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Criminal Punishment for Cyberbullying: *In re Rolando S.*

Caitlin R. Clark*

I. INTRODUCTION

A recent and unsettling trend among today's teenagers is cyberbullying. Cyberbullying is similar to traditional bullying, but it takes place through an electronic medium such as social networking websites.¹ As an alternative to fistfights, these bullies taunt or threaten their victims, spreading rumors, and even making sexually explicit comments.² The victims of cyberbullying are often teased at school as a result of the information posted online.³ Cyberbullying can have such an intense psychological effect on its victims that some commit suicide due, at least in part, to the severity of bullying that occurs online and at school.⁴ Because of this undesirable phenomenon, many look to the law to provide some regulation in this area. *In re Rolando S.* is a case decided by California's Fifth District Court of Appeals that utilizes a unique method to deal with cyberbullying.⁵ The court made cyberbullying punishable as Felony Identity Theft under certain circumstances.⁶ The court analyzed whether a minor—who received an unsolicited text message containing the victim's e-mail password and used it to access the victim's Facebook account, change her profile information, and post inappropriate comments on others' accounts in the victim's name—violated the identity theft provision of the California Penal Code.⁷

The State of California charged the appellant with violating Section 530.5(a) of the California Penal Code.⁸ The juvenile court found the appel-

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1. *What is Cyberbullying?*, NATIONAL CRIME PREVENTION COUNCIL, <http://www.ncpc.org/topics/cyberbullying/what-is-cyberbullying> (last visited Oct. 9, 2011).
2. *Id.*
3. Sameer Hinduja & Justin W. Patchin, *Cyberbullying: Identification, Prevention, and Response*, CYBERBULLYING RESEARCH CENTER, 1 (2010) http://www.cyberbullying.us/Cyberbullying_Identification_Prevention_Response_Fact_Sheet.pdf.
4. Sameer Hinduja & Justin W. Patchin, *Cyberbullying Research Summary: Cyberbullying and Suicide*, CYBERBULLYING RESEARCH CENTER, 1 (2010) http://www.cyberbullying.us/cyberbullying_and_suicide_research_fact_sheet.pdf.
5. *See in re Rolando S.*, 129 Cal. Rptr. 3d 49 (Cal. Ct. App. 2011).
6. *Id.* at 52-53.
7. CAL. PENAL CODE § 530.5(a) (West 2008); *Rolando S.*, 129 Cal. Rptr. 3d at 52.
8. *Rolando S.*, 129 Cal. Rptr. 3d at 52.

lant guilty of the felony.⁹ Due to a prior offense, the maximum available sentence was three years and three months. The appellant, however, was only put on probation and sent to a juvenile detention program for a period of ninety days to one year.¹⁰

This case presents a new approach to combating cyberbullying among teenagers. By making such actions punishable as Felony Identity Theft, the California court presents a potentially effective way to deter teenagers from tormenting their peers by making hacking into Facebook accounts and posting vulgar and embarrassing comments in someone else's name a serious offense. Section 32261 of the California Education Code (Section 32261) was amended on July 8, 2011, to reflect California's recognition of cyberbullying.¹¹ Section 32261 describes the state legislature's intent to include within the definition of "bullying" acts "committed . . . by means of an electronic act, which includes the posting of messages on a social network Internet Web site."¹² Additionally, Section 48900(r) of the Education Code empowers schools to discipline students who "[e]ngage [] in an act of bullying, including . . . bullying committed by means of an electronic act," as described in Section 32261.¹³ These sections demonstrate the California legislature's desire to prevent cyberbullying among teenagers by making it punishable under California law.

Although there are many potentially positive effects of this decision, it is easy to see the difficulty of achieving similar outcomes across the nation. The California court relies heavily on its determination that Section 530.5(a)'s requirement of "unlawful purpose" includes intentional torts.¹⁴ While intentional torts are certainly unlawful, it may be difficult to consistently demonstrate that the commission of a civil offense, such as libel, is sufficient to satisfy the requirements of a criminal statute. Further, similar statutory interpretations are required if comparable standards are to be set across the country. The use of different, existing criminal statutes, or development of new statutes directed toward cyberbullying, may provide a more effective outcome than this type of identity theft provision.

