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ANOMALIES IN THE US CYBERBULLYING JURISPRUDENCE

by

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This article focused on US case law and analyzed the evolution of students' freedom of speech from 1969 to this date in the US. Therefore, it briefly introduced the tests and doctrines, which were created in the landmark cases of the Supreme Court of the United States (SCOTUS), noting that these cases were dealing with offline, on-campus situations and their determinations are not necessarily fully applicable to situations we might experience today. Nevertheless, the tests and doctrines, which were created in SCOTUS landmark decisions, are still in force and every cyberbullying judgment is still based on them even in the era of the Internet. Taking into consideration that the world has changed since these tests were established, I examined some more recent cyberbullying cases in the US, where these above tests were applied.

Based on the analysis of SCOTUS and some Circuit Court jurisprudence, Certain anomalies were revealed, which serve as a basis to clearly state that the US system suffers from severe deficiencies, like handling the off-campus origin of the speech, or defining the substantial disruption or the sufficient nexus. However, the US courts have worked out tests and doctrines as a basis for their cyberbullying jurisprudence, so they are on the right track, but the jurisprudence will remain ambiguous and unpredictable without a SCOTUS landmark decision regarding cyberbullying.

KEY WORDS

Supreme Court of the United States, Freedom of Speech, Tinker, Substantial Disruption, Snyder, Layshock, Kowalski, Cyberbullying

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1. INTRODUCTION

In this article, I focused on US case law and analyzed the evolution of students' (age 10-18) freedom of speech from 1969 to this date in the US, in order to reveal particular anomalies in the relevant jurisprudence. Therefore, I briefly introduced the tests and doctrines, which were created in landmark decisions of the Supreme Court of the United States (SCOTUS), like *Tinker*[1], *Fraser*[2], *Hazelwood*[3] and *Morse*[4], noting that these cases were dealing with offline, on-campus situations and their determinations are not necessarily fully applicable to situations we might experience today. Nevertheless, the tests and doctrines, which were created in US landmark decisions, are still in force and, in the era of the Internet, cyberbullying judgments are based on them. Taking into consideration that the world has changed since these tests were established, I examined some recent US cyberbullying cases (*Snyder*[5], *Layshock*[6], *Kowalski*[7]), where the above tests were applied. In these decisions I highlighted the crucial elements and problems due to the evolution of technology and lapse of time. For instance, the Third Circuit Court of the United States Court of Appeals evaluated similar facts in a different way in two cases heard on the same day, which forced them to reconsider one of their decisions. Furthermore, the Fourth Circuit Court of the United States Court of Appeals transformed off-campus speech into on-campus, but applied the general test to the case instead of the special on-campus tests.

Based on a brief analysis of SCOTUS cases concerning students' freedom of speech and the Circuit Courts' cyberbullying jurisprudence, we can clearly state that the US system suffers from severe deficiencies, like handling the off-campus origin of the speech, or defining the substantial disruption test, or clarifying when a sufficient nexus between off-campus speech and an actual or reasonable foreseeable substantial disruption stands. US courts have worked out tests and doctrines as a basis for their cyberbullying jurisprudence, but still this

[1] Tinker v. Des Moines Sch. Distr., 393 U.S. 503 (1969).
[2] Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986).
[3] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).
[4] Morse v. Frederick, 551 U.S. 393 (2007).
[5] JS Ex Rel. Snyder v. Blue Mountain Sch. Dist., 650 F. 3d 915 - Court of Appeals, 3rd Circuit 2011.
[6] Layshock v. Hermitage Sch. Dist., 593 F. 3d 249 - Court of Appeals, 3rd Circuit 2010.
[7] Kowalski v. Berkeley County Schools, 652 F. 3d 565 - Court of Appeals, 4th Circuit 2011.

jurisprudence suffers from the ambiguous and diverse judgments of the Circuit Courts. Nothing short of a landmark SCOTUS decision could resolve this issue and dispel the existing ambiguity regarding cyberbullying.

2. ANALYSIS OF US JURISPRUDENCE

2.1 TESTS AND DOCTRINES ESTABLISHED BY SCOTUS LANDMARK CASES ON STUDENTS' FREEDOM OF SPEECH

First of all, we should very briefly introduce the evolution of students' freedom of speech and applicable tests and doctrines. Taking into consideration that in its majority literature on cyberbullying frequently summarizes all relevant landmark cases as well as cites the decision statements, which gave birth to the discussed doctrinal developments,[8] here I would rather just list the established tests, and focus more on the cyberbullying cases.

Following this logic, the first test is the 'substantial disruption test' in connection with the 'collision with the rights of others' argument created in *Tinker*. The essence of this first test is that no action will be protected under the First Amendment that would constitute a material or substantial disruption to the school environment or might have a foreseeable risk of such disruption. At first glance, it looks like a perfect solution to on-campus problems, but we will see its defects as we move on to students' virtual speech.

