on the harmful effects and the conscious use of the internet[87], and also European legislators shall realize and recognize the necessity to adopt laws, in which they define cyberbullying, work out the accountability of the perpetrators, and secure the rehabilitation of the bullied victim. I truly hope that our countries do not want to wait until a teenager commits suicide, like the United States did in the case of Ryan Halligan,[88] Megan Meier, Tyler Clementi[8990] and many others.

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[85] See TABBY; PARTI-SCHMIDT-NÉRAY-VIRÁG 2014 p. 93; JANECSKÓ 2013; MARKÓ; KNAUSZI 2014
[86] See POPA 2013
[87] VUOLO 2012 p. 92
[88] NAGY (no year of publication)
[89] Six Unforgettable Cyberbullying Cases (http://nobullying.com/six-unforgettable-cyber-bullying-cases/)
[90] LIPTON 2012-2013 p. 100

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