

New Age of Technology and Criminal Law

How the Criminal Law is being impacted by Social Networking Sites.

It's a new age of technology; computers have advanced beyond the expectations of many. Generations before us have been left in the wake of the rapid advancement in online communication and networking. The laws are struggling to catch up, and the world of criminal law is no different.

The intersection between online interactions and the criminal law is continuing to grow and these cases are rarely examined by the higher courts. This places a large amount of power in the district courts and allows the new and technologically savvy attorney the opportunity to make a large impact with the direction that criminal law will take.

When we see interactions on social networking sights as potential evidence in a criminal case, we can divide the common interactions into three separate groups; character evidence, circumstantial evidence, and as an actual element of the crime.

Character Evidence at Trial

Character evidence is generally the threat hanging over the defendants head. If he attempts to show that he's a good person and would never do whatever he's charged with, the prosecutor will attempt to bring up every scrap of evidence they can find to counter the good character claim.

For example, in Indiana, Ian Clark was found guilty of murdering a young girl. In support of the Prosecutions claim, evidence was introduced of his statement on MySpace. "Society labels me as an outlaw and criminal [. . .] To those people I say, if I can do it

and get away. B . . . s . . . And with all my obstacles, why the f . . . can't you." The Indiana Supreme Court found that the character evidence was admissible.¹

How do you handle this as a defense attorney? In most situations, the harm has already been done. Even if the defendant takes the incriminating information down, most social networking sites archive their data. That archived information is still available, and it is becoming more and more common for the police and prosecution to investigate these treasure troves of character evidence. Be aware and be prepared to identify and explain any character evidence which may arise in your case. Make sure your client is aware of the ramifications of the character evidence.

Character Evidence at Sentencing

Not all the character evidence is brought in for purposes of conviction. In many cases it arises during sentencing. A key area where this can arise is in DWIs. Prosecutors in Santa Barbara, CA discovered the importance of checking social networking sites before sentencing hearings.

In 2007, Jessica Binkerd was driving under the influence; the resulting car crash killed her passenger. She was hoping for probation. The prosecutor produced photos from Ms. Binkerd's MySpace page showing her partying with friends and wearing bandoleers of shot glasses. The court was convinced that she had shown no remorse for the tragedy and sentenced her to 5 years and 4 months in prison.

Within months, Laura Buys was involved in a near identical case. At sentencing, a picture of her drinking wine and posting drinking stories convinced the court that she also had no remorse. She was sentenced to 5 years.

¹ http://www.internetcases.com/library/cases/2009-10-15-clark_v_state.pdf

Luckily, this is an area where the knowledgeable defense attorney can make an impact. Be aware of the social networking sites that your client frequents and make them aware that the prosecution, and court, may well find anything that is posted. Even in situations where the client believes that they have restricted access to postings or pictures, if the prosecution is aware of the information they have the ability to get it. Although posting sob stories about how they learned their lesson is not likely to elicit sympathy from the court, it's better than what happened to Ms. Binkerd and Ms. Buys.

Circumstantial Evidence

Circumstantial evidence is another situation where the defense will generally walk into the situation with the harm already done.

In Martinsburg, Pa., Jonathan Parker, was charged with one count of felony daytime burglary. While in the home, Mr. Parker paused to stop and check his Facebook account while on the victim's computer. Unfortunately, he forgot to log out before leaving the house. Defense in this case is difficult and most likely boils down to damage control.

In Wisconsin, this past November, students at the University of Wisconsin were confronted by what appeared to be a random attractive co-ed that wanted to be their friend.² Like most college students, they jumped at the friend request. Only later did they discover that the “random” was actually an undercover officer. The officer went into the Facebook photo albums, identified pictures of the person in which they appeared to be drinking underage, and sent citations. Because the citation was only \$227, many of the students paid the fine. In this case, the defense has many arguments available to it.

² http://www.lacrossetribune.com/news/local/article_0ff40f7a-d4d1-11de-afb3-001cc4c002e0.html?mode=story

Where's the proof that the beverage was alcohol? Where's the proof that the student was drinking it? (Remember they were being charged with drinking not possession.) And most important, where is the proof that the court even has jurisdiction over the offense?

Actual Element of the Crime

The new trend, and possibly the most important section for lawyers to be aware of, is when the defendant's online presence is an actual part of the crime. Ascherman & Smith had a recent case where Defendant "Jessica" (not her real name) had a court order prohibiting her from contacting the Victim. When the court order was put into place, Jessica ceased all contact with the Victim. However, Jessica had previously accepted a friend request from the Victim on Facebook. Jessica rarely used Facebook and failed to realize that this "friendship" was still in place. The prosecution realized it though. A hearing was called to determine if Jessica had violated the court order.

A significant question at this point is whether Jessica was reasonably expected to know that allowing the connection between Facebook pages to remain would be a violation of the court order. It is important to have a good understanding of how websites work to be able to explain that Jessica didn't actually make any contact with the Victim.

Jessica created a website under the structured format required by Facebook, as did the Victim. When completed, both Jessica and the Victim authorized said website to be viewed by the other persons' account. When this authorization was created, there was no court order. When the court order was put into place, there was no explicit requirement to sever the connection. In my humble opinion, the prosecution failed to show that Jessica made any actual contact with the Victim. However, the court has yet to rule.

Recently, a Facebook posting has been used to negate an element of the crime. Or more specifically, show that the defendant was not present. In October, Defendant Rodney Bradford was updating his Facebook status in Harlem. The next day he was arrested as a suspect in a robbery at the Farragut Houses in Brooklyn.

That simple Facebook update became Mr. Bradford's alibi. After discussing the Facebook update with Mr. Bradford's defense attorney, the prosecutor verified the information and the charges were dropped. Although the posting could have come from someone other than Mr. Bradford, there were other witnesses to support the alibi. This appears to be one of the first cases where a social networking site has been used to help a defendant.

Conclusion

Social networking sites are everywhere. Their influence is growing, and they are impacting every area of life, including criminal law. It is vital that attorneys take the time to know how these sites work, and how they can affect the cases they are working on.



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