In the second landmark decision, the *Fraser* doctrine established that vulgar, lewd, offensive student speech is not a protected speech by the US Constitution. Furthermore, in this judgment SCOTUS clearly expressed that the students' right is not coextensive with the adults'. This leads us

[8] Horowitz, M., Bollinger M., D. 2014. *Cyberbullying in Social Media within Educational Institutions* - Featuring student, employee, and parent information, Rowman & Littlefield, United Kingdom, pp.50-53.

Auerbach, S., 2008-2009. 'Screening Out Cyberbullies: Remedies for Victims on the Internet Playground', *Cardozo Law Review*, vol. 30, 1648-1652.

Hostetler R., D. 2014. 'Off-Campus Cyberbullying: First Amendment Problems, Parameters, and Proposals', *Brigham Young University Education and Law Journal*, no. 1, pp. 4-6.

Erb D., T. 2008. 'A Case For Strengthening School District Jurisdiction To Punish Off-Campus Incidents of Cyberbullying', *Arizona State Law Journal*, vol. 40, pp. 261-263.

Greenhill, J. 2010-2011. 'From The Playground To Cyberspace: The Evolution Of Cyberbullying', *Charleston Law Review*, vol. 5, pp. 724-728.

Pongó, T. 2015. *'Anglo-Saxon Approaches To Students' Freedom Of Speech And Cyberbullying: Constitutional Foundations For A Comparative Analysis*, ed. S.C. Universul Juridic S.R.L., Timisoara, pp. 539-541.

to the following hypothetical case: imagine a student (age 14) delivering lewd and offensive speech in the school, which is not protected by freedom of expression according to *Fraser*, and then imagine the same student, now as an adult, delivering the same speech fifteen years later in the same place to the same audience (let us say at a school reunion). In this case, this exact same speech will be protected under the First Amendment.

As for the third test, in *Hazelwood,* the SCOTUS declared that speech at a school-sponsored event, venue or forum (also a newspaper), may be regulated by the school (*Hazelwood* doctrine).

In a fourth landmark decision, *Morse,* it was stated that promoting illegal drug use or any other activity prohibited by policy, which is against the school's educational mission, will not be protected by the First Amendment.[9]

Consequently, in the judicial practice, courts evaluate all circumstances and facts of the case and try to apply any of the above-mentioned tests. For instance, if vulgar or lewd student speech "is on the table", then *Fraser* will be called in, and cases involving the school-sponsored element will be decided upon *Hazelwood*. If any of these doctrines do not cover the facts of the case, then the "jolly joker", *Tinker's* 'substantial disruption test' will be applied,[10] which actually favors the students, not school employees or school administration.

2.2 SAME COURT, SAME DAY, DIFFERENT DECISIONS

2.2.1 THE *SNYDER I-II* DECISIONS

On 4 February 2010, two cases with very similar factual backgrounds were decided by the Third Circuit.[11] After I shortly introduce the circumstances and the reasoning of those cases, I am going to conclude that off-campus speech with on-campus effect is a burning, unresolved problem in the US.

In *Snyder I-II*[12] an eighth grader, J.S., along with her friend, created a fake MySpace profile with vulgar, lewd, sexually explicit, offensive language

[9] See Auerbach 2008-2009, pp. 1651-1652.

[10] Hostetler 2014, p. 19.

[11] Weil A., O. 2012-2013. 'Preserving The Schoolhouse Gates: An Analytical Framework For Curtailing Cyberbullying Without Eroding Students' Constitutional Rights', *Ave Maria Law Review*, vol. 11, p. 554.

[12] JS Ex Rel. Snyder v. Blue Mountain Sch. Dist., 650 F. 3d 915 - Court of Appeals, 3rd Circuit 2011 (The *Snyder I* Third Circuit Court opinion was filed on 4 February 2010, but it was overruled in *Snyder II*, filed on 13 June 2011).

about their school principal.[13] The key issue of this case was a profile created at home, during non-school hours and on a parent-owned computer, albeit having a great effect on the school environment.[14] In consequence of the outrageous[15] language no one took this profile or its content seriously.[16,17] Furthermore, the profile was not opened in the school, because MySpace was blocked on school computers, and it was set to "private" on the day following its creation;[18] the only printout, which reached the school premises, was expressly asked for by the principal.[19] Leaving these facts out of consideration, the School District decided that the profile disrupted the school environment, because there were general "rumblings", some students talked about it for a few minutes (even though the teachers stated that chatting in a class is not unusual) and Counselor Frain, the principal's wife, had to cancel some of her appointments.[20] Based upon these facts, the District Court decided that there is no substantial disruption; therefore, *Tinker* is not applicable.[21] However, the District Court stated that

> *"as a vulgar, lewd, and potentially illegal speech that had an effect on campus, we find that the school did not violate the plaintiff's right in punishing her for it even though it arguably did not cause a substantial disruption of the school."*[22,23]

This reasoning follows the judicial practice (backwards[24]) that vulgar and lewd student speech should be decided upon *Fraser* instead of *Tinker*. The District Court arranged its arguments in eight points and

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13 *Snyder I* pp. 4-5; *Snyder II* pp. 2-3.

