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## How to Define and Refine Cyberbullying? – A Complex Cyberbullying Definition\*\*

### *Introduction*

In our globalized world, as a result of the rapid development of technology, significant social changes are underway nowadays. Thanks to the info-communication revolution, the boundaries between the offline and online world are blurring, thus the Internet enmeshes our everyday lives along with all its advantages and pitfalls. According to recent Hungarian research, instead of television, the Internet became the most important medium among youth between the age of 15-29, and most of these young people also have smartphones.<sup>1</sup> Therefore, the virtual world offers countless possibilities to them in their private and professional lives, but besides these benefits, several pitfalls fine-tune the whole picture. One of these pitfalls is cyberbullying, which represents an everyday problem for students worldwide. However, this article focuses on school bullying in public education, under the age of eighteen, with particular attention to cyberbullying. Since bullying is not a new issue, but its online type requires different intervention techniques and new skills. Bullying as a social phenomenon exists since the first school was established,<sup>2</sup> and it is present nowadays. Peers are teasing and mocking each other's weaknesses.<sup>3</sup> Aggressive conduct, which is harmful, harassing, repeated and causes power imbalance between the subjects.<sup>4</sup> Another definition provides that „*bullying is a*

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\*\* This research was supported by the project nr. EFOP-3.6.2-16-2017-00007, titled *Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy*. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.

<sup>11</sup> Magyar Ifjúságkutatás 2016 – Az ifjúságkutatás első eredményei [Hungarian Youth Research 2016 – The first results of youth research], Új Nemzedék Központ, 2016, p. 54.

<sup>2</sup> McCarthy, Martha: *Cyberbullying Laws and First Amendment Rulings: Can They Be Reconciled?*, Mississippi Law Journal, Vol. 83., 2014, 805-836., p. 806.; Calvoz, Raul R.-Davis, Bradley W.-Gooden, Mark A.: *Constitutional Implications of School Punishment for Cyber Bullying*, Cardozo Law Review, 2014. 1-7., p. 1.

<sup>3</sup> Greenhill, Joe: *From the Playground to Cyberspace: The Evolution of Cyberbullying*, Charleston Law Review, Vol. 5., 2010-2011, 705-744., p. 738.

<sup>4</sup> PINTÉR, SAROLTA: *Az iskolán belüli erőszak*. <http://www.bulisbiztonsag.hu/az-iskolan-beluli-eroszak>. (last seen: 29th September 2018).

*repeated and intensive, abusive conduct, which causes damage or harm, and a group or a person attempts to create or abolish power imbalance over another group or person, and to protect and maintain such changed power position.*"<sup>5</sup> Bullying, of course, is not just a school phenomenon, workplace bullying (mobbing) became part of it over time. However, the present paper is focusing on the educational environment. As we can see above, bullying has several definitions, so an exact worldwide accepted concept is lacking, only key elements were identified. Therefore, the new, technology-induced form of bullying, namely cyberbullying is also without a generally acknowledged definition. Consequently, a complex concept is required to identify cyberbullying conduct in a consistent manner and tackle this phenomenon.

Therefore, I established a complex definition, which took into due consideration the academic literature, legislation, and jurisprudence approach as well. Below, I will briefly introduce these aspects, with particular attention to the legislative standpoints and the academic point of view. Since the academic literature created countless cyberbullying definitions, only a few will be discussed in this paper,<sup>6</sup> and the deeper analysis focuses on the most prevalent legislative elements in the US state legislation.

### *I. Key elements of a cyberbullying definition from a legislative perspective*

The present research aimed to find the most crucial elements of a legislative definition for cyberbullying. In order to achieve this goal, I examined the US legal system, since the most developed jurisprudence and academic writing regarding cyberbullying can be found there. Therefore, every state anti-bullying laws and bills were researched to identify the legislative key elements. As a result, 27 out of 50 explicitly referred to the term "*cyberbullying*", noting that Hawaii only mentioned cyberbullying, but did not define it at state law level.<sup>7,8</sup> Note that the sole research objective was to find the most important elements of a legislative definition of cyberbullying in order to help future Hungarian legislation. Taking into consideration that every state in the US has already adopted anti-bullying laws, the state bullying laws in the US are possible good examples to be followed. Moreover, in the course of the research, those bills were also examined, which did not become law, but contained additional elements of the current definition in the law of the given state. As a starting point the table of the Co-Directors of Cyberbullying Research Center, Sameer Hinduja and Justin W. Patchin, were used.<sup>9</sup> They

<sup>5</sup> Megfélemlítés Elleni Program-Mi a megfélemlítés [Anti-bullying Program], <https://www.megfelemlites.hu/megfelemlitesrol> (last seen: 29th September 2018).

<sup>6</sup> For further and deeper analysis regarding the academic definitions of cyberbullying, see Pongó, Tamás: *Cyberbullying and the students' freedom of speech, with particular attention to the U.S. legal system*, PhD thesis, University of Szeged, 2017, pp. 27-35.

<sup>7</sup> Hawaiian Act 214 (2011) Section 1 (c).

<sup>8</sup> In the course of the research, I contacted the Legislative Reference Bureau Library of the Hawaiian legislature, and they reinforced my research results, namely the definition cannot be found in the Act 214. Even though, its intention to define bullying and cyberbullying separately makes it important to include this state into the research.

