

PROSECUTORIAL MISCONDUCT IN THE DIGITAL AGE

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I. INTRODUCTION

Prosecutorial misconduct, which this article defines as what occurs when a prosecutor deliberately engages in dishonest or fraudulent behavior calculated to produce an unjust result, is—according to many legal scholars—seriously underreported. One study utilizing a computer-assisted review revealed that there have only been just over one hundred reported cases of professional discipline of federal and state prosecutors in the past century—an average of approximately one disciplinary case per year.¹ Another leading scholar in the area has concluded that prosecutorial discipline is “so rare as to make its use virtually a nullity.”²

Why is this? Many reasons emerge, not the least of which is a practical, empirical obstacle to accurately assessing the problem: prosecutors who engage in such misconduct presumably don’t want to be caught, and will take steps to conceal their actions. Another reason is the autonomy enjoyed by prosecutors’ offices insofar as their internal policies are concerned. The considerable discretion afforded to prosecutors over whom to prosecute and which offenses to charge, coupled with a lack of external oversight of prosecutors’ offices, fosters an environment in which misconduct can remain undetected and unchecked. Yet another reason is sheer volume: most criminal cases in the United States result in plea bargains, which are rarely subjected to judicial review or extensive

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¹ See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 744 & nn.80, 82 & 86 (2001); see also Monroe H. Freedman, *Professional Discipline of Prosecutors: A Response to Professor Zacharias*, 80 HOFSTRA L. REV. 121, 124 (2001) (observing that Professor Zacharias’s study found just over one hundred cases dating back to 1886, which amounted to fewer than one per year).

² BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 1.8(d) (1998).

investigation.³ Consequently, the vast majority of known examples of prosecutorial misconduct only came to light during long, drawn-out trials or over the course of an appeal, and often were discovered with the aid of resources beyond the means of the typical criminal defendant. In *Connick v. Thompson*,⁴ for example, plaintiff John Thompson spent fourteen years on death row (and a total of eighteen years in prison) because prosecutors never disclosed an exculpatory blood evidence report from his defense attorneys.⁵ The chance discovery—one month before Thompson’s scheduled execution—by Thompson’s investigator saved his life and led to the vacating of his convictions for both murder and armed robbery.⁶ At least four, and possibly five prosecutors were aware of the evidence—a swatch of fabric from the bloody pants leg of one of the victims—which conclusively established that the perpetrator’s blood was Type B (Thompson’s blood was Type O).⁷ Yet, it was never turned over to the defense.⁸

Another reason for the underreporting of prosecutorial misconduct is the extreme reluctance and even disincentive on the part of those who are in the best position to report such conduct: other prosecutors, defense counsel and their clients, and judges. Prosecutors are reluctant to turn in colleagues; defense attorneys may feel instituting a bar complaint that they have precious little time for anyway can jeopardize ongoing dealings with prosecutors on other matters; and defendants themselves may believe that a complaint could adversely affect their case or their later prospects for parole. As for the hesitation of judges, one federal judge has summed it up nicely: “When faced with motions that allege governmental misconduct, most district judges are reluctant to find that the prosecutors’ actions were flagrant, willful or in bad faith.”⁹

In addition, one cannot discount other factors that help account for the underreporting of prosecutorial misconduct. The rejection of tort liability (including common law personal tort liability under 42

³ *E.g.*, *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (noting that guilty pleas result in 97 percent of federal convictions and 94 percent of state convictions); Douglas D. Guidorizzi, *Should We Really “Ban” Plea Bargaining?: The Core Concerns of Plea Bargaining Critics*, 47 EMORY L.J. 753, 756, 768 (1998) (discussing the lack of judicial oversight over plea bargaining).

⁴ *Connick v. Thompson*, 131 S. Ct. 1350 (2011).

⁵ *Id.* at 1355–56.

⁶ *Id.* at 1356.

⁷ *See id.* at 1375, 1384 (Ginsburg, J., dissenting).

⁸ *Id.* at 1356 (majority opinion).

⁹ *United States v. Aguilar Noriega*, 831 F. Supp. 2d 1180, 1182 (C.D. Cal. 2011).

U.S.C. § 1983 and municipal liability under § 1983) by the U.S. Supreme Court, most recently in *Thompson*, has proven to be a bar to punishing prosecutors' official misbehavior.¹⁰ Professional discipline by state bar authorities, repeatedly endorsed by the Supreme Court as the appropriate vehicle for addressing claims of prosecutorial misconduct,¹¹ has also proven toothless.