14 *Snyder I* p. 11; *Snyder II* p. 3.

15 Outrageousness test as an element of the Tort of Intentional Infliction of Emotional Distress, see AUERBACH 2008-2009 pp. 1669-1670.

16 *Snyder II* p. 4.

17 Hostetler 2014, p. 20.

18 *Snyder I* p. 7; *Snyder II* p. 4.

19 *Snyder I* p. 8; *Snyder II* p. 4-5.

20 *Snyder I* p. 11-12; *Snyder II* p. 7.

21 *Snyder I* p. 14.

22 *Snyder II* p. 8.

23 See more *Snyder I* p. 14.

24 Backwards i.e. there is no necessity to define why the case does not fall under *Tinker*, if it contains vulgar, lewd or offensive speech, but the District Court did.

> *"rejected several other district court decisions, where the courts did not allow schools to punish speech that occured off campus, including the decision in Layshock"*[25],

(*Layshock* will have a significant meaning later on), to address its judgment. In its decision, the Court ruled that there is no substantial disruption and this case was decided upon *Fraser*.[26]

In the following, I analyze in two parts the two Third Circuit rulings. In the interest of easier understanding, the first decision will be referred as *Snyder I* and the second as *Snyder II*.

Snyder I was filed on 4 February 2010.[27] The Court laid down at the very beginning of its judgment, without reasoning,[28] that this case cannot be decided upon *Fraser*, but falls under *Tinker.*[29] According to the 'substantial disruption test' they examined whether J.S.'s speech created a substantial disruption in the school environment, or there was any significant risk of its occurrence. The Third Circuit emphasized and cited *Tinker* to determine the essence of substantiality, as

> *"undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression"*.[30]

Moreover, they focused on the reasonable foreseeability element of the test, which allows school authorities to curb students' freedom of speech before a substantial disruption or material interference even occur.[31] Elsewhere in the judgment, the Court held that in the case at hand the profile did not reach the level of actual substantial disruption, although *"the profile's potential to cause a substantial disruption of the school was reasonably foreseeable."*[32] The vulgarity, lewdness and very offensive nature of the profile's language served as the basis for this statement.[33] Furthermore, they highlighted the fact that the parents, who were not so

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[25] *Snyder II* p. 9.

[26] *Snyder II* p. 9.

[27] From this point every citation relies on *Snyder I.*

[28] Judge Chagares in his dissent mentioned that the majority declined to decide whether J.S. could be punished under *Fraser*. See dissent p. 55.

[29] *Snyder I* p. 20.

[30] Id. p. 21 cited *Tinker.*

[31] Id. pp. 21-22.

[32] Id. pp. 23-24.

[33] Id. p. 24.

familiar with the principal's conduct and personality, could have taken the profile's content seriously, which established a reasonable fear of future disruption.[34] Nevertheless, the Court went further and expressly held that

> *"the potential impact of the profile's language alone is enough to satisfy the Tinker substantial disruption test."*[35]

(I should mention here that the Court analyzed *Layshock* very briefly, which will have a significant meaning later on in this article, but found the two cases distinguishable, by reason of the lack of sufficient nexus.)

Upon the foregoing arguments, the Third Circuit ruled that the School District did not violate J.S.'s free speech rights.[36,37]

Finally, an interesting fact and approach in the cases at hand was that *Snyder I* was written by Circuit Judge Fisher, and was decided upon the reasonable foreseeability of a substantial disruption. In *Snyder II*, which is analyzed below, Judge Fisher wrote the dissenting opinion and argued in favor of the foreseeability as well.[38]

Circuit Judge Chagares (who actually wrote the majority opinion of the *Snyder II*) concurred and dissented in part. In his dissent he held that no student can be punished for a speech, which is off-campus and causes no substantial disruption nor is school-sponsored. Neither of these circumstances stood in the present case, and he found the arguments of the majority unsatisfactory to establish a reasonable forecast of substantial disruption.[39] Furthermore, he cited the District Court's and the majority's opinion, and according to those there was no substantial disruption at all. In his opinion, to overcome this hurdle by relying on the sister courts' decision was not convincing enough, because those cited cases are distinguishable from the one at hand.[40] Moreover, he rejected the assertion of the majority that the parents could have taken the profile seriously and not let their children to go to school, simply because Chagares found the profile so outrageous and profane that no one could have taken it