<sup>9</sup> Cyberbullying Research Center: Bullying laws across America, <https://cyberbullying.org/bullying-laws> (last seen 29th September 2018).

have been studying cyberbullying since 2002 and the Research Center was established in 2005.<sup>10</sup> In accordance with the Hinduja-Patchin review, the paper focused only on those laws, which include the term „*cyberbullying*” *expressis verbis*. However, their research suggests that 48 states adopted such a law that includes cyberbullying or online harassment. Unfortunately, this approach cannot be applicable in this paper’s approach, since online harassment and cyberbullying are not synonyms either in the US or in Hungary. The Justice Department published a “Dear Colleague letter” to raise awareness of the difference between these two concepts. Harassment is a federal crime, but bullying, in general, is not a crime in most states, and definitely not illegal at federal level.<sup>11</sup> Therefore, the research required to visit each state legislature’s website and explore the existing cyberbullying definitions and identify its elements. Such cluster-analysis led to the results, which shows that 27 US states have expressed cyberbullying definition at legislative level, contrary to the Patchin-Hinduja results (48 states). Although, it shall be mentioned that some states include the electronic way to commit bullying, and that could be evaluated as a cyberbullying concept. In order to understand the different research approaches, we need to clarify the standpoints of academia. The members of the academic world are split into two main schools regarding cyberbullying: (i) the ‘new phenomenon’ approach and (ii) the ‘conservative’ school.<sup>12</sup> Dan Olweus, who created the first scientific bullying definition, represents the latter. According to him, there is no necessity for different intervention and handling of the cyberbullying conduct, because the previous bullying approaches provide solutions for new ones as well.<sup>13</sup> Members of the ‘new phenomenon’ school raise the point that due to the virtual environment, bullying and cyberbullying are different from each other in several elements, like the question of anonymity and a potentially wider audience,<sup>14</sup> as well as the changed role of repetitiveness (one action could constitute cyberbullying, but cannot realize bullying).<sup>15</sup> Peter K. Smith and Ersilia Menesini represent this approach and argue with Olweus about his interpretation. The research of the present article followed the ‘new phenomenon’ approach and declares that including the term electronic into the already existing bullying definition is not appropriate, not enough, since the differences are not shown under such solution. Nonetheless, the biggest problem nowadays is the lack of a widely-accepted definition, in particular, one, which takes into consideration academic literature and legislation as well.<sup>16</sup>

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<sup>10</sup> Cyberbullying Research Center: About us, <http://cyberbullying.org/about-us> (last seen 29th September 2018)

<sup>11</sup> United States Department of Education Office for Civil Rights: Dear Colleague Letter, October 26, 2010

<sup>12</sup> PARTI, KATALIN: *A megfélemlítés (bullying) szabályozása Magyarországon és külföldön* [Regulation of bullying in Hungary and abroad], In *Medias Res*, Vol. 13., Nr. 1. 2016. 114–146., p. 116.

<sup>13</sup> Olweus, Dan: *Invited Expert Discussion Paper – Cyberbullying: An overrated phenomenon?*, *European Journal of Developmental Psychology*, Vol. 9. 2012, 520-538., p. 536.; PARTI 2016. p. 116.

<sup>14</sup> Menesini, Ersilia: *Commentary – Cyberbullying: The right value of the phenomenon. Comments on the paper „Cyberbullying: An overrated phenomenon?”*, *European Journal of Developmental Psychology*, Vol. 9., 2012, 544-552. pp. 545–546.

<sup>15</sup> SMITH, PETER K.: *Commentary – Cyberbullying: Challenges and opportunities for a research program-A response to Olweus (2012)*, *European Journal of Developmental Psychology*, Vol. 9., 2012. 553–558. p. 555.

<sup>16</sup> PARTI 2016, pp. 143–144. CAMPBELL, MARILYN A. – ZAVRSNIK, ALES: *Should Cyberbullying Be Criminalized?*, in Smith, Peter K. & Steffgen, Georges (eds.) *Cyberbullying Through the New Media: Findings from an International Network*, Psychology Press, Taylor and Francis Group, London and New York, 2013. 65–82. p. 12.

In the next part of the paper the most frequently used elements of state cyberbullying laws within the US will be introduced, namely (i) substantial disruption; (ii) off-campus origin of the speech (iii) protect the victim's physical integrity, and protect the property of the victim; (iv) creating a hostile educational environment, which deprives the victim of the educational benefits and services. Some of the state laws (Connecticut, Florida, Hawaii, Maine, Minnesota, Nevada, New Hampshire, New York, Oregon, Rhode Island, and Washington)<sup>17</sup> connect the bullying conduct to actual or perceived protected characteristics, such as race, color, sexual orientation, etc., but this article is not going to deal with these elements.