Along with the vast underreporting of prosecutorial misconduct and the lack of satisfactory, professionally viable means of ensuring accountability even where misconduct is reported, a potentially greater concern looms: technology. In today's digital age, prejudicial pretrial publicity can occur with the speed of a search engine, videos of "perp walks" can go viral, and posts on social networking platforms like Facebook and Twitter can heighten public condemnation of the accused and taint the jury pool with frighteningly fast and widespread results. The two social media trials of the twenty-first century, the prosecutions of Casey Anthony and George Zimmerman, demonstrated the power of harnessing emerging media for both prosecution and defense, in everything from pretrial publicity and raising a defense fund to jury selection and witness impeachment.¹² In an age in which "72 percent of adult Americans maintain at least one social networking profile,"¹³ where Facebook boasts "1.23 billion active monthly users" worldwide,¹⁴ where 500 million tweets are processed each day,¹⁵ and where text messaging has taken over, prosecutors have a host of technological options at their fingertips. It has led to positive results, like the use of social media content as useful evidence relied upon by

¹⁰ See David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 213 (2011), <http://www.yalelawjournal.org/images/pdfs/1018.pdf>.

¹¹ *Id.* at 240.

¹² See Nicola A. Boothe-Perry, *Preface to The "Friend"ly Lawyer: Professionalism and Ethical Considerations of the Use of Social Networking During Litigation*, 24 U. FLA. J.L. & PUB. POL'Y 127 (2013); see also Hillary Cohn Aizenman, *Pretrial Publicity in a Post-Trayvon Martin World*, 27 CRIM. JUST. 12, 13 (2012) (describing increased pretrial publicity and its potential impact on jury selection); *Twitter Account Gets Scrubbed in Zimmerman Case*, SMOKING GUN (June 26, 2013), <http://www.thesmokinggun.com/documents/crime/zimmerman-witness-gets-twitter-scrub-748092> (noting that the Twitter account maintained by Rachel Jeantel, a key prosecution witness in the Zimmerman case, was "scrubbed" for inappropriate comments prior to her testifying).

¹³ John Browning, *It's Complicated: How to Walk the Fine Line in the Age of Social Media*, 76 TEX. B.J. 959, 960 (2013).

¹⁴ *Key Facts*, FACEBOOK, <http://newsroom.fb.com/Key-Facts> (last visited Apr. 21, 2014).

¹⁵ *About Twitter, Inc.*, TWITTER, <https://about.twitter.com/company> (last visited Apr. 21, 2014).

prosecutors and defense attorneys alike. But it has also led to new ways to engage in prosecutorial misconduct, as this article illustrates with its discussions of cases in which prosecutors and judges have texted each other during trial, blogged about pending cases, posted inflammatory Facebook updates, and even created false online personas in an attempt to influence alibi witnesses.¹⁶

As this article demonstrates, prosecutorial misconduct arising out of the use (or more accurately, misuse) of technology poses a particular concern thanks to the ease of use and inexorable spread of these new communication platforms. Misconduct can occur more quickly, easily, and be harder to detect because the very nature of the Internet facilitates deceptive conduct. It can take forms never envisioned before by courts or bar ethics authorities, including the exchange of texts hidden from the defense or a rogue prosecutor who takes it upon himself to create a false Facebook profile and tamper with witnesses. The ABA adopted changes to the Comments to Rule 1.1 of the Model Rule of Professional Conduct in August 2012, a key portion of which now expands the definition of what constitutes competent representation.¹⁷ Counsel in all areas must now not only keep abreast of changes in their specialty, they must also be conversant in the benefits and risks of technology.¹⁸ The many ways of committing prosecutorial misconduct in the digital age discussed in this article underscore the importance of this concept.

II. THE TROUBLE WITH TEXTING, PART ONE

When a Broward County, Florida jury convicted Omar Loureiro of first degree murder on March 27, 2007, and when then Broward Circuit Judge Ana Gardiner imposed the death penalty on Loureiro on August 24, 2007, neither the defendant, his lawyers, nor the jury were aware of a fact that would later send shockwaves across the Florida legal community: that the prosecutor in the case and Judge Gardiner had secretly chatted and texted hundreds of times over the course of his trial.¹⁹ Over the course of 151 days, Broward County prosecutor Howard Scheinberg and Judge Gardiner

¹⁶ See *infra* Parts II–III, V–VII, IX.

¹⁷ See Joan C. Rodgers, *Ethics 20/20 Rule Changes Approved by ABA Delegates with Little Opposition*, 28 LAW. MANUAL ON PROF. CONDUCT 509, 509 (2012).

¹⁸ See MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 8 (2012).