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[34] Id. p. 26.
[35] Id. p. 29.
[36] Id. p. 33; p. 42.
[37] Weil 2012-2013, p. 555.
[38] For detailed information see dissent (below) in *Snyder II*.
[39] *Snyder I* dissent p. 43.
[40] Id. p. 56, p. 58.

seriously.[41] Thus, such a profile could not cause any foreseeable disruption in a school environment.[42] Taking these facts into consideration, he dissented and held that the School District violated J.S.'s free speech rights.[43] Although the majority opinion did not deal with *Fraser*, he cited Chief Justice Roberts's statement in *Morse,* when Chief Justice cited *Cohen v. Cal.* (403 U.S. 15 (1971) and concluded that *Fraser* cannot be applied to off-campus cases.[44]

Following the *Snyder I* decision, *Snyder II* was filed by the same Court *en banc* a year later, in 2011. The great significance of the second ruling is that the Court held that the School District violated J.S.'s right to freedom of speech, because (i) there was no substantial disruption or any foreseeable risk thereof and (ii) *Fraser* is applicable only to on-campus speech, but the present fake profile creation was not on-campus and did not transform later on into on-school speech.[45]

The Third Circuit highlighted the most crucial problem of cyberbullying in the US context, which makes the whole system suffer, namely

> *"[s]ince Tinker, courts have struggled to strike a balance between safeguarding students' First Amendment rights and protecting the authority of school administrators to maintain an appropriate learning environment".*[46]

Firstly, the Court examined the applicability of *Tinker*, albeit both the School District and the District Court admitted that there was no substantial disruption in the school environment. They explored whether the foregoing facts (rumblings, talking in classes and cancellation of consultations) could lead to foreseeable disruption in the future and emphasized that the Court should define how an

> *"undifferentiated fear or apprehension of disturbance transforms into a reasonable forecast that a substantial disruption or material interference will occur."*[47]

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41 Id. p. 60; p. 63.
42 Id. p. 63.
43 Id. p. 65.
44 Id. pp.66-67.
45 From this point on, every footnote refers to *Snyder II*.
46 *Snyder II* p. 12.
47 Id. p. 19.

These facts serve as factors, which should be considered to determine a level of disturbance.[48] Taking into consideration that the fake profile was so profane and outrageous that no one could have taken it seriously, it could not constitute any material disruption in the future, and thus neither the foreseeability element of *Tinker* could stand.[49,50] In balance with *Snyder I*, the Court reconsidered the weight of the circumstances in favor of the student. Moreover, the Court stated, J.S. took all necessary steps to avoid that the profile made its way to campus, which proved the fact that she did not want to target the school environment. Bear in mind, however, that the whole scenario took place off-campus, during non-school hours, on a parent-owned computer.[51]

Secondly, as far as *Tinker* was not applicable to the case at hand, the Court focused on the *Fraser* doctrine, just like the District Court had done before. As we mentioned before, if a case of vulgar or lewd student speech arises, it was to be decided upon *Fraser*, not upon *Tinker*. However, the Third Circuit first analyzed the case under the substantial disruption test, instead of following the *Fraser* doctrine. Even though they evaluated and applied *Fraser*, the logic of this application is questionable. The SCOTUS guidelines in this respect are clear: *Tinker* works as a general test, if no other doctrine provides a basis to decide a student freedom of speech case. On the contrary, the Third Circuit began their reasoning with the analysis of *Tinker* and not of *Fraser.* At first glance, it does not seem such a big issue, but still raises the question of why: why should we use a general test before a special one, a method which, actually, contradicts the fundamental legal principle of *lex specialis derogat legi generali.*[52] At least, however, this time the Court justified why *Fraser* was not applicable, compared to *Snyder I*, where the Third Circuit had just simply, without reasoning, ruled to apply *Tinker*.[53]

Besides this theoretical approach, the Third Circuit explored the facts under *Fraser.* The School District and the District Court based their

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48 Ere 2008, p. 266.

49 Horowitz – Bollinger 2014, p. 47.

50 Bendlin S., S. 2013, 'Cyberbullying: When is it „School Speech" And When is it Beyond the School's Reach?', *Northeastern University Law Journal*, vol. 5 p. 57.

51 The dissenting opinion concluded that this majority opinion constitutes a circuit split withJthe Second Circuit Court. See *Snyder II* dissent p. 22.

52 This theory means that every special test or doctrine deteriorates the general test in the same field of law. Just like *Fraser* did with *Tinker*.

