Harassment Statutes after *People v. Cardamone*: Lowering the Bar for Conviction but Raising Constitutional Questions

by Nate Nieman

I. Introduction

Trial courts have found it challenging to determine what, exactly, constitutes "harassment" when often the same behaviors, in different contexts, can qualify as harassment in one context but not in another. In *People v. Cardamone*,[1] the Illinois Supreme Court diverged from its prior decision in *People v. Parkins*[2] to create a broader, more encompassing definition of "emotional distress" that allows the State to prove harassment without showing that the complainant's emotional distress was at least in part caused by a threat of injury or harm.

This note argues that the *Cardamone* decision should benefit the State by making it easier to show harassment, but that *Cardamone* also exposes harassment statutes to constitutional attack. By broadening the definition of "emotional distress" within the definition of "harassment," *Cardamone* expanded the scope of "harassment" to include conduct that does not contain a threat of injury or harm to the complainant. Therefore, harassment statutes after *Cardamone* will potentially criminalize behavior that, though offensive or annoying, is protected by the First Amendment right to free speech.

In *People v. Klick*,[3] the Illinois Supreme Court acknowledged this danger by striking down as unconstitutional an Illinois disorderly conduct statute criminalizing telephone harassment.[4] Two years after *Klick* was decided, the *Parkins* court sought to protect a newly created telephone harassment statute from the same constitutional attacks which the court grappled with in *Klick* by restricting the arguably over-broad definition of "harass" in an Illinois telephone harassment statute to a more precise definition.[5] Now that *Cardamone* has broadened the definition of "emotional distress" within the definition of "harassment," Illinois harassment statutes are once again exposed to the same constitutional attacks that the court faced in *Klick* but fended off in *Parkins*.

Part II of this note examines the development of the term "harassment" as it has been interpreted in the context of Illinois criminal harassment statutes. Part III reviews the facts and procedural history of *Cardamone*, details the court's analysis, and discusses how it dispenses with the holding of *Parkins* to arrive at a broader definition of "harassment" by enlarging the scope of the "emotional distress" element within it. Parts IV and V discuss how, after dispensing with *Parkins*, *Cardamone* is still at odds with the prior decision of *Klick* and describes the effect that *Cardamone* will have on future cases involving harassment statutes.

II. History

A. "Harassment" as Defined by the Illinois Domestic Violence Act of 1986

Cardamone is the latest decision in a line of cases interpreting "harassment" in Illinois statutes. The three primary statutes that criminalize harassment are the Illinois Domestic Violence Act of 1986 ("DVA"),[6] Illinois telephone harassment statute,[7] and Illinois harassment of a witness statute.[8] The Illinois Criminal Code does not define "harassment."[9] Historically, courts interpreting Illinois telephone and witness harassment statutes have looked to the definition of "harassment" contained in the DVA.[10] Harassment is defined in the DVA 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."[11] Furthermore, harassment "results from intentional acts that cause someone to be worried, anxious, or uncomfortable."[12]

B. *People v. Klick*

The Illinois Supreme Court's decision in *Cardamone* was preceded by two prior Illinois Supreme Court decisions addressing Illinois harassment statutes.[13] In the first of these decisions, *People v. Klick*, the court held the Illinois disorderly conduct statute criminalizing telephone harassment[14] was unconstitutionally over-broad.[15] In *Klick*, the defendant was charged with disorderly conduct in that he "knowingly made a telephone call or calls with the intent to annoy another," in violation of Ill Rev. Stat. 1973, ch. 38, par. 26-1(a)(2).[16] The trial court held that section 26-1(a)(2) was unconstitutionally over-broad, and the Illinois Supreme Court affirmed.

