

Cyberbullying as Harassment

Over the past several years, the media has been replete with stories chronicling the tragic outcomes of children who were victims of cyberbullying. These reports illustrate that the very technology adolescents consider indispensable (the Internet, cell phones, etc.) is increasingly being used to torment them. Accounts of such harassment, from the “kick a Ginger”¹ campaign to the Lori Drew MySpace case,² raised concerns about protecting minors from cyberbullying and led many states to pass legislation addressing the issue. It is obvious that cyberbullying is not something to which we want children subjected, but how do these new laws protect children?

By and large, cyberbullying legislation reflects a trend to hand off the responsibility to school districts in matters pertaining to cyberbullying.³ The laws typically define cyberbullying, mandate the development and adoption of anti-bullying policies,⁴ and prohibit acts constituting cyberbullying.⁵ With limited exceptions, legislation has not established cyberbullying as a separate

¹ <http://www.cnn.com/2009/US/11/22/california.redhead.attack.facebook/index.html>

² *United States v. Drew*, 259 F.R.D. 449 (C.D. Cal. 2009).

³ *E.g.*, IOWA CODE § 280.28 (defining harassment or bullying as any electronic, written, verbal, or physical act or conduct toward a student based on any actual or perceived trait or characteristic of the student and which creates an objectively hostile school environment that (1) places student in reasonable fear of harm to his or her person or property, has substantially detrimental effect on the student's physical or mental health, substantially interferes with student's academic performance, or substantially interferes with the student's ability to participate in or benefit from the services, activities, or privileges provided by a school.)

⁴ *E.g.*, NEB. REV. STAT. § 79-2,137 (requires each school district to develop and adopt a plan for bullying prevention and education for all students.)

⁵ *E.g.*, MISS. CODE. ANN. § 37-11-67 (no student or school employee shall be subjected to bullying or harassing behavior by school employees or students.)

crime.⁶ How then, can incidents of cyberbullying be prosecuted? The following cases illustrate how states have attempted to prosecute such acts under traditional harassment laws.

As applied to cyberbullying, the lowest level harassment and stalking statutes have four elements: (1) an intentional; (2) series of acts; (3) directed at an individual; (4) with the purpose of inflicting emotional distress. This is the type of charge that finally stuck in the Phoebe Prince case.

Prince committed suicide after a series of bullying acts by her classmates.⁷ A year after Prince's death, the first two teens involved in that bullying pled guilty to harassment in a Massachusetts' court room.⁸ This is but one example of the importance of harassment statutes in regards to cyberbullying. However, prosecuting some forms of cyberbullying in this way may at times be akin to putting a square peg into a round hold.

In *State v. Ellison*,⁹ Ohio prosecutors brought harassment charges against a teenager who posted disparaging information about another teen on her MySpace page. The girls at the center of the conflict, Ellison and Gerhard, were friends until seventh grade. At that time Ellison's little brother accused Gerhard of molesting him. The Department of Family Services investigated but

⁶ La. Rev. Stat. § 14:40.7 (“Cyberbullying is the transmission of any electronic textual, visual, written, or oral communication with the malicious and willful intent to coerce, abuse, torment, or intimidate a person under the age of eighteen...[W]hoever commits the crime of cyberbullying shall be fined not more than five hundred dollars, imprisoned for not more than six months, or both. When the offender is under the age of seventeen, the disposition of the matter shall be governed exclusively by the provisions of Title VII of the Children's Code.”); N.C. GEN. STAT. § 14-458.1 (cyberbullying is Class 1 misdemeanor if defendant is 18 years or older at time offense is committed, Class 2 misdemeanor if defendant is under 18 at the time of offense.)

⁷ Emily Bazelon, *What Really Happened to Phoebe Prince*, Slate, July 20, 2010 at 8, http://img.slate.com/media/31/100721_Bull-E_final_3.pdf.

⁸ Emily Bazelon, “*An Acknowledgment of Wrongdoing*,” Slate, May 4, 2011 at 1, <http://www.slate.com/id/2293030/>.