53 See *Snyder I* p. 20.

decisions upon this doctrine, because even though the conduct examined occurred off-campus, it had a significant on-campus effect. However, under SCOTUS landmark rulings, *Fraser* is not applicable to off-campus cases, irrespective of the fact whether it has any effect on the school environment or not. The Circuit Court strengthened the aforementioned jurisprudence furthermore: they emphasized Chief Justice Roberts's opinion in *Morse*, when he cited *Cohen* and according to that reaffirmed that

> *"a student's free speech rights outside the school context are coextensive with the rights of an adult."*[54]

In addition,

> *"[t]he most logical reading of Chief Justice Roberts's statement prevents the application of Fraser to speech that takes place off-campus, during non-school hours, and that is in no way sponsored by school."*[55]

Accordingly, the school authority cannot be expanded to such extent that the school could - hypothetically - punish two students for talking about their teachers using vulgar comments at a house party. This may sound as an absurd presumption, but if *Snyder II* would be ruled in favor of the School District under *Fraser*, then the house party hypothesis could occur and would be followed by lawful action issued by the school authorities. However, we should bear in mind that *Fraser* is not applicable to off-campus speech; therefore, a house party would be a safe haven to the students. The Third Circuit strengthened this position in *Snyder I* by stating that

> *"[s]ince we are expressly not applying Fraser to conduct off school grounds, there is no risk that a vulgar comment made outside the school environment will result in school discipline absent a significant risk of a substantial disruption at the school."*[56]

In summary, the Third Circuit concluded that the School District violated J.S.'s right to free speech, because *Fraser* is not applicable to off-campus cases and there was not any substantial disruption in the school

[54] *Snyder II* p. 23 cited *Morse.*
[55] Id. p. 23.
[56] *Snyder I* pp. 27-28 footnote 8.

environment; further the foreseeable risk of disruption could be excluded, by reason of the online profile's flippancy.

The majority opinion left a crucial question unanswered, namely whether *Tinker* is applicable to off-campus speech or not. In his concurring opinion, Circuit Judge Smith stated that

> *"[he] would hold that it does not, and the First Amendment protects students engaging in off-campus speech to the same extent it protects speech by citizens in the community at large."*[57]

Moreover, he cited Justice Alito's concurring opinion in *Morse*, who ruled that

> *"Tinker's substantial disruption test does not apply to students' off-campus expression."*[58]

Judge Smith emphasized that if *Tinker* would be applicable to any off-campus speech

> *"there would be little reason to prevent school officials from regulating adult speech uttered in the community."*[59]

As it has been suggested in academic writing

> *"[d]etermining where internet speech occurs is almost as thorny an issue as determining when life begins".*[60]

Leading the dissent, Circuit Judge Fisher (maintaining the same reasoning that he had written as majority opinion in *Snyder I*), held that J.S.'s conduct could have led to a reasonably foreseeable substantial disruption. The personal attack towards the school principal and his family caused psychological harm to them, and also undermined *"the authority of the school."*[61] The sufficient nexus between J.S.'s speech and the substantial disruption in the school environment served as basis for Judge Fisher's dissent,[62] who, moreover, emphasized that this nexus distinguished the case

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[57] *Snyder II* concurring opinion p. 1.
[58] Id. p. 4 citing *Morse* Justice Alito's concurring opinion.
[59] Id. p. 7.
[60] Bendlin 2013, p. 48.
[61] *Snyder II* dissenting opinion p. 2.
[62] Id. p. 9.

at hand from *Layshock* (analyzed next).[63] In his argumentation, he highlighted the two forms of reasonably foreseeable substantial disruption: (i) reasonably foreseeable threat of interference with the educational environment, that if went unpunished it would undermine the principal's authority and disrupt the educational process; and (ii) foreseeable threat of disrupting the classroom's operations.[64] Proving his dissent, he stated that the majority opinion misconstrued the facts of the case[65] and the level of substantial disruption.[66]

The dissent clearly agreed with the application of *Tinker* to off-campus cases[67], which however directly contradicts the concurring opinion by Smith to the same decision.

In the present case (*Snyder II*), Judge Fisher emphasized that his disagreement was based upon the different interpretation of the facts, and by virtue of this, he was inclined to rule in favor of the School District.[68]

2.2.2 LAYSHOCK-ING REVELATION – THE IMPORTANCE OF SUFFICIENT NEXUS

Layshock[69] was decided on 4 February 2010, on the exact date of the *Snyder I* decision by the same (Third Circuit) Court.[70]

Justin Layshock, a high school student, created a fake MySpace profile about his principal during non-school hours, in his grandmother's home and on her computer.[71] For this action the School District suspended him and took several additional steps in punishing him.[72] During that time more profiles were created on MySpace about the school principal, but only Layshock was punished for his actions, even though other profiles contained more vulgar and offensive language.[73] His profile was set to "private", therefore only invited students could check it, but it was opened in school, during school hours. However, no one could identify

