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## In The Courts: Insulating Illinois Teens From Prosecution for Non-Threatening Non-Obscene Forms of Cyber bullying

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*In The Courts:*  
**Insulating Illinois Teens From Prosecution for  
Non-Threatening Non-Obscene Forms of Cyber bullying**

*By: Samantha Salvi*

Cyber bullying is usually perpetrated by and against young people. Thus, this form of bullying has been referred to as a form of teen violence. The average cyber bully starts bullying others at the age of 10 years old. The prevalence of cyber bullying coupled with the fragility of its young victims has prompted many to call for new laws that would enable law enforcement to arrest and prosecute high-tech bullies. Stories of victims of bullying, such as of Megan Meier, a 14-year old who committed suicide after being bullied online by several high school classmates, has heightened the clamor for new laws addressing cyber bullying. Legislative efforts to halt cyber bullying have mostly failed. These failures have been due to over breadth of statutes, which, by their terms, attempt to stymie speech protected by the First Amendment. The First Amendment states that "Congress shall make no law...abridging the freedom of speech".

In *Ashcroft v. American Civil Liberties Union*, a case about the right to limit technological censorship on the internet, the court described the First Amendment as sustaining "[o]ur profound national commitment to the free exchange of ideas." As a general matter, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." However, this principle, like other First Amendment principles, is not absolute. For example, the First Amendment does not protect obscene speech. Thus, at issue in many cases is whether the speech is "obscene". The Supreme Court has struggled to define obscenity in a manner that does not impose an impermissible burden on protected speech. This struggle is born out of the Court's desire to always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression".

In *People v. Relford*, the defendant was convicted of cyber bullying and stalking a teenage girl. The *Relford* court found Illinois' cyber stalking statute to be unconstitutional, as it "contain[ed] no requirement that the individual actually intends to inflict emotional suffering on a person." The *Relford* decision relied heavily on the U.S. Supreme Court's decision in *Elonis v. U.S.* In *Elonis*, the defendant was charged with violating a federal statute that made it a crime to "transmit...any communications containing any threat to kidnap any person or any threat to injure the person of another." *Elonis* was accused of making several Facebook posts that were thinly veiled threats of violence against his soon to be ex-wife. At trial, the defendant offered jury instructions that stated that the government was required to prove intent to communicate a true threat. However, the statute made no such requirement and the instruction was refused. The defendant was found guilty, but the U.S. Supreme Court reversed. The Supreme Court noted that the statute made defendant's conviction "premised solely on how [defendant's communications] would be understood by a reasonable person" and that criminal liability based on a "reasonable personal standard is incompatible with due process."

Comparably, the *Relford* court found that section (a)(2) of the cyber stalking statute violated due process because it did not contain a mental state requirement. The *Relford* court further held that while the statute criminalized a wide range of conduct, including communicating to or about a person, the communication itself is not what makes conduct "wrongful." Rather, the conduct can only be considered criminal if the defendant "knows or should know" that it would cause a "reasonable person" to "suffer emotional distress." Subsection (a)(2) does not contain any

requirement that the defendant actually intend to inflict emotional suffering on a person. Thus, the statute, as currently drafted, escapes the conventional requirement for criminal conduct; that the defendant have awareness of some wrongdoing. Instead, the statute is drafted in favor of a reasonable person standard. However, the due process clause does not permit such a standard. Ultimately, the court in *Releford* found 720 ILS 5/12-7.5(a)(1) and (2) unconstitutional for lack of a mens rea requirement.

Besides the difficulties imposed by the First Amendment, legislation addressing cyber bullying has also run afoul of due process protections. Many of the new laws criminalize communications based on the likely effect the message will have on the recipient rather than intent of the messenger. For example, Illinois' cyber stalking statute makes it illegal for a person to engage 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 ... suffer emotional distress." The specific or even general intent of the bully should be immaterial as it is the words that injure, not the speaker's mental state. Presently, the legislature's failure to incorporate a mens rea element in cyber bullying laws has been found to violate the due process clause of the Fourteenth Amendment.

A "obscenity pornography" case, *Miller v. California*, the Supreme Court reviewed the standards which must be used to identify obscene material that a State may regulate. In this case, the Appellant, Miller, conducted a mass mailing campaign to advertise the sale of illustrated adult material books. The Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail. The brochures consist primarily of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often predominantly displayed. This case thus involves the application of a state's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients. The Court proposed the prevailing 3-part test for assessing whether material is obscene and therefore unprotected by the First Amendment. The 3 part test is (a) Whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value."

A common form of cyber bullying by minors does not involve threats of violence or explicit sexual conduct. Instead, the most common form of cyber bullying involves "mean or hurtful" comments and communications of damaging rumors. With the absence of overt threats or sexually explicit content, prosecutors are confronted with the difficulty of prosecuting words so harmful that they dwarf the harmful effects seen in many battery cases. Yet, the charges are met with free speech and due process arguments from defense counsel.

It is in this context the prosecution of cyber bullying in Illinois faces substantial legal problems. Drafting laws, which pass constitutional muster and preclude the offending conduct and protects victims from cyber bullying has proven to be difficult. Criminalizing a threat of violence or sexually obscene content is far easier. But, what about if a teenager harasses a fragile classmate with a barrage of cruel and demeaning messages? To address such a situation, prosecutors in Illinois have relied on two the Criminal Code and seem to be looking to the legislature for an answer rather than the courts.

The scenario in *Releford* exemplifies the quandary of those who make and enforce public policy intended to protect minors. Legislators and prosecutors, understandably, want to help the

victims of cyber bullying. Though such victims of cyber bullying are not the subject of sexually explicit communications or true threats, they are victims of abuse. However, the legal system cannot right all wrongs. Cyber bullying of the type discussed in this article cannot be criminalized without compromising constitutional freedoms such as freedom of speech. Though the prosecution could easily present evidence of the defendant's misdeeds, the case against the defendant would be dismissed. The defendant could be charged with cyber stalking, but those charges would likely be dismissed under *Relerford*. The only other charge a defendant in such a situation could face would be harassment through electronic communications. Those charges would also likely be dismissed as an unconstitutional effort to infringe on the defendant's free speech.

With an understanding of the limitations legislation may have in combating cyber bullying, society must look to mechanisms other than the courts to address this serious problem. Parents, teachers and school administrators must address certain forms of cyber bullying, especially by minors. Perhaps with education and a greater understanding of cyber bullying we will never lose another teen to cyber bullying the way we have lost so many young lives.

### Sources

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