### *1. Substantial disruption*

The first issue to be analyzed is that of 'substantial disruption'. This expression originates from *Tinker*, the landmark students' freedom of speech decision of the Supreme Court of the United States (SCOTUS).<sup>18</sup> According to this judgment, no speech causing substantial or material disruption or a reasonably foreseeable substantial disruption in the school environment deserves First Amendment protection. However, the content of this phrase is ambiguous and left school employees, students, parents, as well as academics and scholars with uncertainty.<sup>19</sup> Usually, school officials are not aware of the boundaries of their authority when it comes to cyberbullying and curb the students' freedom of speech without a valid legal basis according to a number of court judgments.<sup>20</sup>

Several circuit court decisions are based upon the substantial disruption test,<sup>21</sup> and it can be concluded that few states realized that their legislature should implement this SCOTUS test into law, thus endorsing the unification of the legal terminology regarding cyberbullying and helping avoid unambiguity. As a result, 15 state laws included the substantial disruption test into their legislative definition.<sup>22</sup> Moreover, 5 states proposed a bill to include the test, but failed to do so.<sup>23</sup>

<sup>17</sup> Connecticut General Statutes §10-222d. (1); Florida Education Code §1006.147; Hawaii Act 214 (2011) §4.; Maine Revised Statutes §6554. 2. B., C.; Minnesota Statutes §121A.031 Subd. 2. (e)(f)(g); Nevada Revised Statutes §388.122, 388.123; New Hampshire Revised §193-F:3 I. (b); New York Education Law §11. 7.; Oregon Revised Statutes §339.351; Rhode Island General Laws §16-21-33; Revised Code of Washington 28A.300.285 (2)(3).

<sup>18</sup> *Tinker v. Des Moines School District*, 1969 393 U.S. 503.

<sup>19</sup> See GREENHILL 2010–2011. p. 721.

<sup>20</sup> HINDUJA, SAMEER-PATCHIN, JUSTIN W.: *Bullying Beyond the Schoolyard – Preventing and Responding to Cyberbullying* (2nd ed.). Thousand Oaks California: Corwin, 2015. pp. 112–113.; GREENHILL 2010–2011. pp. 708–709., p. 723., pp. 732–733. VUOLO, MARIA C: *Education Connection: Working Together to Give Schools the tools to Prevent Cyberbullying*, Children's Legal Rights Journal, Vol. 32., No. 3., 2012. pp. 91–92.

<sup>21</sup> *JS Ex Rel. Snyder v. Blue Mountain School District*, 650 F. 3d 915 – Court of Appeals, 3rd Circuit 2011. *Layschock v. Hermitage School District*, 593 F. 3d 249 – Court of Appeals, 3rd Circuit 2010. *Kowalski v. Berkeley County Schools*, 652 F. 3d 565 – Court of Appeals, 4th Circuit 2011.

<sup>22</sup> California 48900.4; 48907. (a); Connecticut General Statutes §10.222d (1); Florida Education Code §1006.147. (2)(d); Georgia Code Title §20-2-751.4 (a)(3)(D); Illinois Compiled Statutes 105 ILCS 5/27-23.7 (a)(4); Massachusetts General Laws §370. (a) (v); Michigan Compiled Laws §380.1310b (10)(c)(iv); Minnesota Statutes §121A.031 Subd. 1. (a)(3); Missouri Revised Statutes §160.775. 2.; New Hampshire Revised Statutes §193-F:3 I. (a)(5); New York Education Law §11. 7.(d); Rhode Island General Laws §16-21-

In conclusion, we can safely declare that 20 states – which explicitly refer to “cyberbullying” – use or have the intention to use the substantial disruption test. Therefore, it means that the substantial disruption approach represents an important concept to follow, thus the judicial and the legislative branch should tend towards each other even more in order to effectively tackle cyberbullying.

## 2. *Off-campus origin*

Our second element, the off-campus origin of the speech, represents the greatest problem to be addressed. Before the Internet spread like a wildfire all over the globe, this issue did not pose any problems. During school hours, or at any school-sponsored or school-supervised event, traditional bullying was prohibited, and school employees exercised their authority to take actions to prevent or stop bullying. No speech originated outside the school premises was the school’s concern. Internet, Wi-Fi hotspots, and mobile Internet access, however, have completely changed the world. Students are online 24/7, and any action taken at home, in non-school hours could have a significant effect on the school environment. Students, who might be targeted by other students online, lost their safe haven, and do not have any place, where they can recover from the effects of the attacks. The most common scenario of aforesaid cyberbullying conduct is, if a student (cyberbully) attacks the target on any social media website or creates a group to the same effect, off-campus, during non-school hours. These bullies argue that such speech is protected by the First Amendment, and schools have no authority to curb their right to free speech (e.g. *Kowalski*)<sup>24</sup>. However, such actions of off-campus origin could definitely cause ‘substantial disruption’ in the orderly operation of the school, and by virtue of this disruption, depriving the targeted students of their right to education and right to a safe educational environment.

The crucial question regarding the off-campus origin of the speech is whether school employees have the authority to curb students’ speech, if it comes outside of the school premises. (The other three SCOTUS tests, *Fraser*<sup>25</sup>, *Hazelwood*,<sup>26</sup> and *Morse*<sup>27</sup> are applicable only to on-campus speech.)<sup>28</sup> Hence, this question remains the focal point of great debate, and a good way would be to settle it, probably, to enact into law that bullying through the use of technology or any electronic communication is considered as cyberbullying and prohibited despite its off-campus origin. 11 states provided for definitions according to this logic<sup>29</sup> and prohibited any non-school-related bullying

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33. (a)(1)(v); Tennessee Code Annotated §49-6-4502. (a)(1) and (3)(B); Texas Education Code §37.0832. (b)(2); Revised Code of Washington 28A.300.285 (2)(d).