[63] Id.
[64] Id.
[65] Id. p. 10.
[66] Id. p. 16.
[67] Id. p. 16 footnote 4.
[68] Id. p. 26.
[69] Layshock v. Hermitage Sch. Dist., 593 F. 3d 249 - Court of Appeals, 3rd Circuit 2010.
[70] Weil 2012-2013, p.555; Hostetler 2014, p. 17.
[71] *Layshock* p. 5; p. 7.
[72] He was being placed in an Alternative Education Program, being banned from all extracurricular activities, not being allowed to attend his graduation ceremony. Id. p. 15-16.
[73] Id. p. 10; p. 16.

how many students accessed any of the profiles, and which profiles were actually checked.[74]

In view of this factual background, the District Court had previously held that the School District had violated Layshock's rights to freedom of speech. In their ruling, the District Court had emphasized that the School District

> *"could not establish the sufficient nexus between Justin's speech and the substantial disruption of the school environment."*[75,76]

We should bear in mind that *Snyder I-II* had very similar factual backgrounds to *Layshock*, but in those decisions (both judgments) the sufficient nexus under *Tinker* was not examined, because the facts of that case excluded actual substantial disruption. At the same time, *Snyder I* considered foreseeable disruption, which was not explored in *Layshock*, in the Third Circuit Court decision. These little anomalies make cyberbullying jurisprudence in US courts too vague and unpredictable to practitioners, school administrations and academic scholars as well.

Nevertheless, the Third Circuit Court concluded that they would

> *"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."*[77,78]

This argumentation could also apply to the abovementioned hypothetical case, where, under *Fraser,* two students could have been punished for talking vulgarly and offensively about a school employee at a house party; following *Layshock*, in such a scenario, the school cannot punish. Moreover, the statement in *Snyder I* that

> *"the potential impact of the profile's language alone is enough to satisfy the Tinker substantial disruption test"*,[79]

was actually reconsidered and overruled in *Snyder II,* under the foregoing reasons.[80]

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[74] Id. p. 13.
[75] Id. p. 31 citing Layshock, 496 F. Supp. 2d at 600.
[76] Weil 2012-2013, p. 555.
[77] *Layshock* p. 36.
[78] Hostetler 2014, p. 18.
[79] *Snyder I* p. 29.
[80] Weil 2013-2013, p. 556.

In summary, a school cannot have such an extensive authority that it could punish students for actions not causing any actual substantial or reasonably foreseeable disruption in the school environment. This point was clearly affirmed in both *Snyder II* and *Layshock*.

The School District also argued before the Third Circuit that the profile could be interpreted and treated as on-campus speech, as aiming at the school community, being accessed from the school, and such accessibility made

> "*reasonably foreseeable that the profile would come to the attention of the School district and the Principal.*"[81,82]

In its analysis of the facts, the District Court had held that there was no evidence for any lewd or profane expression by Layshock on-campus, making thus *Fraser* inapplicable;[83] and, furthermore, that the School District could not establish a sufficient nexus as required by *Tinker,* between speech and any substantial disruption in the school environment.[84] Taking the foregoing ruling into consideration, the School District maintained the position that the profile was vulgar, lewd and offensive and not shielded by the First Amendment, relying on *Fraser*.[85] However, to prove its point the School District cited only such cases, which had been decided upon the substantial disruption test and not under *Fraser*.[86]

In consequence, the Third Circuit found that the School District's argument was vague and, not enough evidence was provided to treat the profile as on-campus speech. *Fraser* was not applicable and the Court highlighted their task to declare that, whereas Justin's speech was not on-campus and did not disrupt the school's work, the School District had no authority to punish him without the violation of the First Amendment.[87,88]

In comparison with *Snyder I-II*, we can clearly see the "bedrock principles" of the jurisprudence, namely that *Fraser* is only applicable

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[81] *Layshock* p. 31, p. 38.
[82] Pongó 2015, p. 542.
[83] *Layshock* p. 38.
[84] Id.
[85] Id. p. 39.
[86] See id. pp. 41-46.
[87] Id. p. 48.
[88] Bendlin 2013, p. 58.

to on-campus cases and *Tinker* requires a substantial disruption in the school environment. However, we can also identify the main points that are to be debated and questioned in such occurrences: when and under which circumstances an off-campus speech becomes on-campus? How could school administration provide enough evidence to establish a foreseeable disruption in the school environment and what evidence could sufficiently establish such foreseeable disruption in the same environment? Furthermore, how can the school prove the existence of a sufficient nexus between the students' speech and the reasonably foreseeable substantial disruption? These questions continue to remain unanswered by the SCOTUS to this date, which encumbers school officials and leave them in an ambiguous position when it comes to tackling cyberbullying cases.[89]

2.3 KOWALSKI[90] CASE

Up to this point *Snyder I-II* and *Layshock* dealt with free speech in relation to a student and school personnel. In *Kowalski*, this changed importantly to a student-on-student speech incident.