9. *Id.*

10. *Id.*

11. Schools & School Districts—Reduction—Cyber Bullying, ch. 72, sec. 1, § 32261, 2011 CAL. LEGIS. SERV. 746 (West) (codified at CAL. EDUC. CODE § 32261).

12. § 32261(d).

13. CAL. EDUC. CODE § 48900(r) (West 2009); Sec. 1, § 32261(d), (f)-(g), 2011 CAL. LEGIS. SERV. 746.

14. PENAL CODE § 530.5(a); *Rolando S.*, 129 Cal. Rptr. 3d at 55–57.

II. FACTUAL BACKGROUND

The appellant, Rolando S. (Rolando), is a juvenile citizen of California.¹⁵ The State of California (the State), the appellee, charged Rolando with violating Section 530.5(a) of the California Penal Code, Committing Identity Theft.¹⁶ Rolando received an unsolicited text message from another student containing a female classmate's e-mail password.¹⁷ Rolando then utilized the password recovery feature on Facebook.¹⁸ This feature allowed Rolando to reset the victim's password by accessing her e-mail account and entering the "password reset code" sent by Facebook.¹⁹

Having gained access to the victim's account, Rolando posted messages, posing as his female classmate, to other boys' accounts.²⁰ These messages contained vulgar, sexually explicit language and were able to be viewed publicly by other Facebook users.²¹ Additionally, Rolando made changes of an equally crude and sexual nature to the victim's own account.²² After discovering this invasion of his daughter's Facebook account, the victim's father removed the vulgarities and notified the police.²³ Rolando admitted to police that he was responsible for the changes to the victim's profile and the messages to other Facebook users.²⁴

III. DESCRIPTION OF CLAIMS AND HISTORY OF THE CASE

The State charged Rolando with one count of willfully obtaining personal identifying information and using it for an unlawful purpose, a violation of Section 530.5(a) of the California Penal Code.²⁵ A juvenile petition containing the alleged violation was filed.²⁶ A contested jurisdiction hearing followed, during which the juvenile court sustained the petition, concluding beyond a reasonable doubt that Rolando committed the crime.²⁷

15. *Rolando S.*, 129 Cal. Rptr. 3d at 52.

16. *Id.*

17. *Id.*

18. *Rolando S.*, 129 Cal. Rptr. 3d at 52; FACEBOOK, <http://www.facebook.com>.

19. *Rolando S.*, 129 Cal. Rptr. 3d at 52; FACEBOOK, *supra* note 18.

20. *Rolando S.*, 129 Cal. Rptr. 3d at 52, 58 n.2.

21. *Id.*

22. *Id.*

23. *Id.* at 52.

24. *Id.*

25. *Rolando S.*, 129 Cal. Rptr. 3d at 52.

26. *Id.*

27. *Id.*

At the disposition hearing, the juvenile court denied, without prejudice, Rolando's motion to reduce the crime from a felony to a misdemeanor.²⁸ The juvenile court expressed concern over the short time span between this offense and Rolando's prior offense of assault with a deadly weapon.²⁹ On that occasion, Rolando drove his car toward three girls, intending to scare them.³⁰ Ultimately, the juvenile court found Rolando guilty and determined that the aggregated maximum sentence available for both this offense and his prior offense was three years and three months.³¹ Rolando was committed to a juvenile detention program for ninety days to one year and was put on probation.³² Rolando appealed the juvenile court's decision, arguing that his conduct did not satisfy the elements required by the identity theft statute.³³ The Court of Appeals, disagreeing with Rolando, upheld the juvenile court's decision.³⁴

IV. CALIFORNIA COURT OF APPEALS' HOLDING AND OVERVIEW OF RATIONALE

The court found that Rolando was guilty of committing identity theft for violating Section 530.5(a).³⁵ The statute states, in pertinent part:

Every person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense³⁶

Section 530.55(b) defines "personal identifying information," as including passwords and other unique electronic data.³⁷ The court analyzed Section 530.5(a) through a previously developed two-part test: (1) whether Rolando "willfully" obtained the password; and (2) whether an "unlawful purpose" was present.³⁸

28. *Id.*

29. *Id.*

30. *Rolando S.*, 129 Cal. Rptr. 3d at 52.

31. *Id.*

32. *Id.*

33. *Id.* at 51–52.

34. *Id.* at 51–52.

35. *Rolando S.*, 129 Cal. Rptr. 3d at 52.