¹⁹ See Fla. Bar v. Scheinberg, No. SC11-1865, 2013 Fla. LEXIS 1225, at *3 (Fla. June 20, 2013) (*per curiam*).

exchanged 471 text messages and 949 cellphone calls, averaging nearly 10 ex parte communications *per day*.²⁰ Unbeknownst to Loureiro, with his life literally on the line, the lawyer prosecuting him and the judge who would ultimately decide his fate were in regular, secret contact—including a seventy-minute phone conversation on the very same night that the jury returned a verdict recommending a death sentence.²¹

Both Gardiner and Scheinberg denied any romantic relationship.²² According to David Bogenschutz, the lawyer who later defended Gardiner in a disciplinary proceeding, “[t]he relationship, if you can call it that, between Ms. Gardiner and Howard Scheinberg was a phone relationship, a text relationship and it had to do with their own personal problems.”²³ Bogenschutz maintained that Scheinberg was supportive of Gardiner after she lost her father and grandmother in early 2007, while Gardiner was a source of support for Scheinberg as he went through a difficult divorce and “its effects on his two young daughters.”²⁴ Bogenschutz added that the bulk of the texts were brief, consisting of little more than “how are you” or “can’t talk now.”²⁵ Moreover, according to the Florida Supreme Court in its ruling on the disciplinary action brought against Scheinberg, “[i]t is not disputed that their conversations were personal in nature and did not pertain to the *Loureiro* case.”²⁶

At the same time, however, the court observed that the communications between Scheinberg and Judge Gardiner “were not casual or administrative, such as the type of communication that might occur when a lawyer and judge pass each other in the hallway or when they serve on the same committees.”²⁷ Instead, the court noted that the “extensive communications . . . created an appearance of impropriety in the case” and “served to damage the perception of judicial impartiality.”²⁸ In fact, the Florida Supreme

²⁰ *See id.* at *1, *3.

²¹ Tonya Alanez, *Ex-Judge in Court over Texting*, SUN-SENTINEL (Ft. Lauderdale), Nov. 28, 2012, at 1A.

²² Gardiner denied having a romantic relationship with Scheinberg through her attorney. *Id.* Likewise, in Scheinberg’s disciplinary proceeding, the court noted the impropriety of Scheinberg’s conduct even in absence of a romantic relationship. *See Scheinberg*, 2013 Fla. LEXIS 1225, at *7–8.

²³ Alanez, *supra* note 21 (internal quotation marks omitted).

²⁴ *Id.*

²⁵ *Id.* (internal quotation marks omitted).

²⁶ *Scheinberg*, 2013 Fla. LEXIS 1225, at *7.

²⁷ *Id.*

²⁸ *Id.* at *7–8.

Court felt strongly enough about the damage that this sordid episode did to the administration of justice that it doubled the recommended penalty of one year put forth by a referee and suspended the former prosecutor's Florida law license for two years.²⁹ Not only was the court swayed by the "substantial number of personal communications that were not disclosed to the opposing party and his attorney," but also the fact that "this conduct occurred in the context of a capital first-degree murder case where the judge had to rule on motions made by and against [Scheinberg] . . . and where the judge could, and did, impose the ultimate sentence of death."³⁰ Moreover, the court concluded, Scheinberg's conduct resulted in the expenditure of resources of defense counsel and valuable court resources, including an investigation and the retrial of the *Loureiro* case (he was convicted at his second trial).³¹ For both "the seriousness of Scheinberg's misconduct and the harm it caused to the administration of justice in the *Loureiro* case," the court held a two year suspension was warranted.³²

Ana Gardiner is no longer a judge.³³ She resigned in 2010 from the bench, although that did not forestall a state bar disciplinary proceeding.³⁴ She was found guilty in 2012 of lying to the Judicial Qualifications Commission.³⁵ Although a referee recommended a one year suspension of her law license, the Florida Bar is seeking her permanent disbarment.³⁶

The fact that technology that is readily available to both prosecutors and the judges before whom they practice, combined with a casual societal attitude towards texting, generally can be a recipe for trouble has not been lost on the Florida Supreme Court

²⁹ *Id.* at *10.

³⁰ *Id.* at *11–12.

³¹ *See id.* at *3–4, *12. It should be noted that the referee found that the undisclosed texting and other communication between Gardiner and Scheinberg led "the State of Florida, through its Broward State Attorney to agree to a new trial in *State of Florida v. Omar Loureiro* to dispel any public misconception that there was any denial of due process." *Id.* at *4 (internal quotation marks omitted). In his second trial, Loureiro was again convicted and is serving a life sentence in prison. Tonya Alanez, *Attorney Faces Year Suspension; He Failed to Disclose Texts, Calls to Judge During Trial*, SUN-SENTINEL (Ft. Lauderdale), Apr. 25, 2012, at 1B.