Kara Kowalski was a high school senior, who created the MySpace group S.A.S.H., inviting approximately 100 students to join.[91] The acronym S.A.S.H. had two interpretations. According to Kowalski it referred to Students Against Sluts Herpes, but Ray Parsons, a classmate and active participant of the group, stated it meant Students Against Shay's Herpes. Shay was the targeted student, fact that was proven by posted comments, images, and photographs.[92] Although, Kowalski created the profile at home, Parsons was the first member to access the MySpace group on-campus from a school computer. He created images, all depicting Shay as a "whore" with herpes everywhere, including her pelvic area.[93] As punishment the school suspended Kowalski for ten days and issued a 90-day social suspension (prevented her from being Queen of Charm and participating in the cheerleader squad). On request of Kowalski's father, the school

[89] See Ere 2008, pp. 271-272.
[90] Kowalski v. Berkeley County Schools, 652 F. 3d 565 - Court of Appeals, 4th Circuit 2011.
[91] Id. pp. 2-3.
[92] Id. p. 3.
[93] Id. p. 4.

administration reduced school suspension to 5 days, but retained the social penalty.[94] Due to the profile Shay didn't want to attend school.[95]

In consequence of this punishment Kowalski filed a suit against the School District and some school employees alleging that her freedom of speech was violated by the school's actions. The District Court dismissed her claim.[96] Kowalski claimed that her speech originated off-campus and was non-school related, therefore, the school administration had no authority to punish her.[97] Contrary to Kowalski's statement, the School District emphasized that if an off-campus speech causes a foreseeable risk of reaching the school premises and creating substantial disruption, then the school has the power to curb her free speech rights. Under the circumstances of the case at hand, Kowalski's only purpose with the profile was to target Shay, humiliate and bully her online. (Actually, she reached this goal, since Shay didn't attend her classes on the day following the group's creation as feeling uncomfortable about sitting in class next to her abusers.) Moreover, Kowalski invited others from the same high school to join the group, thus she had to foresee that her off-campus conduct would reach school premises and would cause substantial disruption.[98]

On appeal, the Fourth Circuit took all facts into consideration, and explored the basis of Kowalski's defense, which was that her conduct enjoyed the full protection of the First Amendment due to the off-campus origin of the speech. However, the Court argued that, although her speech originated literally outside of the school premises,

> *"she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment."*[99]

According to this reasoning, the Fourth Circuit transformed Kowalski's off-campus speech into on-campus, which also marked a crucial change regarding the application of law, since from that point on, every SCOTUS

[94] Id. p. 6.
[95] Id. p. 5.
[96] Id. p. 9.
[97] Id.
[98] Id.
[99] Id.

test and doctrine in this field instantly became relevant to the case at hand.[100] Furthermore, the Court referred to the reasonable foreseeability element of *Tinker*, which, had not stood in *Snyder II.* Moreover, the Fourth Circuit stated being

> *"satisfied that the nexus of Kowalski's speech to Musselman High School's pedagogical interests was sufficiently strong to justify the action taken by school officials in carrying out their role as the trustees of the student body's well-being."*[101]

In comparison with the above-analyzed *Snyder I-II* and *Layshock* cases, we can conclude that under facts very similar to those of *Kowalski*, the Third Circuit did not find reasonably foreseeable substantial disruption in *Snyder II*; nor a sufficient nexus between individual student speech and school disruption in *Layshock*. However, the Fourth Circuit, in *Kowalski*, explicitly declared the existence of both of these *Tinker* elements.[102] We should mention, though, that, since the analysis in *Kowalski* contains speculative and conclusory determinations about the effect of the online group page, it can easily be argued as not being part of the "judicial mainstream".[103]

One significant difference to the backgrounds of the other cases is that in *Kowalski* the target was another student and not a school employee. (However, we should keep in mind that even the student-on-student scenario involves some school action, like suspension or expulsion.) In a student-on-student scenario the Fourth Circuit explored both foreseeable disruption and sufficient nexus and both were found to stand, even though Kowalski herself did not refer to sufficient nexus. (Auerbach argues that student-on-student cases are factually distinct from cyberbullying cases, which mainly target school employees.[104]) The Court also highlighted that even though Kowalski's speech turned into on-campus,[105] they didn't have to explore the case under *Fraser*,