The Illinois Supreme court reasoned that "[b]y making the call itself the criminal act--not the language used or the method employed to harass--the legislature has attempted to avoid infringing on protected speech. But the means they have chosen to reach unprotected conduct sweeps too broadly, and, in fact, makes criminal conduct protected by the First Amendment, *i.e.*, the right to communicate to another in a reasonable manner."[17] The court explained that the broad language of section 26-1(a)(2)

could criminalize "many instances when, without breaching the peace, one may communicate with another with the possible intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek."[18] The court continued that such a circumstance "would daily subject countless callers to the stigmatization of the criminal process at the election of their listeners who might perceive the call as having been made with the intent to annoy. Such an unlimited intrusion on first amendment freedom is not permitted."[19]

C. *People v. Parkins*

The Illinois Supreme Court's decision in *Parkins* sought to prevent a newly enacted telephone harassment statute from suffering the same fate that section 26-1(a)(2) met in *Klick* by narrowing the description of the conduct criminalized therein. The defendant in *Parkins* was charged with harassment by telephone, in violation of Ill. Rev. Stat. 1977, ch. 134, par. 16.4-1(2).[20] Section 16.4-1(2) provides, in pertinent part, that "harassment by telephone" is "[m]aking a telephone call, whether or not conversation ensues, with intent to abuse, threaten or harass any person called at the number."[21] As in *Klick*, the trial court held section 16.4-1(2) unconstitutional.[22]

On appeal, the *Parkins* court expressed concern that "[a] statutory enactment, though sufficiently clear and precise to withstand a vagueness attack, may nevertheless be impermissibly overbroad if it may reasonably be interpreted to prohibit conduct which is constitutionally protected."[23] To prevent section 16.4-1(2) from being attacked as being overly broad, the *Parkins* court invoked the maxim *Noscitur a sociis*, stating that "'a word is known by the company it keeps,'" which, "'while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid giving the unintended breadth to the Acts of Congress.'"[24] When the court applied *Noscitur a sociis* to section 16.4-1(2) it held that "the words 'abuse' and 'harass' take color from the word 'threaten' and acquire more restricted meanings."[25] By coloring the words "abuse" and "harass" with the word "threaten," the court effectively narrowed the description of criminalized conduct by requiring that the harassing conduct must tend to threaten, thereby preventing section 16.4-1(2) from proscribing constitutionally protected speech.[26]

III. *People v. Cardamone*

A. Facts

In *People v. Cardamone*, the defendant was charged with and convicted of two counts of harassment of a witness, in violation of section 5/32-4a, and three counts of disorderly conduct for filing a false police report, in violation of section 5/26-1(a).[27] The complainant in *Cardamone* attended a hearing where the defendant was accused of wrongdoing and where the complainant was both a potential witness and the mother of the alleged victim in the case.[28] After the hearing, the complainant and her daughter were driving home when the defendant "found himself immediately behind" the complainant.[29] The defendant and his wife testified that the complainant tried to cut the defendant off as he attempted to pass her on the road.[30] The defendant subsequently called 911 to report the complainant as a drunk driver.[31] The 911 operator asked the defendant, "'Did you see them drinking or you just suspect it?'" to which the defendant replied, "'Yeah, I saw a bottle in their car actually, it was that was so weird [sic], half covered up.'"[32] A police officer pulled the complainant over shortly after defendant made the 911 call.[33] The complainant testified that her "heart dropped" upon being pulled over and that it was "nerve wracking."[34] The officer told the complainant that she had been pulled over because a 911 call had been made about her driving intoxicated.[35] After hearing the reason for being pulled over, the complainant felt "quite a bit of anger that this was happening."[36] The officer did not observe any signs of intoxication or drinking in the complainant, and though he did not search the vehicle, he leaned in through the sliding door to look for a beverage container but found none.[37] Finding nothing and observing no signs of intoxication, the officer released the complainant.[38]

At trial, the defendant was convicted on both the disorderly conduct charges and the harassment of a witness charges.[39] The harassment of a witness statute provides, in pertinent part, that a defendant is guilty if he or she, with the intent to harass or annoy the:

> witness or person who may be expected or may have been expected to serve as a witness, communicates directly or indirectly with the juror, witness or person who may be expected or may have been expected to serve as a witness, or family member of a juror or witness or person who may be expected or may have been expected to serve as a witness in such manner as to produce *mental anguish or emotional distress* or who conveys a threat of injury or damage to the property.[40]