⁹ 900 N.E.2d 228, 229 (Ohio Ct. App. 2008).

determined it did not have enough evidence to proceed. During the summer of 2007 Ellison posted a picture of Gerhard on her MySpace page captioned “Molested a little boy.” She also stated on her profile that she hated Gerhard. This information was viewable by the general public. Gerhard learned about the posting and went to Ellison’s profile to see it for herself. Gerhard complained to school authorities who contacted Ellison. Ellison then voluntarily removed the posting. She was subsequently charged with violating Ohio’s Telecommunications Act.¹⁰

At trial Gerhard testified Ellison never communicated with her on the Internet and that she had taken steps on her own to seek out the postings. Ellison testified “I think that other people need to know how she is. And she denies everything, but a lot of people believe that she did it. And I was told that she did it. And so I think that other people have a right to know.” Ellison was convicted of violating the statute.¹¹

On appeal the court found the statute could be violated without direct communication. However, the court held the state failed to prove that Ellison acted with the specific intent to harass. The court’s finding is two pronged: (1) Ellison could have a legitimate purpose in posting the information, and (2) her failure to direct the comments towards Gerhard showed a lack of purpose to cause emotional distress. With little analysis the court found no rational jury could have found the specific intent element beyond a reasonable doubt.

Since Ellison never contacted Gerhard about the posting or anything else on the Internet it is difficult to believe her intent in posting the picture was to harass Gerhard. At a minimum there

¹⁰ OHIO REV. CODE ANN. § 2917.21(B) The statute provides that “[n]o person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person’s control, with purpose to abuse, threaten, or harass another person.”

¹¹ *Id.*

is a strong argument that in order to harass Gerhard, Ellison would have needed to communicate her message to Gerhard or at least know that Gerhard would be exposed to the message. The absence of those facts when coupled with the fact that the message, though potentially harassing,¹² also had a legitimate purpose made it difficult to determine Ellison's intent. However, there is a significant question as to whether the court overstepped its bounds in ruling that Ellison was not guilty. Questions of intent are always difficult to answer. Prosecutors are almost never able to offer direct proof of mental state. Thus this type of finding is normally left to juries. An argument can be made that the court's holding here is really a sign that such an indirect cyberbullying case is so weak no conviction should have occurred.

The Indiana Supreme Court dealt with a similar and perhaps more straightforward issue in, *A.B. v. State*.¹³ That case began when A.B. was found to be a delinquent child for a posting on MySpace that would have constituted criminal harassment had she been prosecuted as an adult.¹⁴ A.B. posted a "vulgar tirade" complaining about her principal's enforcement of school policies.

The principal investigated. He found a fake profile had been created which claimed to be his own. That profile was created by another student, R.B., and could be accessed by twenty-six of R.B.'s friends. It was on this profile that A.B. first posted her rant. A.B. also created her own group page making her tirade available to the general public.

Following her hearing and adjudication as delinquent A.B. appealed to the Indiana Court of

¹² The court did state that while the legislature had not defined "harass," a reasonable reading of "harass" might take outside the statute any speech that served a legitimate purpose. However, the court did not rely on this analysis in making its decision.

¹³ 885 N.E.2d 1223 (Ind. 2008).

¹⁴ Indiana's harassment statute prohibits a person from communicating with the "intent to harass, annoy, or alarm another person with no intent of legitimate communication." IND. CODE § 35-45-2-2(a).

Appeals. That court found her speech to be protected by the First Amendment.¹⁵ The Indiana Supreme Court vacated that opinion.

The Indiana Supreme Court held that A.B.'s conduct was not criminal. In dealing with the postings to the private account the court held that A.B. did not have an expectation this language would come to the attention of her principal. Based on this finding the court found that A.B. could not be guilty because she did not have a subjective belief her comments would harass the principal. This ruling was more clear cut than the decision in *Ellison* because the principal did not have the ability to access the private profile.

The court's analysis of the information posted publically turned on whether the content was posted with a legitimate intent. There was evidence that A.B. posted the material with the legitimate intention of criticizing an official's use of disciplinary procedures.¹⁶ Prosecutors did not rebut this evidence and the court found "it impossible for the State to have carried its burden to prove '*no intent of legitimate communication.*'"¹⁷

This ruling is distinguishable from *Ellison* because of language in the statute which criminalized only speech with no legitimate purpose. The *Ellison* court found it did not have to reach the issue of whether speech with a legitimate purpose was protected because it reversed on other grounds. This leaves open the question of where First Amendment protection ends. However, even for speech that is not protected, these cases show the difficulty in prosecuting all acts of cyberbullying under a harassment theory.

¹⁵ A.B. v. State, 863 N.E.2d 1212 (Ind. Ct. App. 2007).

¹⁶ The court later stated that A.B.'s intent might have been simply to amuse.

¹⁷ IND. CODE § 35-45-2-2(a).