[100] Pongó 2015, p. 543.
[101] *Kowalski* p. 14.
[102] Horowitz – Bollinger 2014, p. 38.
[103] Hostetler 2014, p. 14.
[104] Auerbach 2008-2009, p. 1654.
[105] Regardless of the origin of the speech, it directed at persons in school, therefore, it was in fact in-school speech. See. *Kowalski* p.14.

because the school's action was permissible under *Tinker*.[106] In the above analyzed *Snyder II* and *Layshock*, the Third Circuit did not evaluate vulgar and offensive profiles, which targeted school principals, on-campus, but the Fourth Circuit did find the creation of a group on MySpace to be on-campus speech.[107] The Fourth Circuit reasoned why Kowalski's speech was turned into on-campus speech, yet, contrary to the *lex specialis derogat legi generali* principle, failed to explore the case under special on-campus tests like *Fraser*, deciding instead to adjudicate by using the general *Tinker* test.[108] Nothing short of surprising, this raises plausible questions: since the speech was declared to be on-campus, should not the general *Tinker* test be the last resort, and not the first applicable doctrine? Moreover, should not the Court, instead of *Tinker*, examine the case under SCOTUS doctrines referring to on-campus speech, and, only after such analyses, then turn to *Tinker*?

In my opinion, the foregoing remark and these four decisions reveal that when US jurisprudence comes to cyberbullying it can be rather unpredictable and ambiguous. Some courts will rule in favor of students in off-campus cases and

> *"[s]chools that act without showing a substantial disruption can be held liable and be forced to pay damages to the bully."*[109]

However, under very similar circumstances, other courts will find the school authorities' actions constitutionally permissible. There are no guidelines or uniform jurisprudence in the US court system. Therefore, every case could be decided either way depending on which court will explore and rule on the case.

3. CONCLUSIONS

In this article, I analyzed three cases (and four decisions) decided by US Circuit Courts in order to reveal anomalies in US jurisprudence regarding cyberbullying. In the course of this research, I tried to identify some of the most crucial problems of US case law on cyberbullying. Since the US courts ruled on several cyberbullying cases, I supposed that an in-depth

[106] Id.
[107] Id.
[108] Id.
[109] Greenhill 2010-2011, p. 733.

analysis could identify ambiguous and undecided elements in the existing judicial practice. The analysis of *Snyder I-II, Layshock* and *Kowalski* aimed precisely at revealing these problems. Pursuant to this logic, I focused on finding and highlighting these problems, the so-called anomalies. In my opinion the following issues represent the most important anomalies in cyberbullying jurisprudence in the US, thus these seem to be the most urgent to get resolved.

First of all, the question is whether *Tinker* is applicable to off-campus student freedom of speech cases, or not. According to the analysis that took place in this paper, I would say, it does, but, as we can see above in Judge Smith's concurring opinion in *Snyder II*, this issue is not the least finally settled. However, we have to accept the fact that *Tinker* is applicable to off-campus cases and serve as a general test to any cyberbullying cases, because the other SCOTUS tests are declared to be applicable only on-campus scenarios. Without *Tinker*, courts cannot rule in any off-campus student speech case, only if they transform it into on-campus speech. Therefore, the SCOTUS should finally deliver a landmark ruling regarding when and under which circumstances an off-campus speech can become on-campus. Moreover, the role and the importance of the 'sufficient nexus' test should be clarified, because as we could see above in *Layshock*, there this element did not stand, but in *Kowalski* it did, having a decisive role in reaching the decision the Court did.

Second of all, the SCOTUS should call the attention of the courts to the fact that if an off-campus speech is turned into on-campus, courts are obliged to first apply the special on-campus tests instead of instantly referring to *Tinker.* Such an approach would be more compatible with the ancient legal principle of *lex specialis derogat legi generali*.

Third of all, if a speech has a significant effect on the school environment, but does not turn into on-campus speech, then SCOTUS should offer some guiding principles on which facts could constitute substantial disruption or foreseeable future substantial disruption, and how could school employees provide enough evidence to establish such actual or reasonably foreseeable disruption in the school environment.

Fourth of all, if the above facts of an actual or reasonably foreseeable disruption are identified, the SCOTUS may provide solutions on how school authorities, for the purposes of relevant litigation, could prove

the existence of a sufficient nexus between students' speech and the reasonably foreseeable substantial disruption.

As a consequence of the analysis herein, we could conclude that the US court system is faced with a great hurdle when it comes to cyberbullying. The courts are doing their best, but without a clear guideline provided by the SCOTUS, the foregoing problems and anomalies will remain, and circuit splits on the federal level will rise continuously. Moreover, we should highlight that this jurisprudence not only affects law enforcement personnel, but the students, school employees, parents and every member of the community, who tackle cyberbullying.

As far as I am concerned, the US courts are on the right track, but without a SCOTUS landmark decision on this specific issue, the anomalies and problems, unfortunately, will persist and remain.

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