<sup>23</sup> Kansas (SB 278) (2012); Kentucky (SB 127) (2015); Maine (HP 724) (2011); Nebraska (LB 123) (2011); North Dakota (SB 2167) (2011).

<sup>24</sup> *Kowalski v. Berkeley County Schools*. 652 F. 3d 565 – Court of Appeals, 4th Circuit 2011.

<sup>25</sup> *Bethel School District v. Fraser*. 1986 478 U.S. 675.

<sup>26</sup> *Hazelwood School District v. Kuhlmeier*. 1988 484 U.S. 260.

<sup>27</sup> *MORSE v. FREDERICK*. 2007. 551 U.S. 393.

<sup>28</sup> PONGÓ 2017. p. 40.

<sup>29</sup> Connecticut General Statutes §10.222d (b)(16)(B); Delaware §4112D. (f) (1); Florida Education Code §1006.147. (2)(d); Georgia Code Title §20-2-751.4 (a)(3); Illinois Compiled Statutes 105 ILCS 5/27-23.7

activity through technology. Interestingly, 4 other states<sup>30</sup> proposed a bill to introduce this prohibition, but these remained unsuccessful.

An important feature should be mentioned here that 10 out of these 11 states (except Delaware) connected the off-campus origin of the speech to substantial disruption in the orderly operation of the school. Accordingly, an off-campus speech could be prohibited only if it caused substantial disruption in the school environment. This logic leads us back to *Tinker* and supports the approach that only *Tinker* is applicable to off-campus speech.<sup>31</sup> At this point, we can conclude that the US court jurisprudence and state legislation are on the same page. However, we should keep in mind that only 11 states out of 27 enacted such laws, i.e. the majority remained reluctant to consider judicial practice as a source of statutory law in this respect. This legislative attitude increases uncertainty and ambiguity in the field of cyberbullying. Therefore, the approach of these 11 states is the desirable one to handle cyberbullying of off-campus origin.

### 3. Protection of the students' physical integrity and property

The foregoing two elements were implemented from SCOTUS and lower court decisions; however, the third one, namely the 'protection of the students' physical integrity and their property' was not mentioned in any SCOTUS landmark judgments, like *Tinker*, *Fraser*, *Hazelwood*, *Morse*. Neither was this element called on in circuit court decisions, such as *Layshock*,<sup>32</sup> *Kowalski* or *Snyder*.<sup>33</sup> No courts have raised this issue in their jurisprudence, but legislators still found this element highly important. It should be emphasized here that the protection of physical integrity and property could be considered as separate elements, because they are protecting various student rights. However, I found it highly interesting and important to connect these two prongs into one legislative element, because bullying conduct, which endangers any of these two prongs, usually, jeopardizes the other one as well. Therefore, the analysis will continue accordingly, merging these two prongs into one element. The research realized that 23 state laws out of 27 found that causing physical harm to a student constitutes bullying conduct.<sup>34</sup> It is an interesting fact that only 20 out of

(a)(4); Maine Revised Statutes Title 20-A: Education §6554 4. B.; Massachusetts General Laws §370. (b)(ii); Minnesota Statutes §121A.031 Subd. 1. (a)(3); New Hampshire Revised Statutes §193-F:4 I. (b); New York Education Law §11. 7.(d); Tennessee Code Annotated §49-6-4502. (a)(1) and (3)(B)

<sup>30</sup> Hawaii (SB 268) (2015); Kansas (SB 278) (2012); Nebraska (LB 123) (2011); Texas (HB 1059) (2011) and (HB 1467) (2011).

<sup>31</sup> PONGÓ, TAMÁS: *Anomalies in the US Cyberbullying Jurisprudence*. Masaryk University Journal of Law and Technology. Vol. 10., No. 2. 2016. 148–168. p. 166.

<sup>32</sup> *Layshock v. Hermitage School District*, 593 F. 3d 249 – Court of Appeals, 3rd Circuit 2010.

<sup>33</sup> *JS Ex Rel. Snyder v. Blue Mountain School District*, 650 F. 3d 915 – Court of Appeals, 3rd Circuit 2011

<sup>34</sup> California Education Code §48900 (r)(1)(A) (B); Connecticut General Statutes §10.222d (a)(1) and (a)(2); Delaware §4112D. (a) (1); Florida Education Code §1006.147 (3); Georgia Code Title §20-2-751.4 (a)(3); Illinois Compiled Statutes 105 ILCS 5/27-23.7 (b)(1)-(2); Kansas Statutes §72-8256 (a) (1)(i)(iii) and (2); Maine Revised Statutes §6554. 2. B.(1) and C.; Massachusetts General Laws §370. (a) (i)(ii); Michigan Compiled Laws §380.1310b (10) (c)(ii)(iii); Minnesota Statutes §121A.031 Subd. 2.(e)(f)(g); Missouri Revised Statutes §160.775.2.; Nevada Revised Statutes §388.122 1. (a) and 388.123; New Hampshire Revised Statutes §193-F:3 I.(a)(1) and II.; New York Education Law §11. 7.(b)(c); North Carolina General Statutes §115C-407.15. (a)(1); Oregon Revised Statutes §339.351 (1) and (2)(c)(A)(B); Rhode Island General Laws

