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Cyberbullying and the Law

JAMIE MOSSER*¹

Laws are created to regulate behavior and criminalize actions. Sometimes those laws have unintended consequences when it is applied to behavior not anticipated to be covered by those laws. Most states do not have laws specifically directed towards the punishment of cyberbullying behavior. However, the laws that have been created to punish Internet behavior are being used to punish cyberbullying. This essay, which has been written for the Northern Illinois University Law Review's Symposium on the Legal Implications of Social Media, explores the different civil and criminal laws that have an intended or unintended regulation of a student's use of social media to bully another person. The essay also discusses cyberbullying behavior in comparison to bullying behavior not done on the Internet and the difference in consequences along with the First Amendment implications.

I. INTRODUCTION.....	79
II. ARTICLE EXAMPLE.....	80
III. ILLINOIS LAW.....	81
IV. ILLINOIS, THE FIRST AMENDMENT, AND CRIMINAL LAW.....	86
V. OTHER REMEDIES FOR CYBERBULLYING	90
VI. APPLYING ILLINOIS LAW TO CYBERBULLIES	93
VII. CONCLUSION.....	94

I. INTRODUCTION

What a desperate, pathetic fool I was.
Time after time, my “friends” had shown me their true colors.
Yet, I still wanted to believe they were sorry for causing me pain.²

Bullying. It is a word we all know. It is a life experience we can all relate to. Seemingly everyone can describe at least one incident where they

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2. JODEE BLANCO, PLEASE STOP LAUGHING AT ME... ONE WOMAN'S INSPIRATIONAL STORY 127-28 (2003).

were the target of a bully or had seen someone get bullied. While our school years are referred to as our formative years, in reality, they need to reclassify them as a test of our survival skills. Bullying became even worse with the invention of the Internet and the creation of cyberbullying. For kids these days, bullying no longer ends when they leave school. It is everywhere they turn and on every social media site they visit.

With the popularity of social media and its easy access, bullying became even more prevalent and was coined “cyberbullying.” Cyberbullying is defined as “[t]he use of electronic communication to bully a person, typically by sending messages of an intimidating or threatening nature.”³ What once was a semi-contained phenomenon became an epidemic limited only by a person’s access to the Internet. Reports of cyberbullying became rampant, including the effects therefrom. People would be hard pressed to read the news each month and not learn about a new suicide caused by bullying behavior. In addition to suicides, victims of bullying also reacted in the extreme opposite by sometimes seeking out revenge on the bullies. Stories of school shootings that were linked back to the victims of bullying played across the headlines.

The legislature responded by enacting statutes that would deal with situations like these both civilly and criminally. Some states did not create specific cyberbullying statutes but would rely on presently existing statutes to punish the bullies. This paper examines the existing civil and criminal laws in Illinois, how those laws apply to the issues of cyberbullying, and closes with analyzing whether cyberbullying needs to be dealt with by civil laws, criminal laws, or both.

II. ARTICLE EXAMPLE

Let’s bring ourselves back to high school for a moment and watch a fictional story of bullying. Our characters for this story, Parker and Matthew, are both seniors in high school. For the past few years, Matthew has made Parker the target of his bullying behavior. He verbally taunts Parker daily by calling him derogatory and insulting names. He also spreads rumors about him to other friends. While he is very threatening, Matthew never makes any physical contact with Parker. Parker becomes depressed as a result of the bullying. He no longer wants to go to school or participate in activities. He becomes withdrawn and maybe suicidal.⁴

3. *Cyberbullying*, OXFORD DICTIONARY (3d ed. 2010).

4. *Bullying and Suicide*, BULLYING STATISTICS, <http://www.bullyingstatistics.org/content/bullying-and-suicide.html> (last visited Apr. 1, 2016) (“Suicide is the third leading cause of death among young people, resulting in about 4,400 deaths per year, according to the CDC. For every suicide among young people, there

What happens with Matthew? If this occurs in school or somehow affects a student at school, the school has a course of action against Matthew that could include him being suspended or expelled. However, what happens if this behavior all happens outside of school? Does Parker have any recourse to help him stop this bullying behavior? Parker can confront Matthew and ask him to stop. The parents of all involved can attempt to work out the issues. But what happens if all sensible talk in the world fails to stop Matthew from bullying Parker? Does Matthew's behavior ever become criminal?