³² *Scheinberg*, 2013 Fla. LEXIS 1225, at *12.

³³ Alanez, *supra* note 21.

³⁴ *Id.*

³⁵ Rafael Olmeda, *Lawyer Out 2 Years; Florida Supreme Court Suspends Former Prosecutor over Relationship with Judge*, SUN-SENTINEL (Ft. Lauderdale), June 21, 2013, at 3B.

³⁶ Rafael Olmeda, *Florida Bar Wants Ex-Broward Judge Disbarred over Misconduct*, SUN-SENTINEL (Ft. Lauderdale), May 10, 2013, at 4B.

Judicial Ethics Advisory Committee (JEAC). Starting with Opinion No. 2009-20, issued in November 2009, the JEAC has issued a series of opinions sharply warning judges against using social networking platforms.³⁷ A majority of the Committee felt that allowing a judge to accept or reject contacts of “friends” on his or her social networking profile would violate Canon 2B of the Code of Judicial Conduct, because “this selection and communication process . . . [may] convey[] or permit[] others to convey the impression that . . . [such ‘friends’] are in a special position to influence the judge.”³⁸

In fact, as one recent case illustrates, Florida is particularly leery of Facebook “friendships” between prosecutors and judges. In *Domville v. State*,³⁹ Pierre Domville faced charges “of lewd and lascivious battery on a child.”⁴⁰ At the trial court level, Domville’s attorney filed a motion to disqualify the trial judge because he happened to be Facebook “friends” with the prosecutor handling the case.⁴¹ Domville’s affidavit in support of the disqualification motion noted that his Facebook friends were “persons whom [he] could not perceive with anything but favor, loyalty and partiality,” and it “attributed [previous] adverse rulings to the judge’s Facebook relationship with the prosecutor.”⁴² “The trial judge denied the motion as ‘legally insufficient.’”⁴³ On appeal, in a September 5, 2012, per curiam opinion, the Fourth District Court of Appeals overturned the trial court’s order denying disqualification, finding that Domville had “alleged facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial.”⁴⁴ In January 2013, the court denied the state’s

³⁷ See Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-04 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-04.html>; Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-05 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-05.html>; Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2010-06 (2010), available at <http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2010/2010-06.html>; Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20 (2009), available at <http://jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html>.

³⁸ Fla. Sup. Ct. Judicial Ethics Advisory Comm., Op. 2009-20, *supra* note 37.

³⁹ *Domville v. State*, 103 So. 3d 184 (Fla. 4th Dist. Ct. App. 2012) (per curiam), *rehearing denied*, 125 So. 3d 178 (Fla. 4th Dist. Ct. App. 2013) (per curiam), *appeal denied*, 110 So. 3d 441 (Fla. 2013) (unpublished table decision).

⁴⁰ Lisa J. Huriash, *State Weighs Whether to Hear Case of Who Judges Can “Friend”; Court May Set Parameters on Social Media Ties*, SUN-SENTINEL (Ft. Lauderdale), Feb. 5, 2013, at 4B.

⁴¹ *Domville*, 103 So. 3d at 185.

⁴² *Id.* (first alteration in original).

⁴³ *Id.*

⁴⁴ *Id.* at 186.

motion for rehearing, but did certify the following question to the Florida Supreme Court: “Where the presiding judge in a criminal case has accepted the prosecutor assigned to the case as a Facebook ‘friend,’ would a reasonably prudent person fear that he could not get a fair and impartial trial, so that the defendant’s motion for disqualification should be granted?”⁴⁵

A concurrence by Judge Gross left no doubt as to his opinion about the risks inherent in judges being active on social media: “Judges do not have the unfettered social freedom of teenagers. Central to the public’s confidence in the courts is the belief that fair decisions are rendered by an impartial tribunal. Maintenance of the appearance of impartiality requires the avoidance of entanglements and relationships that compromise that appearance.”⁴⁶

While both that appellate court and the Attorney General of the State of Florida considered this issue to be of “great public importance,”⁴⁷ in February 2013 the Florida Supreme Court declined to hear the appeal and consider the question that had been certified to it, giving no reason for its decision.⁴⁸ As a result, the 2009 JEAC ethics ruling and the *Domville* case remain the prevailing law in Florida—prosecutors and judges cannot be Facebook friends.

III. THE TROUBLE WITH TEXTING, PART TWO

Canon 3 of the Texas Code of Judicial Conduct provides that:

A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney *ad litem*, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding.⁴⁹

A judge who allegedly disregarded these provisions and communicated *ex parte* with prosecutors in the Polk County District

⁴⁵ *Domville v. State*, 125 So. 3d 178, 179 (Fla. 4th Dist. Ct. App. 2013).