36. PENAL CODE § 530.5(a).

37. CAL. PENAL CODE § 530.55(b) (West 2007).

38. *Rolando S.*, 129 Cal. Rptr. 3d at 53 (quoting *People v. Tillotson*, 69 Cal. Rptr. 3d 42, 54 (Cal. Ct. App. 2007)).

Rolando argued that he did not act “willfully” in acquiring the victim’s e-mail password because it was sent to him in an unsolicited text message.³⁹ The California Penal Code states that, “[t]he word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act It does not require any intent to violate law, or to injure another, or to acquire any advantage.”⁴⁰ The court, acknowledging that Rolando did not request the password, nevertheless held that he did obtain the information willfully by choosing to keep the password and “was a free agent” when he maintained it for use in retrieving the victim’s Facebook password.⁴¹ The court further held that Rolando’s actions in retrieving the Facebook password demonstrated his willful intent to gain personal identifying information.⁴² Using Facebook’s password recovery tool is a multi-step process.⁴³ Rolando first notified Facebook that “the victim” had forgotten her password.⁴⁴ Then, a verification code was sent to the victim’s e-mail address, and Rolando used the password he received through the text message to retrieve the verification code, reset the victim’s Facebook password, and ultimately access her account.⁴⁵ The court found these actions to be satisfactory in establishing the first part of the identity theft test because Rolando voluntarily kept the victim’s e-mail password for his own future use and subsequently used it to obtain the victim’s Facebook password.⁴⁶

The court next examined Rolando’s contention that his use of the e-mail password did not constitute an “unlawful purpose” as required by Section 530.5(a).⁴⁷ Rolando claimed that his behavior was, “at most,” a civil tort and, as such, did not come within the statute.⁴⁸ In response to Rolando’s argument, the State presented two theories: (1) Rolando’s behavior was unlawful under Section 647.6(a)(1) of the California Penal Code;⁴⁹ and (2) civil torts do satisfy the unlawful purpose element of Section 530.5(a) and Rolando committed libel under Section 45 of the California Civil Code.⁵⁰

The court did not agree with the state’s first argument. Section 647.6(a)(1) of the California Penal Code prohibits a person from “annoy[ing]

39. *Id.* at 53.

40. CAL. PENAL CODE § 7(1) (West 1987).

41. *Rolando S.*, 129 Cal. Rptr. 3d at 53.

42. *Id.* at 53–54.

43. FACEBOOK, *supra* note 19.

44. *Rolando S.*, 129 Cal. Rptr. 3d at 53; FACEBOOK, *supra* note 19.

45. *Rolando S.*, 129 Cal. Rptr. 3d at 53; FACEBOOK, *supra* note 19.

46. *Rolando S.*, 129 Cal. Rptr. 3d at 53–54.

47. *Id.* at 54.

48. *Id.*

49. CAL. PENAL CODE § 647.6(a)(1) (West 2006).

50. CAL. CIV. CODE § 45 (West 1872); *Rolando S.*, 129 Cal. Rptr. 3d at 54.

or molest[ing] any child under 18 years of age.”⁵¹ The California Supreme Court has set forth a two-part test for this statute, requiring, “(1) conduct a ‘normal person would unhesitatingly be irritated by’, and (2) conduct ‘motivated by an unnatural or abnormal sexual interest’ in the victim.”⁵² The court held that the facts in the present case did not satisfy this test because Rolando made no attempt to contact the victim directly, and there was no indication that he was motivated by any sexual interest in her.⁵³

The court, in analyzing the State’s second theory, considered various external sources when interpreting the “unlawful purpose” requirement of Section 530.5(a) and determined that the term was to be understood as a broad description covering a variety of offenses.⁵⁴ The California Supreme Court has further explained that “the term ‘unlawful’ . . . include[s] wrongful conduct which is not criminal,” including offenses under the common law.⁵⁵ The court found that this definition includes intentional civil torts.⁵⁶ Section 45 of the California Civil Code defines libel as “a false and unprivileged publication by writing, printing, picture, effigy, or other fixed representation to the eye, which exposes any person to hatred contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.”⁵⁷ The court determined that Rolando’s postings on the victim’s Facebook account and her friends’ profiles was sufficient to “expose[] the victim to hatred, contempt, ridicule, and obloquy.”⁵⁸