The simple answer is no. Matthew's behavior does not fit any statute within Illinois law. If Matthew hit or physically touched Parker, it could be a battery. If Matthew attempted to hit or placed Parker in reasonable apprehension of receiving a battery, he could be charged with assault. If Matthew bullied Parker in public in such a way that it somehow breached the peace for those around, he could be charged with disorderly conduct. The above fact pattern falls short of criminal behavior. Yet it is causing severe consequences to Parker.

Now, let's alter the bullying narrative. Presume Matthew not only bullies Parker in-person, but also over the Internet. Like most kids their age, each student has a Facebook page and a Snapchat account. Matthew uses both to harass, threaten, and intimidate Parker. Simply by taking his conduct from in-person to over the Internet, Matthew has committed a crime. This is the subject of this Article.

III. ILLINOIS CRIMINAL LAW

At present, there is no crime of cyberbullying in Illinois. In fact, most states do not have statutes specifically created to prosecute cyberbullying.⁵ However, most states, like Illinois, have statutes that criminalize cyberbullying behavior. Illinois has two statutes that can be used to prosecute instances of cyberbullying: Harassment by Electronic Communication and Cyberstalking.

Harassment by Electronic Communication is codified under 720 ILL. COMP. STAT. 5/26.5-3(a). It states that:

are at least 100 suicide attempts. Over 14 percent of high school students have considered suicide, and almost 7 percent have attempted it.”)

5. *Cyberbullying and the States*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/civil-and-criminal-justice/cyberbullying-and-the-states.aspx> (last visited Apr. 1, 2016).

A person commits harassment through electronic communications⁶ when he or she uses electronic communication for any of the following purposes:

- (1) Making any comment, request, suggestion or proposal which is obscene with an intent to offend;
- (2) Interrupting, with the intent to harass,⁷ the telephone service or the electronic communication service of any person;
- (3) Transmitting to any person, with the intent to harass and regardless of whether the communication is read in its entirety or at all, any file, document, or other communication which prevents that person from using his or her telephone service or electronic communications device;
- (4) Transmitting an electronic communication or knowingly inducing a person to transmit an electronic communication for the purpose of harassing another person who is under 13 years of age, regardless of whether the person under 13 years of age consents to the harassment, if the defendant is at least 16 years of age at the time of the commission of the offense;
- (5) Threatening injury to the person or to the property of the person to whom an electronic communication is directed or to any of his or her family or household members; or

6. 720 ILL. COMP. STAT. 5/26.5-0.1 (2013) (“‘Electronic communication’ means any transfer of signs, signals, writings, images, sounds, data or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photo-optical system. ‘Electronic communication’ includes transmissions through an electronic device including, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail.”).

7. 720 ILL. COMP. STAT. 5/26.5-0.1 (2013) (“‘Harass’ or ‘harassing’ means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances, that would cause a reasonable person emotional distress and does cause emotional distress to another.”).

(6) Knowingly permitting any electronic communications device to be used for any of the purposes mentioned in this subsection.⁸

Evidence that a defendant made additional telephone calls or engaged in additional electronic communications after having been requested by a named complainant or by a family or household member of the complainant to stop may be considered as evidence of an intent to harass unless disproved by evidence to the contrary.⁹

A person who commits Harassment by Electronic Communication is guilty of a Class B misdemeanor. A second or subsequent violation is a Class A misdemeanor, for which the court shall impose a minimum of fourteen days in jail or, if public or community service is established in the county in which the offender was convicted, 240 hours of public or community service. A third or subsequent offense within the last ten years is a Class 4 felony. Conceivably, a person who commits Harassment by Electronic Communication can receive supervision for the first two offenses. It is not until the third offense that the offender is subjected to a mandatory conviction. There are, however, cases in which a person guilty of this offense can be charged with a felony on the first offense. If “[a]t the time of the offense, the offender was under conditions of bail, probation, conditional discharge, mandatory supervised release or was the subject of an order of protection, in this or any other state, prohibiting contact with the victim or any member of the victim’s family or household;” or “[i]n the course of the offense, the offender threatened to kill the victim or any member of the victim’s family or household;” or “[t]he person has been convicted in the last 10 years of a forcible felony as defined in Section 2-8 of the Criminal Code of 1961 or the Criminal Code of 2012,” the offender can be charged with the Class 4 felony.¹⁰

Harassment is not defined in the context of this statute. However, a person can look to other statutes to see what behavior constitutes harassment. In the civil and domestic violence statutes, harassment is defined as “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the [person].”¹¹ While this statute also created presumptions of harassing behavior, Illinois case

8. 720 ILL. COMP. STAT. 5/26.5-3(a)(6) (2013).