these 23 states protect the students' property as well, and evaluate the harm of the targeted student's property as bullying conduct. Accordingly, if we connect the protection of physical integrity and property as the third element of a working definition for cyberbullying, we can conclude that the remaining 3 states (Michigan, New York, and Virginia) should adopt such legislation, which defines harm to the student's property as bullying conduct. Therefore, it worth highlighting that in 2 states out of these 3 (Michigan and New York) bills were proposed to amend current state laws,<sup>35</sup> and therein the element of harm to the victim's property classified as bullying conduct. Only Virginia remains reluctant to extend its cyberbullying definition in this aspect, and include the protection of the students' property therein. Hereby should be mentioned that some states proposed bills in order to include one of the two prongs of this element, but all of them have failed. For instance, Kentucky, North Dakota and Pennsylvania wanted to add both to their current cyberbullying definition,<sup>36</sup> and Nebraska would also like to include the protection of physical integrity into its definition,<sup>37</sup> but all of these attempts have remained unsuccessful. However, it should be noted here that none of these four states have the term "*cyberbullying*" in their current law, accordingly, it was intended to be introduced with the bills that have failed to pass by legislation so far.

At this point, it should be highlighted that the collision between the freedom of speech and the right to safe educational environment stands in the focal point of the discussion in US cyberbullying jurisprudence. Usually, the targeted student is not placed in reasonable fear of bodily harm or damage to his/her property, but, of course, could be. Furthermore, any bullying conduct could cause such harm or damage, thus any decision to include this element into a working definition of cyberbullying would be a testament to legislative wisdom and foresight. For instance, if a student is targeted on a social media website, and one comment says „*you better not to come to school tomorrow*”, this situation could place a student in a reasonable fear of physical harm or property damage being caused to him/her.

Keep in mind that state laws do not only evaluate actual physical harm or property damage as bullying conduct, but they also account for any reasonable fear of such occurrences. This represents a subjective legislative assessment regarding the feelings of the victim, but it is nonetheless necessary, because the main goal of cyberbullying is to create a power imbalance between the perpetrator and the victim.<sup>38</sup> Therefore, any bullying conduct reaches its goal, if the victim feels that the bully already has the

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§16-21-33. (a) (i)(ii) and (2); Tennessee Code Annotated §49-6-4502. (a)(1) and (3)(A)(i)(ii); Texas Education Code §37.0832. (a)(1); Utah Code 53A-11a-102 (1)(a)(i)(A)(B)(D) and (ii)(A); Virginia Code Annotated §22.1-276.01. A.; Revised Code of Washington 28A.300.285(3)(a).

<sup>35</sup> Michigan (HB 6472) (2010), (SB 1458) (2010), (SB 1462) (2010), (SB 147) (2011) and (SB 148) (2011); New York (A6707) (2015).

<sup>36</sup> Kentucky (SB 127) (2015); North Dakota (SB 2167) (2011) and Pennsylvania (HB 156) (2015).

<sup>37</sup> Nebraska (LB 123) (2011).

<sup>38</sup> LANGOS, COLETTE: *Regulating Cyberbullying: A South Australian Perspective*, Flinders Law Journal, Vol. 16. 2014. 73–109. p. 74. GIMÉNEZ GUALDO, ANA M. – HUNTER, SIMON C. – DURKIN, KEVIN – ARNAIZ, PILAR-MAQUILÓN, JAVIER J.: *The emotional impact of cyberbullying: Differences in perceptions and experiences as a function of the role*, Computers & Education, Vol. 82., 2014, 228-235., p. 228.; Minnesota Statutes §121A.031 Subd. 2. (e)(1); New Hampshire Revised Statutes §193-F:3 I. (b); Texas Statutes §37.0832. (b)(1); Code of Virginia §22.1-276.01. A.

“upper hand”. Moreover, “[t]he harm in bullying often depends on the impact on the victim and not on the content of the particular speech”.<sup>39</sup> At this point, it should be highlighted as well that the analysis focused only on the physical integrity of students, but, as the quote suggests, the mental impacts and struggles are also significant. Victims are afraid to attend school and anxiety, depression will appear in their life due to bullying conduct.<sup>40</sup> Consequently, including the mental harm into a definition is essential, since bullying conduct could cause both physical and mental harm to the victim.<sup>41</sup> In conclusion, we could declare that this element constitutes an essential part of any functional cyberbullying definition. Due to its inclusion, legislators protect the victims’ rights to physical and mental health and to property more effectively.