⁴⁶ *Id.* (Gross, J., concurring).

⁴⁷ *See id.* (majority opinion).

⁴⁸ *State v. Domville*, 110 So. 3d 441, 441 (Fla. 2013) (unpublished table decision).

⁴⁹ TEX. CODE OF JUDICIAL CONDUCT Canon 3(B)(8) (2013).

Attorney's Office and the San Jacinto County District Attorney's Office, Elizabeth Coker, is no longer a judge.⁵⁰ Effective December 6, 2013, Judge Coker (who presided over the 258th Judicial District Court in Texas, which serves San Jacinto, Polk, and Trinity counties) resigned her bench as part of a settlement agreement reached with the Texas Commission on Judicial Conduct, and she will never be allowed to sit as a judge in Texas again.⁵¹ While Coker did not admit any guilt as part of this agreement to resign from judicial office in lieu of disciplinary action, the Commission's allegations are telling. They include claims not only of improper ex parte contact with prosecutors, but also that

Judge Coker allegedly exhibited a bias in favor of certain attorneys and a prejudice against others in both her judicial rulings and her court appointments; and Judge Coker allegedly met with jurors in an inappropriate manner, outside the presence of counsel, while the jurors were deliberating in one or more criminal trials . . .⁵²

The Commission's agreement with Coker also alleges that she may have tried to influence a witness in the investigation against her and that she was not truthful in her testimony to the Commission.⁵³

However, the linchpin in the case against Judge Coker proved to be testimony from a former prosecutor in her court, who is now a judge herself. Kaycee L. Jones currently serves as the presiding judge of the 411th Judicial District Court.⁵⁴ She alleged that in 2012 (when she was a prosecutor for the Polk County District Attorney's Office) Judge Coker sent text messages to her to relay instructions to other prosecutors who were trying a felony injury to a child case.⁵⁵ The defendant in that case, David Reeves, was later acquitted.⁵⁶ According to a letter provided by Jones to the Office of Chief Disciplinary Counsel for the State Bar of Texas:

On Aug. 8, 2012, I did receive a text message from Judge

⁵⁰ *In re Coker*, Voluntary Agreement to Resign From Judicial Office in Lieu of Disciplinary Action, at 1–2 (Tex. Comm'n on Judicial Conduct Oct. 19, 2013).

⁵¹ *Id.* at 1–2 & n.1.

⁵² *Id.* at 1.

⁵³ *Id.* at 2.

⁵⁴ Martha Neil, *Judge Texted During Trial to Help State, Says Ex-Prosecutor*, ABAJOURNAL (July 9, 2013, 5:00 AM), http://www.abajournal.com/news/article/judge_texted_during_trial_to_help_state_says_ex-prosecutor.

⁵⁵ *Id.*

⁵⁶ *Id.*

Coker that suggested a line of questioning in an Injury to a Child trial over which she was presiding and telling me to tell the trial prosecutor . . . I was not the trial prosecutor and had nothing to do with the investigation or prosecution of the case, but I was present in the courtroom for portions of the trial as an observer. When I received the text, I hand-wrote the text verbatim and asked our investigator to deliver it to the prosecutor who was trying the case, Beverly Armstrong .

. . .

I deeply regret that I acted in this manner. It was wrong and I knew better. My boss, District Attorney Lee Hon, discussed this incident with me and we agreed that it should not have happened and that it would not happen again . . .⁵⁷

Jones's letter went on to state that she "can 'now fully appreciate the importance of the impartiality of a judge in a trial and my responsibilities as an attorney not to engage in such conduct. I was wrong and nothing like this will ever happen again.'"⁵⁸ The text in question that Jones relayed from Judge Coker to the prosecutor, Beverly Armstrong, clearly was intended to help the prosecution's key points. Judge Coker texted "If he threw dog off bed because dog peed on bed, what would he do if baby pooped on him?????"⁵⁹ Jones texted back "Good point," to which Judge Coker replied "Tell Beverly."⁶⁰ The exchange was witnessed by David Wells, an investigator for the D.A.'s office, who then saw Jones write a comment on the legal pad that Wells and Armstrong were sharing.⁶¹ Wells later wrote a letter to the Commission on Judicial Conduct regarding what he observed.⁶²

The incident is disturbing on multiple levels, and not merely for the text message itself, or the casual manner with which a sitting judge passed on directions and strategy to a prosecutor in her court.