9. 720 ILL. COMP. STAT. 5/26.5-4 (2013).

10. 720 ILL. COMP. STAT. 5/26.5-5(b) (2013).

11. 750 ILL. COMP. STAT. 60/103(7) (2013).

law has looked at each situation on a case-by-case basis to determine harassing behavior.

Unlike the crime of Harassment by Electronic Communication, cyberstalking begins as a Class 4 felony.¹²

A person commits cyberstalking when he or she engages in a course of conduct using electronic communication directed at a specific person, and he or she knows or should know that would cause a reasonable person to . . . fear for his or her safety or the safety of a third person [or] suffer other emotional distress.¹³

The Illinois Legislature changed the cyberstalking statute in 2011 to add in the emotional distress element. Presumably, they did so because it was a small amount of cases that could be charged based on the element of having to prove that you, or a third person, feared for their safety. It is important to note that it was not because it was an easy response to cyberbullying.

The legislature did provide definitions to assist in prosecuting crimes of cyberstalking. A “course of conduct” is defined as

2 or more acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person’s property or pet.¹⁴

“Electronic communication” means any transfer of signs, signals, writings, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric, or photo-optical system. “Electronic communication” includes transmissions through an electronic device including, but not limited to, a telephone, cellular phone, computer, or pager, which communication includes, but is not limited to, e-mail, instant message, text message, or voice mail.¹⁵

“Emotional distress” means significant mental suffering, anxiety or alarm.¹⁶ “Harass” means to engage in a knowing and willful course of

12. 720 ILL. COMP. STAT. 5/12-7.5(a)(1)-(2) (2013).

13. *Id.*

14. 720 ILL. COMP. STAT. 5/12-7.5(c)(1) (2013).

15. 720 ILL. COMP. STAT. 5/12-7.5(c)(2) (2013).

16. 720 ILL. COMP. STAT. 5/12-7.5(c)(3) (2013).

conduct directed at a specific person that alarms, torments, or terrorizes that person.”¹⁷

“Non-consensual contact” means any contact with the victim that is initiated or continued without the victim’s consent, including but not limited to being in the physical presence of the victim; appearing within the sight of the victim; approaching or confronting the victim in a public place or on private property; appearing at the workplace or residence of the victim; entering onto or remaining on property owned, leased, or occupied by the victim; or placing an object on, or delivering an object to, property owned, leased, or occupied by the victim.¹⁸

“‘Reasonable person’ means a person in the victim’s circumstances, with the victim’s knowledge of the defendant and the defendant’s prior acts.”¹⁹

What defines emotional distress? No one knows at this point. The amendment to the cyberstalking statute is still so new that there are no cases to guide us. However, we can look to other statutes to help answer this question. The criminal statute of Harassment of a Witness has the term “emotional distress” listed as one of its elements.²⁰ The case of *People v. Cardamone*, helps to explain the level of emotional distress a person has to suffer to be a victim of harassment.²¹ The victim in that case was a witness against the defendant in another case.²² After one court date where the victim and the defendant were present, the defendant followed the victim from the courthouse.²³ He then called the police and reported that the victim was driving under the influence and that he had seen a bottle in the car.²⁴ An Aurora Police Officer then pulled the victim over to further investigate the DUI allegations.²⁵

[The victim] testified that her “heart dropped” when she was pulled over, “like it always does

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17. 720 ILL. COMP. STAT. 5/12-7.5(c)(4) (2013).
 18. 720 ILL. COMP. STAT. 5/12-7.5(c)(5) (2013).
 19. 720 ILL. COMP. STAT. 5/12-7.5(c)(6) (2013).
 20. 720 ILL. COMP. STAT. 5/32-4a(a) (2004).
 21. *People v. Cardamone*, 232 Ill. 2d 504 (2009).
 22. *Id.* at 507-08.
 23. *Id.* at 508.
 24. *Id.*
 25. *Id.*

when a police officer—even when you know you didn’t do anything wrong, you think what did I do?” [The victim] testified that it was “nerve wracking.” [The officer] explained to [the victim] that she had been stopped because 911 had received a report that she was intoxicated. Upon hearing this explanation, Eason stated that she felt “quite a bit of anger that this was happening.” [The victim] also told [the officer] that defendant had made the call to 911 as he was “the only one who would have called the police.” [The victim] offered to let the officer search her entire car. Though [the officer] declined to search the vehicle, [the victim] did open the sliding door of her minivan to allow the officer to look inside.²⁶