The *Cardamone* trial court adopted the DVA's definition of harassment to determine whether the complainant suffered the requisite "emotional distress."[41] The trial court thereafter found the defendant guilty beyond a reasonable doubt, stating that his conduct was:

> deliberate with the intent to harass or annoy [complainant]. She certainly suffered emotional distress by his conduct; being stopped by the police without cause, being detained even for a short time without any reasonable suspicion of criminal conduct, having her car searched, all are actions that would make a person upset anxious and certainly uncomfortable.[42]

The defendant appealed only the conviction for harassment of a witness, arguing that the trial court erred in finding him guilty beyond a reasonable doubt because (1) the State failed to prove beyond a reasonable that the traffic stop produced in [complainant]'s mind the requisite mental anguish or emotion distress; and (2) the evidence was insufficient that he communicated with [complainant].[43] The Illinois Appellate Court, Second District, affirmed the conviction, and the same issues were raised before the Illinois Supreme Court.[44]

B. Analysis

The *Cardamone* court had to determine what level of emotional distress the witness harassment statute requires in order to decide whether the evidence was sufficient to convict the defendant.[45] The witness harassment statute contains two bases of liability under which a defendant can be convicted.[46] Under the first basis, a defendant is guilty of witness harassment if, having the requisite intent, he communicates with the witness "in such a manner as to produce mental anguish or emotional distress."[47] Under the second basis, a defendant is guilty of witness harassment if the defendant "conveys a threat of injury or damage to the property or person of any witness."[48] The court determined that the defendant was convicted under the first basis of liability.[49] Because the statute lacks any adjectives to quantify the amount of emotional distress needed to sustain a conviction under the first basis, the court looked to the plain meaning of "emotional distress" and "mental anguish" to ascertain this, adopting the dictionary's definition of "emotional distress" as a "highly unpleasant mental reaction (such as anguish, grief, fright, humiliation, or fury) that results from another person's conduct."[50]

The defendant urged the court not to adopt the plain meaning of "emotional distress," but instead to invoke *Noscitur a sociis* to restrict the definition of "emotional distress" as the *Parkins* court did in defining the term "harass."[51] If the court would have accepted this argument, the "threat of injury or damage to the property or person" language in the second basis of liability in the statute would have colored the terms "mental anguish" and "emotional distress" in the first basis of liability to narrow the definition of these terms to require some anticipation of injury to person or property to be present in order for emotional distress to have been inflicted under the statute. However, the *Cardamone* court instead chose to employ the plain meaning of the term,[lii] thus extinguishing *Parkins*' *Noscitur a sociis* approach.[53]

The court thereafter held that the complainant's reaction to being stopped by the police officer fell within the scope of the plain meaning definition of "emotional distress."[54] The *Cardamone* court reasoned that *Parkins* and its progeny were "not compelling in light of the purpose and the plain meaning of the statute. The statute does not contain any limiting language or exceptions, and the court does 'not depart from the plain language of the statute by reading into it exceptions, limitations, or conditions that conflict with the expressed intent.'"[55] Furthermore, the court determined that because the statute was designed to protect jurors and witnesses involved in courtroom proceedings, it found that "the statutory language encompasses negative emotional states that are not necessarily linked to fear or harm to either the person or property of a person protected under the statute."[56]

IV. Commentary

Cardamone is complicated by *Klick*, which was not mentioned in *Cardamone* and which, unlike *Parkins* and its progeny, was not abrogated by *Cardamone*.[57] The *Klick* court determined that section 26-1(a)(2) chilled an individual's constitutional right to "communicate to another in a reasonable manner" because "*the call itself* . . . not the language used or the method employed to harass" was criminalized.[58] The *Klick* court reasoned that criminalizing the act of communicating and not the content of the communication went beyond the legislature's intent "to ban the type of unreasonable conduct which by its very nature attacks the individual's peace of mind and solitude"[59] because criminalizing the call itself also proscribed an individual's constitutionally protected ability to "communicate with another with the possible intention of causing a slight annoyance in order to emphasize an idea or opinion, or to prompt a desired course of action that one is legitimately entitled to seek,"[60] which the legislature must not do.[61]