⁵⁷ Vanesa Brashier, *Disgraced Judge Steps Down as Part of Judicial Commission Agreement*, CLEVELAND ADVOCATE (Oct. 21, 2013, 1:54 PM), http://www.yourhoustonnews.com/cleveland/news/disgraced-judge-steps-down-as-part-of-judicial-commission-agreement/article_bd00989d-ad82-56c2-9f56-d7236bb23ae1.html (internal quotation marks omitted).

⁵⁸ *Id.*

⁵⁹ Text Message from Elizabeth Coker, 258th Judicial District Judge, to Kaycee L. Jones, Prosecutor, Polk County District Attorney's Office (Aug. 8, 2012, 5:14 EST), <http://www.click2houston.com/image/view/-/20843542/data/1/-/fcj1qwz/-/JudgeCokerTextDoc.jpg>.

⁶⁰ Text Message from Elizabeth Coker, 258th Judicial District Judge, to Kaycee L. Jones, Prosecutor, Polk County District Attorney's Office, *supra* note 60.

⁶¹ Brashier, *supra* note 57.

⁶² *See id.*

As one observer commented, behavior like this “took [the] uphill battle” that was defending the accused and “increased the grade to 85 degrees, covered it with a sheet of ice and sprinkled it with a 50/50 blend of Teflon and motor oil.”⁶³ This was one documented incident in one trial, in which fortunately the defendant was acquitted despite the distinctly unlevel playing field. The unresolved questions raised by this deplorable episode include how many defendants have been convicted in Polk, San Jacinto, and Trinity counties thanks to a judge and prosecutor comparing notes on trial strategy, examination of witnesses, evidence issues, and other matters? Put another way, how routinely did this occur for a prosecutor (now judge) like Kaycee Jones to have treated it so casually, so nonchalantly, that she merely responded “Good point” to the judge before passing on the instruction to her colleague trying the case? And despite her apologetic, “it’ll never happen again” letter (provided during Judge Coker’s prosecution, rather than immediately after the incident itself), what are criminal defendants appearing before Judge Kaycee Jones to think of their chances for a fair trial and an impartial judge?⁶⁴

Like the temptation to shroud oneself in secrecy or take on another persona, modern technologies like social networking tools and text messaging have only made it easier to covertly engage in misconduct. Without the digital means to do so surreptitiously, prosecutors even considering actions like *ex parte* communications with a sympathetic judge or impersonating a made-up “witness” would be daunted by the lengths to which they’d have to go or the likelihood of getting caught (passing handwritten notes between the bench and counsel’s table is considerably more likely to attract attention than a quick glance at the screen of a smartphone). Thanks to technology, that barrier is removed, leaving only a prosecutor’s conscience and scruples.

⁶³ Tim Cushing, *Texas Judge Forced to Resign After Being Caught Texting Instructions to Assistant DA During Trial*, TECHDIRT (Oct. 24, 2013, 7:19 AM), <http://www.techdirt.com/blog/wireless/articles/20131023/14363624989/texas-judge-forced-to-resign-after-being-caught-texting-instructions-to-assistant-da-during-trial.shtml>.

⁶⁴ It appears that while Elizabeth Coker will never be a judge again, she is not ready to write off elected office entirely. In December 2013, Coker announced her campaign for Polk County Criminal District Attorney, stating that “public service is still in my blood” and that “I have seen firsthand the need for improvement in the District Attorney’s office.” POLKCOUNTYTODAY.COM, <http://www.polkcountytoday.com/coker120813.html> (last visited Feb. 23, 2014) (internal quotation marks omitted).

IV. THE TROUBLE WITH TEXTING, PART THREE: PLEASE DON'T TEXT THE JURORS

The ethical prohibition against lawyers communicating outside the courtroom with jurors is well known and rarely violated.⁶⁵ But as we have seen with other forms of electronic communication, the ease, availability, and seemingly second nature quality of texting for many may contribute to a blurring of the lines for a few with regard to what is ethically permissible. For example, the South Carolina Supreme Court recently suspended (for six months) the license of an assistant solicitor in the state's Ninth Circuit Solicitor's Office for texting with a juror.⁶⁶

It all began on July 8, 2007, when Ninth Circuit Assistant Solicitor Michael O'Brien Nelson received a call from a cousin who had been summoned to jury duty, and wanted advice on how to avoid serving.⁶⁷ Nelson told his cousin to inform the court that his cousin was an assistant solicitor.⁶⁸ The cousin appeared for jury duty the following day, apparently did not tell the court about his relation to an assistant solicitor (Nelson was not on the prosecution team for this case) and was ultimately selected to serve.⁶⁹ After the state rested its case on July 17, 2007, the defense attorney in the criminal case informed the court that he had learned over the weekend that one of the jurors had a cousin who was an assistant solicitor, and requested that the juror be dismissed and that Nelson be questioned.⁷⁰ After some discrepancies between what the cousin told the court about the extent and nature of his communications with Nelson, and what Nelson had to say, the defense attorney offered a telephone log "demonstrating the numerous telephone and text contacts between [Nelson] and [his] [c]ousin between July 6 and July 18."⁷¹ All told, there were approximately thirty contacts between Nelson and his cousin between July 9 (the first day of the