A third approach to establishing the “unlawful purpose” element of Section 530.5(a) was presented by the court: even if Rolando’s conduct was not unlawful within the meaning of that provision, it satisfied the “unlawful purpose” requirement because his behavior violated Section 653m(a) of the California Penal Code.⁵⁹ Section 635m(a), in pertinent part, states, “Every person who, with an intent to annoy . . . makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language . . . is guilty of a misdemeanor.”⁶⁰ Section 635m(c) states, in pertinent part, “Any offense committed by use of an electronic communication device or medium, including the Internet, may be

51. PENAL CODE § 647.6(a)(1).

52. *Rolando S.*, 129 Cal. Rptr. 3d at 54 (citations omitted) (quoting *People v. Lopez*, 965 P.2d 713, 717 (Cal. 1998)).

53. *Id.*

54. *Id.* at 55–57.

55. *Id.* at 57 (citations omitted) (quoting *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 954 (Cal. 2003)).

56. *Id.*

57. CIV. CODE § 45.

58. *Rolando S.*, 129 Cal. Rptr. 3d at 58.

59. CAL. PENAL CODE § 635m(a) (West 2009); *Rolando S.*, 129 Cal. Rptr. 3d at 58.

60. PENAL CODE § 635m(a).

deemed to have been committed when and where the electronic communication or communications were originally sent or first viewed by the recipient.”⁶¹ The court determined that, by posting as the victim and changing her profile information, Rolando violated Section 635m(a)⁶² and the violation was committed at the time he posted the information as explained by Section 635m(c).⁶³ For these reasons, the court affirmed the juvenile court’s ruling.⁶⁴

V. CRITIQUE OF COURT’S APPROACH

In many ways, punishing this type of behavior as *felony* identity theft is an effective means of ending cyberbullying. There is, potentially, a great deterrent effect in imposing such seemingly severe punishment on offenders, particularly teenagers, which will help in efforts to stop cyberbullying. One underlying issue raised by imposing criminal punishment on cyberbullies is whether identity theft is the proper crime to charge in these cases.

Identity theft as punishment broadens the ability of the law to step in and provide a form of punishment for behavior that affects students both in the online realm and at school. As in this case, many teenage victims of similar crimes are subsequently ridiculed at school, not just online.⁶⁵ One widely debated question is whether, and to what extent, schools should be involved in preventing and punishing cyberbullying that occurs away from school property and outside of school hours. It seems, however, that no measure taken by schools to combat cyberbullying will be sufficient on its own against acts occurring away from school grounds, and thus the need for criminal punishment arises.

Despite the potential positive effects of imposing felony identity theft on individuals who commit actions like those in this case, there are difficulties posed by this type of punishment. One main difficulty is achieving nationwide uniformity in using identity theft to punish cyberbullying. This court’s decision was based largely on careful interpretation of the specific language in the relevant statute; however, state statutes prohibiting identity theft are not perfectly identical and interpreting them the same way may be difficult, if not impossible.⁶⁶ This is amplified by the fact that cyberbullying, while largely conducted by a victim’s peers at her own school, is not limited to only those individuals. The Internet allows cyberbullying to occur across state lines, compounding the need for uniformity in this area of the law.

61. PENAL CODE § 635m(c).

62. PENAL CODE § 635m(a).

63. PENAL CODE § 635m(c); *Rolando S.*, 129 Cal. Rptr. 3d at 58.

64. *Rolando S.*, 129 Cal. Rptr. 3d at 52, 58.

65. See Hinduja, *Cyberbullying: Identification, Prevention, and Response*, *supra* note 3.

66. See *Rolando S.*, 129 Cal. Rptr. 3d at 55–56.

Another potential problem associated with this decision arises from the court's interpretation of the statutory language requiring that the information be used for "any unlawful purpose."⁶⁷ The court points out that the California Supreme Court has "defined the term 'unlawful' to include wrongful conduct which is not criminal," and that "an act is unlawful . . . if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard."⁶⁸ This is a very broad definition that allows for the inclusion of intentional torts, such as libel, to be punishable as identity theft under the statute. It is evident that Rolando's actions fall within the definition of "libel" under California law.⁶⁹ The language of Section 530.5(a), and the legislative intent underlying it, could be interpreted differently, but such examination is not the most relevant consideration here.