The *Cardamone* court, by refusing to invoke *Noscitur a sociis* to restrict the definition of "emotional distress" to require a threat of injury, now exposes section 5/32-4a to the same constitutional attacks that section 26-1(a)(2) faced in *Klick* because the *Cardamone* court's plain reading of "emotional distress" similarly restricts an individual's First Amendment free speech rights by limiting permissible speech to that which does not cause a "highly unpleasant mental reaction" in another.[62] Though section 5/32-4a would likely survive a vagueness attack,[63] the constitutionally protected types of telephone conversations that the *Klick* court feared would be proscribed by section 26-1(a)(2)[64] would probably also be proscribed by the *Cardamone* court's enlarged definition of harassment because these conversations are likely to cause a "highly unpleasant reaction" in another.

For example, if a husband telephones his estranged wife, who is to testify against him in an up-coming domestic violence trial, to discuss custody arrangements relating to their shared children, and a heated argument ensues in which his wife becomes angry, the husband's constitutionally protected speech in the call can now form the basis for a witness harassment charge. Therefore, *Cardamone*'s broad-sweeping definition of "emotional distress" is at odds with the *Klick* court's decision that the terms "harass" and "abuse" in section 26-1(a)(2) were unconstitutionally

over-broad. This brings the courts full-circle, back to *Klick*, where the *Cardamone* court's definition of "emotional distress" once again invites First and Fourteenth Amendment constitutional attacks because broad categories of constitutionally protected speech can cause a "highly unpleasant mental reaction" in a witness without being criminal.[65]

V. Conclusion

To reach a definition of "emotional distress" in *Cardamone*, the court considered the trial court's interpretation of "harassment, " drawn from the DVA,[66] the definitions of "abuse" and "harass" in section 16.4-1(2) as interpreted by the *Parkins* court,[67] and the *Parkins*' court's narrowed definition of "abuse" and "harass" as applied in the harassment of a witness context in *People v. Calvert*.[68] Because "harassment" is not defined in the code,[69] trial and appellate courts, when considering whether certain conduct constitutes "harassment" in any of these three contexts, will probably continue to look to the DVA for the definition of "harassment" and will further look to *Cardamone* to define "emotional distress" within that definition. By choosing to replace the *Noscitur a sociis* approach used in *Parkins* with a "plain meaning" approach to statutory interpretation, the *Cardamone* court removed the anticipation of injury requirement established in *Parkins* and replaced it with a requirement that is easier for the State to satisfy--"highly unpleasant mental reaction"--but harder for the State to defend against constitutional challenges. It will be relatively easy for the State to prove that a complainant has suffered emotional distress because much constitutionally protected speech can cause the requisite "highly unpleasant mental reaction" in another.[70]

The *Cardamone* court erred by refusing to follow the logic of *Parkins* that solved the constitutional problem in *Klick*. If the court had invoked *Noscitur a sociis* as it did in *Parkins* to restrict the definition of "emotional distress" to require at least some anticipation of injury, Illinois harassment statutes would remain constitutionally durable (which would advance the interests of petitioners who rely on these statutes to protect them) while at the same time respecting defendants' constitutional rights to free speech and due process. But if the *Cardamone* court had employed this approach, the conduct of the defendant in *Cardamone* would not have been criminalized because the complainant's "emotional distress" was not colored by a threat of injury. Instead, the court broadened the definition of "emotional distress" to encompass the defendant's behavior in the instant case and therefore achieve the result it sought. Now, with the *Cardamone* court's newly formulated definition of "emotional distress," many defendants, who were only exercising their constitutional rights, will be criminally charged and convicted, while at the same time the convictions of those defendants, if history is any guide, will be challenged on constitutional grounds. The result is that the *Cardamone* decision will further burden the courts at a time when the courts are already overburdened.