#### *4. Right to education and the right to a safe educational environment*

The present research paid special attention to the right to education and the right to a safe educational environment in accordance with victims’ testimonies in judgments. Victims were afraid to go to school due to off-campus, online bullying. This also means that they were deprived of the educational benefits and services offered by the school. Furthermore, one of the main signs that a student became a victim of cyberbullying is decreasing academic performance. In consequence, I focused on those provisions of state laws in the US, which protect the students’ right to education in any form. As a result, I discovered that 21 states find the creation of a hostile educational environment or the deprivation of the student of the benefits and services of the school as bullying conduct. 3 more states (Kentucky, North Dakota and Pennsylvania)<sup>42</sup> proposed bills to include this element into their cyberbullying definition. (Keep in mind, however, that these three states do not refer to “cyberbullying” *per se* in their laws.) This fact shows us that the legislators are more concerned about the physical integrity of the students (23 states prohibit such conduct) than anything else, including the right to education. Naturally, the difference seems very small (2 states), but it is nonetheless still remarkable.

As I mentioned above, this paper construes cyberbullying as a school phenomenon, so the research focus is limited to students under the age of 18, who are not university students. Taking into consideration that the US court judgments regarding cyberbullying first arose in the educational (school) context, it seems quite interesting that the right to education is not the most protected element by legislation. Moreover, some states openly refuse to address this issue. In my opinion, this element shall be included in any functional cyberbullying definition, because this represents the core of the problem. The greatest disadvantage caused by cyberbullying is that the victim feels him/herself vulnerable in the school environment and has no intention to spend more time there than necessary. In consequence, schools lose their foremost mission, namely to educate children and raise responsible citizens.

<sup>39</sup> LIPTON, JACQUELINE D.: *Cyberbullying and the First Amendment*. Florida Coastal Law Review, Vol. 14. 2012–2013. 99–130. p. 118.

<sup>40</sup> CAMPBELL-ZAVRSNIK 2013, pp. 1–2.

<sup>41</sup> MENESINI 2012, pp. 549–550.

<sup>42</sup> Kentucky (SB 127) (2015); North Dakota (SB 2167) (2011) and Pennsylvania (HB 156) (2015).

## *II. The academic approach of a cyberbullying definition*

In the previous part, the legislative approach was introduced and the most prevalent US legislative elements were revealed. Moreover, the courts' standpoints were mapped and explained as well, since the substantial disruption derives from *Tinker*, the other SCOTUS tests were also mentioned at the off-campus origin issue. Furthermore, it was declared that the courts are not dealing with the protection of students' physical integrity or property, because the cases are focusing on the limits of First Amendment protection. Therefore, the legislative and case law approaches were already briefly analyzed, so now the academic standpoints will be further investigated.

According to Dan Olweus, cyberbullying has the same characteristics as bullying, it is just another environment, a new tool to commit bullying. Pursuant to his standpoint, the essential elements have not changed since the 1980s, which are the intention, repetition and power imbalance.<sup>43</sup> He defined cyberbullying as *“bullying performed via electronic means such as mobile/cell phones or the internet.”*<sup>44</sup>

According to Patchin and Hinduja, cyberbullying is *“willful and repeated harm inflicted through the use of computers, cell phones, and other electronic devices.”*<sup>45</sup> Furthermore, Peter K. Smith, who represents the 'new phenomenon' school, defines cyberbullying as follows: *„an aggressive, intentional act carried out by a group or individual, using electronic forms of contact, repeatedly and over time against a victim who cannot easily defend him or herself.”*<sup>46</sup>

However, Smith highlights that this definition is nothing but *„a straightforward adaptation of the Olweus definition...”*<sup>47</sup> In his argumentation, the new approach of repetition and power imbalance is emphasized, since the essence of these elements are different in the cyber world than it was in the offline environment. In addition to the abovementioned concepts, cyberbullying was also defined as *„a clearly intentional aggression or hostile or harmful act carried out through an electronic device repeatedly over time by setting up an imbalance of powers between the aggressor and the victim.”*<sup>48</sup>

Countless academic concepts could be raised here from the US, Europe or Australia,<sup>49</sup> but we can state that the generally acknowledged key elements of a cyberbullying definition are already delineated by the academic world. Some of these key points are: the conduct is always committed in the virtual world; often repetitive;<sup>50</sup> offensive, intentional; causes power imbalance.

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<sup>43</sup> OLWEUS 2012, p. 523.

<sup>44</sup> OLWEUS 2012, p. 521.

<sup>45</sup> HINDUJA-PATCHIN 2015, p. 11.

<sup>46</sup> SMITH 2012, p. 555.

<sup>47</sup> SMITH 2012, p. 555.

<sup>48</sup> DEL REY, ROSARIO et al.: *Structural validation and cross-cultural robustness of the European Cyberbullying Intervention Project Questionnaire*, *Computers in Human Behavior*, Vol. 50., 2015. 141–147. p. 142.

<sup>49</sup> See PONGÓ 2017, pp. 27–35.

<sup>50</sup> The term 'often' is significant, since it represents one of the key elements, which differentiate traditional bullying and cyberbullying. In case of cyberbullying a single act, a single transmission could constitute cyberbullying conduct. See A/HRC/31/20, Office of the UN Special Representative of the Secretary-General on Violence against Children, 'Annual report', 5 January 2016. p. 12. p. 61.