The victim was not questioned extensively and was also not put through any of the standardized field sobriety tests. While she offered, the police did not search her vehicle. She was not charged with any traffic or criminal offense as a result of what happened. She did not have any follow up medical or psychological treatment. Even without all of this, the court found that she had suffered emotional distress.²⁷ The court in *Cardamone* looked to the Illinois Domestic Violence Act (IDVA) to determine how to apply the emotional distress standard.²⁸ The IDVA defines harassment as “knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner.”²⁹ Again, it is not dispositive of the issue but it does give the court some guidance of what to look for when determining a person has suffered emotional distress.

IV. ILLINOIS, THE FIRST AMENDMENT, AND CRIMINAL LAW

The First Amendment of the Constitution of the United States prohibits the making of any law respecting an establishment of religion, impeding the free exercise of religion, abridging the freedom of speech, infringing on the freedom of the press, interfering with the right to peaceably assemble or prohibiting the petitioning for a governmental redress of grievances. Many seminal cases address laws that restrict free speech. What we do not have are a myriad of cases that deal with cyberbullying and free speech. In fact, a

26. *People v. Cardamone*, 232 Ill. 2d 504, 508-09 (2009).

27. *Id.* at 510.

28. *Id.*

29. 750 ILL. COMP. STAT. 60/103(7) (2013).

review of case law for the United States shows very few cases dealing with cyberbullying, the First Amendment, and criminal law. Most of those cases deal with the school's reaction to cyberbullying when it occurs off of the school property.³⁰

Interestingly enough, there is one case that deals tangentially with cyberbullying through criminal law, and it occurred in Kane County.³¹ The defendant, Daniel Diomedes, was indicted for disorderly conduct, a Class 4 felony, for transmitting a threat of violence against Susan Shrader, who was a dean at Geneva High School.³² At the time of the commission of the offense, the defendant was eighteen years old. Prior to the offense date, a well-known anti-bullying activist, Jodee Blanco, presented at Geneva High School about bullying.³³ She left all of the students with an e-mail address that went to her activist website.³⁴ On April 26, 2011, she received an e-mail from the defendant wherein he expresses his anger from having been expelled from Geneva High School and that “[he] just want[ed] the dean at Geneva, [his] grandparents, and [his] mother dead.”³⁵ As a result of this e-mail, she felt concern for the safety of the individuals mentioned and contacted the police.³⁶ The defendant was taken into custody and interviewed wherein he stated that that he wrote the e-mail.³⁷ The defendant was found guilty of disorderly conduct after a bench trial.³⁸

Amongst the arguments the defendant made in his appeal of his conviction, he argued that his conviction should be reversed because it was not a “true threat” and, therefore, was protected speech under the First Amendment.³⁹ It is well settled law, espoused in the *Diomedes* case, that threats are not protected speech under the First Amendment.⁴⁰ In the *Diomedes* case, the court quotes case law that states that the First Amendment permits restrictions on speech including:

“[T]rue threats,” which . . . encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or

30. See *United States v. Cassidy*, 814 F. Supp. 2d 574 (M.D. 2011); *Kowalski v. Berkeley Cty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

31. *People v. Diomedes*, 13 N.E.3d 125 (Ill. App. Ct. 2014).

32. *Id.* at 127.

33. *Id.*

34. *Id.*

35. *Id.* at 127-28.

36. *People v. Diomedes*, 13 N.E.3d 125, 128 (Ill. App. Ct. 2014).

37. *Id.* at 130.

38. *Id.*

39. *Id.* at 134.