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[1] 905 N.E.2d 806 (Ill. 2009).
[2] 396 N.E.2d 22 (Ill. 1979) (Moran, J., dissenting), abrogated by *People v. Cardamone*, 905 N.E.2d 806 (Ill. 2009).
[3] 362 N.E.2d 329 (Ill. 1977).
[4] *See id.* at 331.
[5] *See Parkins*, 396 N.E.2d 22, 24 (Ill. 1979).
[6] 750 ILL. COMP. STAT. 60/101 *et seq.* (West 2004).
[7] Ill. Rev. Stat. 1977, ch. 134, par. 16.4-1(2) (later codified at 720 ILL. COMP. STAT. 135/1-1 (West 2004)).
[8] 720 ILL. COMP. STAT. 5/32-4a (West 2004).
[9] *See, e.g., People v. Calvert*, 629 N.E.2d 1154, 1157 (Ill. App. Ct. 1994), disagreed with on other grounds by *People v. Cardamone*, 905 N.E.2d 806 (Ill. 2009).
[10] *See*, *e.g.*, *People v. Spencer*, 731 N.E.2d 1250, 1251 (Ill. App. Ct. 2000) ("Although the telephone harassment statute does not specifically incorporate [the DVA's] definition of harassment, given the similar descriptions of the offenses, seems to be a workable definition for that offense as well and we apply it here.").
[11] 750 ILL. COMP. STAT. 60/103(7) (West 2004).
[12] *People v. Zarebski*, 542 N.E.2d 445, 452 (Ill. 1989) (citing *People v. Whitfield*, 498 N.E.2d 262, 265 (Ill. App. Ct. 1986)).
[13] *See generally People v. Klick*, 362 N.E.2d 329 (Ill. 1977); *People v. Parkins*, 396 N.E.2d 22 (Ill. 1979).
[14] Ill Rev. Stat. 1973, ch. 38, par. 26-1(a)(2) (later codified at 720 ILL. COMP. STAT. 5/26-1(a)(2) (West 2004) ("A person commits disorderly conduct when he knowingly . . . [w]ith intent to annoy another, makes a telephone call, whether or not conversation thereby ensues.")).
[15] *Klick*, 362 N.E.2d at 332.
[16] *Id.* at 330.
[17] *Id.* at 330-31.
[18] *Id.* at 331-32 (criminalizing "a single telephone call made by a consumer who wishes to express his dissatisfaction over the performance of a product or service; a call by a businessman disturbed with another's failure to perform a contractual obligation; by an irate citizen, perturbed with the state of public affairs, who desires to express his opinion to a public official; or by an individual bickering over family matters").
[19] *Id.* at 332.
[20] *See Parkins*, 396 N.E.2d at 23 (citing Ill. Rev. State. 1977, ch. 134, par. 16.4-1(2)).
[21] *Id.* (quoting Ill. Rev. Stat. 1977, ch. 134, par. 16.4-1(2)).
[22] *See id.*
[23] *Id.* at 24 (citing *Grayned v. City of Rockford*, 408 U.S. 104 (1972)).
[24] *See id.* (quoting *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961)).
[25] *See Parkins*, 396 N.E.2d at 24.
[26] *See id.*
[27] *See People v. Cardamone*, 905 N.E.2d 806, 808 (Ill. 2009).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Cardamone*, 905 N.E.2d at 808-09.
[33] *Id.* at 809.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Cardamone*, 905 N.E.2d at 809.
[38] *Id.*
[39] *Id.*