More pertinent is the fact that commission of an intentional civil tort, such as libel, is supporting a felony conviction. Punishment for cyberbullying is undoubtedly necessary, but using a civil tort as the basis for a felony conviction may be an extreme measure. The deterrent effect of a criminal punishment for cyberbullying would not be lost if it were punishable as a misdemeanor, and many may view a felony conviction as too extreme a punishment for committing a civil tort, particularly in the case of a minor. This may also be a factor inhibiting adoption of similar laws across the nation if other states view this penalty as too severe for the offense committed. The court's discussion of a violation of Section 635m(a) as satisfactory for punishment under Section 530.5(a) also raises a question as to the felony component of Rolando's conviction.⁷⁰ Section 635m(a) specifically states that its violation would constitute a misdemeanor.⁷¹ This makes it even more difficult to see how the court can justifiably impose a felony conviction when a similar statute, which could be used to satisfy the requirements of the statute being considered, specifically prescribes a lesser degree of punishment.⁷² Also, it is questionable whether the court's interpretation of Section 635m(a) is correctly applied in this case.⁷³ If the statute has been misapplied, it is uncertain what effect this might have on the same issue in the future.

Instead of basing criminal charges on civil torts, such as libel, courts may achieve better results by applying existing criminal statutes in new and different ways. In this case, the California court could have instead punished Rolando under Section 528.5 of the California Penal Code,⁷⁴ a different iden-

67. *See id.*

68. *Id.* at 57.

69. *See* CIV. CODE § 45; *Rolando S.*, 129 Cal. Rptr. 3d at 57–58.

70. *See* PENAL CODE § 635m(a); *Rolando S.*, 129 Cal. Rptr. 3d at 58.

71. *See* PENAL CODE § 635m(a).

72. *See Rolando S.*, 129 Cal. Rptr. 3d at 58.

73. *See* PENAL CODE § 635m(a); *Rolando S.*, 129 Cal. Rptr. 3d at 58.

74. CAL. PENAL CODE § 528.5 (West 2011).

tity theft provision. Section 528.5(a) provides that “any person who knowingly and without consent credibly impersonates another actual person through or on an Internet Web site . . . for purposes of harming, intimidating, threatening, or defrauding another person is guilty of a public offense. . . .”⁷⁵ Credible impersonation occurs where “another person would reasonably believe, or did reasonably believe, that the defendant was or is the person who was impersonated.”⁷⁶ The statute also defines “electronic means” as “opening an e-mail account or an account or profile on a social networking Internet Web site in another person’s name.”⁷⁷ Rolando’s actions certainly would qualify him as a “credible” impersonator, and he definitely employed “electronic means” as defined by the definitions in Section 528.5.⁷⁸ Also, Rolando could easily be said to have harmed the victim by damaging her reputation, making his behavior punishable under this section.⁷⁹ This type of statute could be more effective in punishing cyberbullies. It does not require the use of an underlying civil tort to find guilt, a practice that may not be well received in courts nationwide. Using a civil tort, as was done in the present case, to justify criminal charges is arguably difficult, despite statutory interpretation demonstrating it as an acceptable practice in California.⁸⁰ Utilizing a criminal statute similar to Section 528.5 may result in an outcome that is less likely to be overturned since statutory interpretation has a subjective component that could allow for different results dependent upon individual perspectives.

VI. CONCLUSION

In this case, the California Court of Appeals takes a radical approach to punishment of cyberbullying. The court upholds the felony conviction of a minor for identity theft. This presents an intriguing approach to combating cyberbullying through seemingly strict, deterrent punishment. Whether the use of felony identity theft in such cases is too severe a penalty for the commission of an intentional civil tort, and whether states can, and will, be persuaded by this analysis to develop similar, more uniform laws to punish cyberbullies across the country are inquiries still to be answered. As this area of the law develops, the use of other existing criminal statutes in lieu of ones similar to that relied upon in this case should be examined and may lead to more effective deterrence nationwide.

75. PENAL CODE § 528.5(a).

76. PENAL CODE § 528.5(b).

77. PENAL CODE § 528.5(c).

78. PENAL CODE § 528.5(b), (c). *See Rolando S.*, 129 Cal. Rptr. 3d 49.

79. *See* PENAL CODE § 528.5; *Rolando S.*, 129 Cal. Rptr. 3d 49.

80. *See Rolando S.*, 129 Cal. Rptr. 3d at 55-57.