40. *Id.*

group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats protect[s] individuals from the fear of violence and from the disruption that fear engenders, in addition to protecting people from the possibility that the threatened violence will occur.⁴¹

The standard stated in this case is whether the defendant established that his speech did or did not constitute a true threat.⁴² Specifically, the defendant in *Diomedes* argued that the courts should use a “reasonable sender” test when determining whether a statement is a threat or rather what a “reasonable” speaker would believe a “reasonable” person would interpret the speech as being. The prosecution in *Diomedes* argued that it should be a “reasonable-recipient” test or how an “ordinary reasonable” person would interpret the message.⁴³ Eventually, after a recitation of relevant case law, the court in *Diomedes* neither accepted the “reasonable-speaker” test nor the “reasonable-recipient” test.⁴⁴ Instead, they looked to the totality of circumstances surrounding the statement in question to determine whether the statement is a threat.⁴⁵ In the *Diomedes* case, the court ruled that the totality of the circumstances weighed in favor that the e-mail sent was threatening.⁴⁶ What is most interesting about this decision is the last paragraph. In that paragraph, the court pointed out that it is not unsympathetic to the plight of *Diomedes* in that he is a troubled teenager who chose to express his teenage despair through an e-mail to an anti-bullying activist who encouraged such behavior to be sent to her activist e-mail.⁴⁷ However, the court felt that due to the

e-mail’s tenor, defendant’s history of making at least one prior threat and purportedly, in close temporal proximity to the e-mail, a list of people whom he was going to kill, and the e-mails expression of defendant’s present wish for specific individuals to die and suffer are circumstances sufficient for [the court] to find that a reasonable sender

41. *People v. Diomedes*, 13 N.E.3d 125, 135 (Ill. App. Ct. 2014) (second alteration in original) (citing *Virginia v. Black*, 538 U.S. 343, 359-60 (2003)).

42. *Id.* at 136-37.

43. *Id.* at 137.

44. *Id.* at 138.

45. *Id.* at 138-39.

46. *People v. Diomedes*, 13 N.E.3d 125 (Ill. App. Ct. 2014).

47. *Id.* at 139.

would foresee that a reasonable recipient would view it as a serious threat to harm another.⁴⁸

Outside of the *Diomedes* case, no other Illinois case deals specifically with cyberbullying. You will find several cases that deal with harassment by electronic communication and cyberstalking, but not in the context of cyberbullying. A review of case law outside of Illinois shows that North Carolina recently heard a case on appeal dealing with cyberbullying.⁴⁹ North Carolina has a cyberbullying statute that “prohibits the use of a computer or computer network to ‘post or encourage others to post on the Internet private, personal or sexual information pertaining to a minor’ with ‘the intent to intimidate or torment a minor.’”⁵⁰ In this case, the defendant posted several comments on Facebook about the victim, a fellow high school student, in that he was “homophobic” and “homosexual.”⁵¹ The defendant also made several other vulgar and disparaging comments about the victim.⁵² The mother of the victim came home one day to find her son overwrought with emotion about the posts being made about him.⁵³ She then called the police who began an investigation into the defendant, which resulted in the charges.⁵⁴ After a jury trial, the defendant was found guilty of one count of cyberbullying.⁵⁵ The defendant argued that the statute was overbroad in that it criminalized protected speech on its face and was unconstitutionally vague.⁵⁶ The First Amendment “prohibits governmental restrictions of speech which are based upon its subject-matter or content.”⁵⁷ The “overbreadth doctrine” was created to “allow[] litigants to challenge a statute ‘not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute’s very existence may cause others not before the court to refrain from constitutionally protected speech or expression.’”⁵⁸ The court ruled that the North Carolina statute was not overbroad in its application.⁵⁹ Specifically, the court ruled that the statute criminalized malicious behavior and any burden that was placed on speech could be dealt with on a case-by-case basis.⁶⁰

48. *Id.*

49. *State v. Bishop*, 774 S.E.2d 337 (S.C. Ct. App. 2015).

50. *Id.* at 342 (citing N.C. GEN. STAT. § 14-458.1(a)(1)(d) (2012)).

51. *Id.* at 340.

52. *Id.*

53. *Id.*

54. *State v. Bishop*, 774 S.E.2d 337, 341 (S.C. Ct. App. 2015).

55. *Id.*

56. *Id.*

57. *Id.* at 342.

58. *Id.*

59. *State v. Bishop*, 774 S.E.2d 337, 345 (S.C. Ct. App. 2015).