⁶⁵ Unfortunately, the same cannot be said for the rules prohibiting juror communications with third parties or use of the Internet to "research." See, e.g., Terry Dickson, *Gale Will Get New Trial in Stepson's Death; Judge Sets Aside Conviction, Cites Contact Between Juror, Witness*, FLA. TIMES-UNION (Jacksonville), Dec. 11, 2012, at A-1.

⁶⁶ *In re Nelson*, 750 S.E.2d 85, 86 (S.C. 2013).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 88.

trial) and July 17, 2007 (when the cousin was excused from the jury)—contacts which correlated closely with breaks and recesses during the trial.⁷²

The South Carolina Supreme Court’s opinion does not provide any insight into the specifics of the calls and texts, in part because Nelson maintained he had no memory of them because they were short.⁷³ Interestingly, Nelson did recall that he went into the courtroom once “during the trial and the trial judge texted him and told him to leave,” a message that led Nelson to assume the “judge was ‘messing with’ him” since “he and the trial judge were friends, and that texting with the trial judge was not uncommon.”⁷⁴ Ultimately, the court found that Nelson violated the following provisions of South Carolina’s Rules of Professional Conduct: (1) “Rule 3.4(c) (lawyer shall not knowingly disobey an obligation under the rules of a tribunal)”; (2) “Rule 3.5 (lawyer shall not communicate *ex parte* with a juror during the proceeding unless authorized to do so by law or court order)”; and (3) “Rule 8.4(e) (it is professional misconduct for lawyer to engage in conduct prejudicial to the administration of justice).”⁷⁵ Nelson “resigned his position with the Ninth Circuit Solicitor’s Office effective June 1, 2013.”⁷⁶

V. PROSECUTORS BEHAVING BADLY

The siren song of social media has proven all too tempting for people from all walks of society when it comes to sharing (and in many cases oversharing) seemingly every detail of their lives online. From intimate relationship matters to complaints about jobs or family, sites like Facebook have become a kind of digital confessional where one can vent or engage in all manners of questionable judgment calls. Even escaped convicts have posted on Facebook while on the run, a move that usually hastens apprehension.⁷⁷

Prosecutors and other government attorneys are as human as everybody else and their use of social media—while not always rising to the level of misconduct—can still serve as a useful prism into instances of poor judgment and character flaws. These

⁷² See *id.* at 88–89.

⁷³ *Id.* at 89.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 90 n.7.

⁷⁷ See, e.g., JOHN G. BROWNING, *THE LAWYER’S GUIDE TO SOCIAL NETWORKING: UNDERSTANDING SOCIAL MEDIA’S IMPACT ON THE LAW* 54–55 (2010).

cautionary tales from the digital age include the following examples:

In July 2012, Brooklyn Assistant District Attorney Justin Marrus had his Facebook page profile posted on a national media outlet.⁷⁸ The page featured photographs of Marrus in blackface, displaying a Confederate flag, and engaging in a simulation of prison rape.⁷⁹ A spokesman for the D.A.'s office said, "We think the[] [photos] are abhorrent, stupid, and childish. We're asking Mr. Marrus for [a] full explanation of his conduct, which is totally unacceptable. And we will take appropriate action."⁸⁰

In May 2011, Guadalupe County, Texas assistant district attorney Larry Bloomquist was found in contempt and fined for violating a court's gag order by posting a Facebook status update about an ongoing felony trial.⁸¹ Apparently, the gag order was entered at the start of the manslaughter trial, and Judge Gary Steel was not amused when Bloomquist posted "Happy ending" on Facebook when the jury returned a guilty verdict.⁸² Those two words cost the assistant D.A. \$400.⁸³

In July 2012, former Norfolk, Virginia assistant prosecutor Clifton C. Hicks was experiencing some problems with his former boss, Commonwealth's Attorney Greg Underwood.⁸⁴ Unfortunately, he made Facebook his forum for airing his grievances. After a series of Facebook posts in which Hicks allegedly threatened Underwood, the former assistant was charged with the felony of making "a written threat to kill or do bodily injury."⁸⁵

In February 2011, Jeffrey Cox (then a deputy attorney general in Indiana) tweeted about using "live ammunition" on pro-labor protestors in Madison, Wisconsin, in addition to a number of similarly politically-charged comments on a blog he maintained.⁸⁶

⁷⁸ See Garth Johnston, *Should Brooklyn ADAs Wear Blackface, Simulate Prison Rape on Facebook?*, GOTHAMIST (July 9, 2012, 2:41 PM), http://gothamist.com/2012/07/09/should_brooklyn_adas_put_blackface.php#photo-1.