Moreover, in 2016, the European Union conducted a study concerning cyberbullying to assess the already achieved milestones and developments of the Member States.<sup>51</sup> Pursuant to this study, the most important elements of a cyberbullying concept were explored and the lack of a generally acknowledged, common definition was also emphasized.<sup>52</sup> Consequently, the task to establish an official cyberbullying definition was vested in the European Commission.<sup>53</sup> In order to resolve this crucial issue, the Commission organized the Safer Internet Day project as a first step in this way. In the framework of the project, the Commission adopted the following cyberbullying definition: „repeated verbal or psychological harassment carried out by an individual or group against other.”<sup>54</sup> Unfortunately, this definition is lacking several crucial elements, such as power imbalance,<sup>55</sup> the issue of off-campus origin, etc. Moreover, harassment does not necessarily occur in every cyberbullying case, thus including harassment into a cyberbullying definition could misguide the whole concept. According to this paper’s point of view, cyberbullying should be defined as an umbrella term, which includes several conducts that constitute cyberbullying conduct, e.g. online harassment or sexting. Therefore, cyberbullying could occur without any harassment, for example, by sharing sexually explicit images about a classmate in a closed social media group. Such conduct would be evaluated as sexting (cyberbullying), but not as harassment. Moreover, harassment, in general, is a crime, but bullying is not illegal, as I have mentioned above.

Nonetheless, under the study, the EU found the following elements also necessary regarding a cyberbullying concept: anonymity, the possibility of a wider audience, lack of sense of responsibility of perpetrators and the reluctance to report cyberbullying conduct.<sup>56</sup>

In this brief introduction of the academic approaches, it could be discovered that even though the definitions as a whole are different in the academic world, but several key elements are identified. These are very similar both overseas and in the EU, so establishing a generally acknowledged, common cyberbullying definition does not seem an impossible mission in the close future. In my point of view, the different purposes and approaches represent the greatest obstacle in this process. A legislature’s point of view and methodology will always differ from a researcher’s one, not to mention the court’s procedural approach. However, the present paper provides a solution by introducing a complex cyberbullying definition, which includes the legislative, case law and academic perspectives as well.

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<sup>51</sup> Policy Department for Citizen’s Rights and Constitutional Affairs: *Cyberbullying Among Young People*, European Union, 2016 (hence EU study).

<sup>52</sup> EU study, p. 9. p. 19. p. 26.

<sup>53</sup> EU study, p. 10.

<sup>54</sup> EU study, p. 23.

<sup>55</sup> Even though the study mentioned power imbalance in the text, but the Commission did not include this key element into its cyberbullying definition.

<sup>56</sup> EU study, p. 22.

### *III. Conclusions*

The present article aimed to reveal the complexity of establishing a generally acknowledged cyberbullying definition. In the course of the research, some of the key elements of the US legislative concepts were mapped, but these are inconsistent with some of the academic terms. The issue became more complex, if we add the courts' perspective into this definitional problem.

Therefore, first, I examined every US state-level cyberbullying definition found in anti-bullying laws, and narrowed down the research focus to those 27 states, which *expressis verbis* use the term of cyberbullying. As a result of such examination, I identified several key elements, which I introduced and considered to include into or exclude from a cyberbullying concept. Such cluster-analysis shed light that there is a dissent among the legislators, like among scholars, regarding the definition. Certain elements, like harm to the right to physical integrity or property, or the right to education are under the general protection of the law, but no single definition exists, which includes all the identified key elements. There is a concern, but the cooperation between legislators and scholars were also revealed in some points. For instance, the role of power imbalance, which is a crucial element in the academic literature (without it we cannot even talk about cyberbullying at all), has low importance in legislation. Such less significant role of power imbalance in legislation is proven if we explore that only 6 out of the examined 27 states included this element into their definitions, and Nevada erased this component from its effective definition of cyberbullying.<sup>57</sup>

Therefore, taking academic literature, legislative solutions, and case law into consideration, the present research provides the following complex cyberbullying definition:

*An intentional, single or repeated conduct, committed by or against a student or school employee, through electronic device, and it attempts to cause power imbalance and established any of the followings:*

*a) causes physical or mental harm or damage property, or the occurrence of any of these is reasonably foreseeable; or*

*b) creates a hostile educational environment, or deprives the services, benefits or possibilities provided by the school.*

*The school has a legal ground on curtailing the student's freedom of speech:*

*a) in school, during school hours;*

*b) at any event, program supervised, supported, organized by the school;*

*c) in the case of off-campus electronic speech, if the sufficient nexus between the school and the speech is established, and the speech caused substantial disruption in the school environment.<sup>58</sup>*

Such a definition includes the key elements of the abovementioned three perspectives, but some further explanation is needed. Repetition is an essential

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<sup>57</sup> Nevada (SB 504) (2015)

<sup>58</sup> PONGÓ 2017, p. 205.

requirement in the case of traditional bullying, but the standpoints are split concerning cyberbullying. Both sides have support from scholars,<sup>59,60</sup> since cyberbullying could occur with one single move, e.g. upload a sexually explicit image, but it probably will be followed by comments and other reactions. However, the single act to upload the image starts the “online storm”, so this paper joins to that scientific approach, which considered that a single act could result in cyberbullying.

Furthermore, the protection of physical, mental health and the property originates from the legislative perspective, but the issue of off-campus origin and its solution derives from the case law solutions.

In summary, this complex cyberbullying definition intends to provide a concept that could be used by legislators, judges, scholars as well to promote a unified, coherent perception and understanding about the question: what do we call cyberbullying? Since Hungary has no anti-bullying law or any nationwide applied anti-bullying program, this definition also offers a solution for future Hungarian legislation.