60. *Id.*

V. OTHER REMEDIES FOR CYBERBULLYING

Most incidents of cyberbullying are not dealt with by the criminal justice system. Instead, it has primarily been the parents of the person involved and the school system who have dealt with cyberbullying. Schools have been assisted by the passing of legislation that deals with bullying. In Illinois, the statute governing these situations is 105 ILCS 5/27-23.7(a). Part of the statute states that:

The General Assembly finds that a safe and civil school environment is necessary for students to learn and achieve and that bullying causes physical, psychological, and emotional harm to students and interferes with students' ability to learn and participate in school activities. The General Assembly further finds that bullying has been linked to other forms of antisocial behavior, such as vandalism, shoplifting, skipping and dropping out of school, fighting, using drugs and alcohol, sexual harassment, and sexual violence. Because of the negative outcomes associated with bullying in schools, the General Assembly finds that school districts, charter schools, and non-public, non-sectarian elementary and secondary schools should educate students, parents, and school district, charter school, or non-public, non-sectarian elementary or secondary school personnel about what behaviors constitute prohibited bullying.⁶¹

Further, it specifies four situations in which schools can govern bullying behavior. Those four situations are:

- (1) during any school-sponsored education program or activity;
- (2) while in school, on school property, on school buses or other school vehicles, at designated school bus stops waiting for the school bus, or at school-sponsored or school-sanctioned events or activities;

61. 105 ILL. COMP. STAT. 5/27-23.7(a) (2015).

(3) through the transmission of information from a school computer, a school computer network, or other similar electronic school equipment; or

(4) through the transmission of information from a computer that is accessed at a nonschool-related location, activity, function, or program or from the use of technology or an electronic device that is not owned, leased, or used by a school district or school if the bullying causes a substantial disruption to the educational process or orderly operation of a school.⁶²

While the first three are obvious in a school setting, it is the fourth one that gives the schools the power to punish bullying behavior that occurs outside of the school. The law though, requires that a school administrator or teacher receive a report about the bullying behavior.⁶³

This statute goes on to define what constitutes bullying and cyberbullying and ultimately requires that each school have a policy to deal with bullying prevention. The bullying prevention policy must contain twelve different factors to be compliant with state law.⁶⁴ Primarily it requires doing a prompt investigation into any incident of bullying that is reported. It also provides a means of punishment to bullies called “restorative measures” and makes it mandatory for schools to execute these “restorative measures” when a person has been found to be a bully.⁶⁵ It is important to note that the legislature intended that expulsion from the school be the last possible consequence to the bully.

Once this policy is in place, the schools can do a variety of punishments to attempt to curb the bullying behavior, like involving the parents, detentions, suspensions, loss of participation in extracurricular activities and other similar non-expulsion punishments. Most high schools also have School Resource Officers who are police officers assigned to the schools to help investigate crimes occurring in the schools. These officers act in conjunction with the school officials to assess the bullying actions and help determine the proper punishment. This could include an arrest for violating the criminal statutes. The statute also gives the schools the right to expel someone who has been found to be a bully as long as other punishments were attempted first.

62. 105 ILL. COMP. STAT. 5/27-23.7(a)(1)-(4) (2015).

63. 105 ILL. COMP. STAT. 5/27-23.7(a)(4) (2015).

64. 105 ILL. COMP. STAT. 5/27-23.7(b)(1)-(12) (2015).

65. 105 ILL. COMP. STAT. 5/27-23.7(b) (2015).

As it appears to always be, civil lawsuits have erupted when a child has been punished based on their bullying behavior.⁶⁶ In *Kowalski v. Berkeley County School*, a student used her home computer to create a webpage that mostly ridiculed another classmate.⁶⁷ The school gave the student a suspension from school and a ninety-day social suspension.⁶⁸ The student's family sued the school alleging a violation of the right to free speech under the First Amendment Rights, due process violations under the Fourteenth Amendment, cruel and unusual punishment under the Eighth Amendment, and Equal Protection violations under the Fourteenth Amendment.⁶⁹ The district court granted summary judgment for the First Amendment claims and dismissed the rest of the suit based on the Due Process violations.⁷⁰

In her appeal to the Fourth Circuit Court of Appeals, the student argues that her First Amendment Rights were violated when the school punished her for out-of-school behavior.⁷¹ The question the court postulated from this argument is whether the student's "activity fell within the outer boundaries of the high school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students."⁷² The appellate court quoted a case that it used to guide its argument as this was an issue of first impression for them. They relied heavily on *Tinker v. Des Moines Independent Community School District*.⁷³ In the *Tinker* case, the students were wearing black arm bands in protest against the Vietnam War.⁷⁴ *Tinker* stated that:

[C]onduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.⁷⁵

The appellate court, using the test espoused in *Tinker*, found that the student's behavior caused an "interference and disruption" in school and

66. *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565 (4th Cir. 2011).