[40] 720 ILL. COMP. STAT. 5/32-4a (West 2004) (emphasis added).
[41] *See Cardamone*, 905 N.E.2d at 809 (quoting 750 ILCS 60/103(7) (West 2004)).
[42] *See id*. at 810.
[43] *See id.*
[44] *See id.*
[45] *See id.*
[46] *See Cardamone*, 905 N.E.2d at 811.
[47] *Id.* (quoting 720 ILL. COMP. STAT. 32-4a(a) (West 2004)).
[48] *Id.*
[49] *Id.*
[50] *Cardamone*, 905 N.E.2d at 812 (quoting BLACK'S LAW DICTIONARY 1007 (8th ed. 2004)).
[51] *See Cardamone*, 905 N.E.2d at 812; *see also Calvert*, 629 N.E.2d at 1159 (applying *Parkins*' *Noscitur a sociis* approach to section 5/32-4a).
[52] *See Cardamone*, 905 N.E.2d at 812-13.
[53] *See id.* at 813.
[54] *Id.* at 812.
[55] *Id.* at 813 (citing *People v. Perry*, 864 N.E.2d 196 (Ill. 2007)).
[56] *Cardamone*, 905 N.E.2d at 813.
[57] *See generally People v. Cardamone*, 905 N.E.2d 806 (Ill. 2009).
[58] *Klick*, 362 N.E.2d at 331 (emphasis added).
[59] *See id.*
[60] *See id.*
[61] *See*, *e.g.*, *id.* at 331-32 (citing *Zwickler v. Koota*, 389 U.S. 241, 250 (1967); *People v. Ridens*, 321 N.E.2d 264 (Ill. 1974) ("In attempting to control of prevent activities which are subject to state regulation, the legislature must not use means which sweep too broadly and thereby penetrate the area of protected freedoms."); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971) ("The legislature cannot abridge one's first amendment freedoms merely to avoid slight annoyances caused to others.")).
[62] *See Cardamone*, 905 N.E.2d at 812.
[63] *See*, *e.g.*, *Parkins*, 396 N.E.2d at 24 (citing *Jordan v. De George*, 341 U.S. 223 (1951)); *People v. Dednam*, 304 N.E.2d 627 (Ill. 1973) (statutory terms are not required to be reduced to "impossible standards of specificity").
[64] *See supra* note 18 and accompanying text.
[65] *See, e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296, 307 (1940) (Jehovah's Witnesses playing an anti-Catholic recording to two Catholics on the street was constitutionally protected speech); *Terminiello v. City of Chicago*, 337 U.S. 1, 5 (1949) (Vinson, J., dissenting) (inflammatory, anti-Semitic speech to a crowd was constitutionally protected); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (Black, J., concurring) (racist speech during a Klan rally was constitutionally protected).
[66] *See Cardamone*, 905 N.E.2d at 809 (citing 750 ILL. COMP. STAT. 60/103(7) (West 2004)).
[67] *See*, *e.g.*, *id.* at 812 (citing *Parkins*, 396 N.E.2d 22 (Ill. 1979)).
[68] *See*, *e,g.*, *id.* at 812-13 (citing *People v. Calvert*, 629 N.E.2d 1154, 1157 (Ill. App. Ct. 1994)).
[69] *See Calvert*, 629 N.E.2d at 1157.
[70] *See Cardamone*, 905 N.E.2d at 812 (the *Cardamone* court's plain meaning interpretation of "emotional distress" was satisfied where the complainant suffered "'stomach dropping," "nerve-racking," "wondering what she had done wrong,' "knowing that she had not done anything wrong," and "anger," which are emotions that people experience in a variety of contexts, both as victims of crimes and otherwise).

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Kane County Circuit Clerk's Office

Effective April 12, 2010, the filing of new civil and family cases and documents will be filed by the individual teams. The Family window (green sign) will be filing the Adoption, Divorce, Family and Juvenile cases and documents. The Civil window (blue sign) will be filing the Arbitration, Law, Law Medium, Small Claims, Tax and all other civil case types. Filings at the satellite offices (Judicial Center and Courthouse) will not be affected by this change at the main Clerk's office.

When possible, please keep payment of case types separate on checks. Should you have one check to cover cases for both windows, please defer to the Civil window.

Effective April 5, 2010, the four courtrooms on the first floor at the Judicial Center, as well as room 005 (lower level), will be able to accept payments for certifications, appearances, reinstatement and vacate fees etc. Court Clerks may accept checks, cash, money orders and credit card payments, which carry a 4.75% convenience fee (minimum $2 fee) added to the total.

When filing civil or juvenile NEW cases in Kane County, the plaintiff, or attorney filing the case, needs to file a New Case Information Sheet (NCIS) for each case filed. The NCIS form our office uses allows for more efficient data entry and is a time saver. All pertinent information is in one place instead of having to review a complaint or petition. In order to properly file the case, we need the form filled out completely.