## PONGÓ TAMÁS

### A CYBER-MEGFÉLEMLÍTÉS FOGALMI KÉRDÉSEI – JAVASLAT EGY KOMPLEX CYBER-MEGFÉLEMLÍTÉS DEFINÍCIÓRA

#### (Összefoglalás)

A bullying jelensége már az első iskola megalakulása óta létezik, s a technológiai fejlődésnek köszönhetően a cyberbullying magatartás is megjelent. Noha a bullying meghatározására kialakult egy viszonylag egységes álláspont, a cyber-megfélemlítés vonatkozásában még nem sikerült ilyen közös nevezőt találni. Egyes szerzők szerint ez

<sup>59</sup> HINDUJA-PATCHIN 2015, p. 12.; Horowitz, Merle-Bollinger Dorothy M.: *Cyberbullying in Social Media within Educational Institutions – Featuring student, employee, and parent information*, Rowman & Littlefield, United Kingdom, 2014. p. 7. RODKIN, PHILIP C. – FISCHER, KARLA: *Cyberbullying form Psychological and Legal Perspectives*, Missouri Law Review, Vol. 77. 2012. 619–640. pp. 622–626. WEBER, NICOLE L. – PELFREY, WILLIAM V. JR.: *Cyberbullying – Causes, Consequences, and Coping Strategies*, LFB Scholarly Publishing LLC, 2014, p. 9.; GORDON, MICHAEL R.: *The Best Intentions: A Constitutional Analysis Of North Carolina’s New Anti-Cyberbullying Statute*, North Carolina Journal of Law and Technology, 2009. 48–71. p. 52. PHILLIPS, HALEY E.: *Online Bullying and the First Amendment: State Cyberbullying Statutes After People v. Marquan M.* Vol. 93., North Carolina Law Review Addendum, 2014–2015. 179–206. p. 4. WEGMAN, ATTICUS N.: *Feature: Efforts To Curb Cyberbullying Move Off Campus*, Orange County Lawyer, Vol. 56., 2014. 18–23. p. 1.; WEIL, OLIVIA A.: *Preserving The Schoolhouse Gates: An Analytical Framework For Curtailing Cyberbullying Without Eroding Students’ Constitutional Rights*, Ave Maria Law Review, Vol. 11. 2012–2013. 541–573. pp. 544–545. DEL REY 2015, p. 142. GIMÉNEZ GUALDO – HUNTER – DURKIN – ARNAIZ – MAQUILÓN 2014, p. 228. MCCARTHY 2014, pp. 806–807. VUOLO 2012, p. 91. GREENHILL 2010–2011, p. 712. LANGOS, COLETTE: *Cyberbullying: The Challenge to Define*, Cyberpsychology, Behavior, and Social Networking, Vol. 15, No. 6., 2012. pp. 285–290. LANGOS, COLETTE: *Which laws can apply to cyberbullying?* BULLETIN, 2013, pp. 38–39. LANGOS 2014.

<sup>60</sup> PARTI 2016, p. 116. WEGMAN, ATTICUS N.: *Cyberbullying and California’s Response*, University of San Francisco Law Review, Vol. 47. 2012–2013. 737–758. p. 743. GREENHILL 2010–2011, p. 718.; LIPTON 2012–2013, p. 119. *California Education Code §48900 (r)(1); New Hampshire Revised Statutes §193-F:3 I.(a) and II.*

csupán egy új eszköz a bullying megvalósítására, míg mások nézőpontja alapján, ez több annál, s önálló cselekményként érdemes kezelni. Jelen cikk az utóbbi iskolához csatlakozik, mikor egy önálló, komplex cyber-megfélemlítési fogalmat dolgoz ki. E komplex definíció alapját egy átfogó kutatás képezi, miszerint a jogalkotói, jogalkalmazói és tudományos világ nézeteit indokolt egy összetett fogalomban meghatározni. Ebből kifolyólag, minden USA anti-bullying törvény megvizsgálásra került, de a kutatás tárgyává csak azon huszonhét tagállam vált, amik *expressis verbis* említik a cyberbullying terminust. Jogalkalmazói oldalról szövetségi és tagállami bírósági döntések kerültek górcső alá, különös tekintettel a diákok véleménynyilvánítási szabadsága és az iskolák fegyelmezési hatásköre között húzódó vékony, ám rendkívül fontos határra. Végezetül pedig, az akadémiai világ álláspontját tárta fel a tanulmány, amely során USA-beli, ausztrál és európai kutatók fogalmi meghatározásait vizsgálta, tekintettel az EU dokumentumaira is.

E fentebbi átfogó kutatás számos elemet azonosított, amik egy cyberbullying definícióját alkotják, ám terjedelmi korlátok miatt, itt csak a legfontosabbak kerültek bemutatásra, úgymint a lényeges bomlasztás, az iskolán kívüli eredet problematikája, az áldozat testi, lelki egészsége és tulajdonának védelme, valamint az ellenséges oktatási környezet. A tanulmány következtetések részében azonban, a kutatás eredményeként megalkotott, komplex cyber-megfélemlítési fogalom is megtalálható.