67. *Id.* at 567.

68. *Id.* at 569.

69. *Id.* at 570.

70. *Id.*

71. *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 570-71 (4th Cir. 2011).

72. *Id.* at 571.

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

74. *Id.* at 504.

75. *Id.* at 513.

could not be protected as free speech under the First Amendment.⁷⁶ The court then further discussed how the actions of the student, while all off campus, could still be punished by the school when the student reasonably knew that her out-of-school behavior would affect people or activities during school.⁷⁷ The court found that:

Rather than respond constructively to the school's efforts to bring order and provide a lesson following the incident, [the student] has rejected those efforts and sued school authorities for damages and other relief. Regretfully, she yet fails to see that such harassment and bullying is inappropriate and hurtful and that it must be taken seriously by school administrators in order to preserve an appropriate pedagogical environment. Indeed, school administrators are becoming increasingly alarmed by the phenomenon, and the events in this case are but one example of such bullying and school administrators' effort to contain it. Suffice it to hold here that, where such speech has a sufficient nexus with the school, the Constitution is not written to hinder school administrators' good faith efforts to address the problem.⁷⁸

Thus, schools have both legislative and judicial support for punishing bullying behavior that does not happen on school grounds, but does, in fact, affect the school. Illinois appears to be ahead of the game in that the legislature specifically added the provision that off-campus bullying could be punished by the schools.

VI. APPLYING ILLINOIS LAW TO CYBERBULLIES

Revisit the bullying incident between Parker and Matthew for a moment. If the bullying is verbal only and is not done over the internet, there is nothing that Matthew can be charged with. However, those same bullying words, when placed on the Internet, subject Matthew to being charged with harassment by electronic communications or even cyberstalking. The schools can obviously punish this behavior, whether or not it occurs on school grounds, if it affects the school environment in some way.

76. *Kowalski*, 652 F.3d at 572-73.

77. *Id.* at 573.

78. *Id.* at 577 (emphasis omitted).

Is it fair that the same behavior is criminalized solely because it is conducted electronically? Are these laws then a violation of the First Amendment's right to free speech? Because this behavior is distinguished between in-person and electronically, should a cyberbully be dealt with only by school punishments? The *Diomedes* case tells us that it may not be free speech depending on what the speech is. However, Illinois case law has dictated that threats are not considered free speech. What then happens in situations where the language is not threatening but merely harassing? Courts will have to then rely on each case's facts to make that determination. Specifically, they will have to rely on the domestic violence three-part definition of harassing.

First, in the example I gave above, were Matthew's words necessary to accomplish a purpose which is reasonable under the circumstances? It is clear in most bullying situations that there is no reasonable purpose under the statute except to hurt someone else. This is also the area in which most First Amendment pundits will argue the law is infringing on a person's right to express their opinion, whether that opinion is hurtful or not. Second, would Matthew's behavior cause Parker emotional distress? Absolutely, yes. Especially when you put it into the context of Parker being a minor and not having the emotional wherewithal to handle that stressful situation, and that it is on the Internet with no conceivable way to contain these statements. Third and last, did Parker suffer emotional distress? Yes (in my hypothetical world).

VII. CONCLUSION

How then should cyberbullying or any type of bullying be punished? Should it be left solely to the parents and the schools? Or, should the criminal justice system intervene and charge the offenders with crimes? Should the targets of the bullies be allowed to sue the bullies in civil court for damages?

As a mom of three kids, I am afraid that someday I will come home and find one of them overcome with the emotion of being bullied. I hear stories of children who have committed suicide because their lives were so utterly destroyed by the effects of bullying that they would rather die than continue to live in pain. I read statements online made by children as they carelessly demean each other. I have also seen where the intervention of parents and the school fails to stop bullying behavior. I know that things that are posted on the Internet can never be taken down and can haunt an individual for the rest of their life. From this point of view, I want to see the involvement of the criminal justice system in cases of bullying and cyberbullying. I want to see actual punishment meted out to the perpetrators of these acts. If for no other reason than just to get a break from the bullying, I

want to see them go to jail for their continued harassment of someone they have deemed to be weak and worthy of misery.

As a former prosecutor, I know that the purpose of the criminal justice system is supposed to rehabilitate people before it turns solely to punishment. To involve someone in the criminal court system is an extreme measure. Juvenile court is supposed to be a non-adversarial process where they are focusing on the best way to help keep the kids out of the criminal courts. However, even in a non-adversarial situation, there are still severe penalties when charged with a crime. They can be forced to do counseling, to complete community service hours, to pay costs, and to even go to juvenile jail or prison. The parents have to take off work to accompany their child to court. Costs for an attorney can be expensive. When I think about the criminally punishing behavior that traditionally has been a “school yard phenomenon,” I would prefer that it be dealt with by the parents or the schools.

Unfortunately, neither is the right answer. In a perfect world, you should be able to call up the parents of the bully and tell them what is happening. Those parents would then have a conversation with the bully and then all is right with the world. However, we know this is not a perfect world. In fact, some of those situations end with one of the parents being charged with a crime because they too turn to violence to deal with the accusations made or the inactivity or unacceptance of the bullying behavior by the other parents. I have seen cases like that prosecuted by my former office. I have also seen cases where the parents of the bullying target run right to the police to deal with a situation that could have been handled properly by a school that has an effective anti-bullying policy.

While the Illinois Legislature did not intend to punish cyberbullying per se when it created Cyberstalking and Harassment by Electronic Communication, it does serve its purpose. Parents and schools should always be the first responders when it comes to issues of bullying and cyberbullying. However, police officers should be prepared to investigate these allegations and to take them seriously. They should work with the parents and schools to attempt to stop the behavior. They should utilize the resources they have, like diversion programs or station adjustments prior to seeking charges being filed. They should also be ready to advocate for charges in certain circumstances when the facts are extreme and every resource has been exhausted to stop the behavior from happening. Prosecutors should prosecute these cases vigorously and ethically. They should not treat them as “just a school thing.” They need to seek the best possible solution to rehabilitate the bully and, most importantly, protect the victim.

It is not enough to have a statute allowing schools to punish bullying behaviors or laws that do the same. We need to educate everyone involved in the situation. At my former office, we created a program with Kane County State’s Attorney Joseph H. McMahon where we proactively went

into schools to speak with teachers, students, and parents about bullying and the potential criminal consequences. With the teachers, we spoke with them about creative ways to find out about bullying like installing a spirit desk⁷⁹ or anonymous bullying hotline. With the students, we discussed what could happen to them if they bullied or cyberbullied another student. We spoke about the differences between the freedom of speech and criminal or harassing behavior. Mostly, we tried to discuss with them about making wise decisions with what social media they were participating and what they were posting. We told them that their actions could psychologically or physically affect another student. We spoke with them about kids who have committed suicide because they were being bullied. We also told them that they could be charged with a crime because of the bullying behavior. With parents, we discussed the different forums for cyberbullying and how to recognize if their child showed signs of being a target of a bully or being a bully. We spoke with them about the resources they had to help their child deal with the issues. We also told them about the possibilities of the children being charged with a crime for their actions.

I do not want my child, or anyone's child for that matter, to become the next Megan Meier,⁸⁰ Tyler Clementi,⁸¹ or Amanda Todd.⁸² I am happy that we have laws that deal with acts of bullying both in the school setting and the criminal justice system. I am disappointed that these laws are sometimes not effective in dealing with these cases. However, given adequate training and people who are passionate about ending the bullying behavior, we can see results when we tackle the issues of bullying and cyberbullying. It is not enough that we have the criminal laws and the civil laws. We need to be active in our training and education of the community. We need to teach children the difference between free speech and a crime. Mostly, we need to teach children about having compassion for each other and making room for each other's differences. If we do not do that, then the only solution may be these children ending up in the criminal system because they have chosen to bully over the Internet.

79. See HEROES IN THE HALLWAY, <http://herointhehallway.com/> (last visited March 10, 2016). This concept was created by bullying activist Michael Barrett. The purpose it to give a way for students to anonymously report bullying behavior by having everyone fill out a piece of paper with directed questions and have them deposit it in the box. Some of the forms may be blank but most described who was being bullied, where the bullying was occurring and, who the bully was. Additionally, they were allowed to commend a person that they saw stand up against bullying.

80. MEGAN MEIER FOUNDATION, <http://www.meganmeierfoundation.org/megans-story.html> (last visited March 10, 2016).

81. TYLER CLEMENTI FOUNDATION, <http://www.tylerclementi.org/tylers-story> (last visited March 10, 2016).

82. AMANDA TODD LEGACY, <http://amandatoddlegacy.org/about/> (last visited March 10, 2016).