⁷⁹ See *id.*

⁸⁰ *Id.* (internal quotation marks omitted).

⁸¹ See Roy Bragg, *Prosecutor in Hot Water over Facebook Post*, SAN ANTONIO EXPRESS-NEWS, May 12, 2011, at 3B.

⁸² See *id.*

⁸³ *Id.*

⁸⁴ See Louis Hansen, *Ex-Prosecutor is Charged after Facebook Post*, VIRGINIAN-PILOT (Norfolk, Va.), July 27, 2012, at B3.

⁸⁵ *Id.*

⁸⁶ See *Indiana State Prosecutor Fired over Remarks About Wisconsin Protests*, CNN (Feb. 23, 2011, 9:57 PM), <http://www.cnn.com/2011/US/02/23/indiana.ammo.tweet/>; Debra Cassens Weiss, *Indiana Deputy AG Loses Job After Live Ammo Tweet*, ABAJOURNAL (Feb. 24, 2011, 4:46 PM), http://www.abajournal.com/news/article/indiana_deputy_ag_loses_job_after_live_ammotto_tweet/.

The Indiana A.G.'s office terminated him, stating, "We respect individuals' First Amendment right to express their personal views on private online forums, but as public servants we are held by the public to a higher standard, and we should strive for civility."⁸⁷ Cox later commented, "I think that in this day and age that tweet was not a good idea."⁸⁸

In April 2010, following a felony firearms case in Florida, a prosecutor posted a poem to Facebook about a trial which his co-counsel dubbed the "trial from hell."⁸⁹ The poem (intended to be sung to the tune of the theme song from the TV show *Gilligan's Island*) went (in part) as follows:

Just sit right back and you'll hear a tale/A tale of [a] fateful trial/That started from this court in St. Lucie County . . . Six jurors were ready for trial that day for a four-hour trial, a four-hour trial/The trial started easy enough/But then became rough/The judge and jury confused/If not for the courage of the fearless prosecutors/The trial would be lost, the trial would be lost.⁹⁰

While the judge granted a mistrial in the case, the parody song/poem was not cited as one of the grounds—since it had been posted only after deliberations were already over.⁹¹ Nevertheless, Chief Assistant State Attorney Tom Bakkedahl was clearly not amused by the ditty, especially with its references later in the song to the "gang banger defendant" and the "weasel face" defense attorney.⁹² He characterized the prosecutor's conduct as "immature" behavior that his office would need to learn from.⁹³

In August 2013, an assistant U.S. Attorney in the criminal division of the Beaumont, Texas office of the U.S. Attorney for the Eastern District of Texas posted a number of derogatory comments on Facebook about President Obama.⁹⁴ AUSA John Craft referred to the President as "the Dalibama" and posted a graphic that read "Obama: Why Stupid People Shouldn't Vote."⁹⁵ Perhaps more

⁸⁷ Weiss, *supra* note 86 (internal quotation marks omitted).

⁸⁸ *Id.*

⁸⁹ BROWNING, *supra* note 77, at 150 (internal quotation marks omitted).

⁹⁰ *Id.*

⁹¹ *Id.* (internal quotation marks omitted).

⁹² *Id.* (internal quotation marks omitted).

⁹³ *Id.* (internal quotation marks omitted).

⁹⁴ See Brooke Crum, *Assistant U.S. Attorney's Facebook Posts Probed*, BEAUMONTENTERPRISE.COM (Aug. 14, 2013, 11:33 AM), <http://www.beaumontenterprise.com/news/article/Assistant-U-S-attorney-s-Facebook-posts-probed-4730814.php>.

⁹⁵ *Id.* (internal quotation marks omitted).

disturbing than his personal opinions about the President were Craft's comments—in response to a status update backing “Stand Your Ground” laws generally—referencing the Trayvon Martin/George Zimmerman case. Craft wrote:

How are you fixed for Skittles and Arizona watermelon fruitcocktail (and maybe a bottle of Robitussin, too) in your neighborhood? I am fresh out of “purple drank.” So, I may come by for a visit. In a rainstorm. In the middle of the night. In a hoodie. Don't get upset or anything if you see me looking in your window . . . kay?⁹⁶

The U.S. Attorney for the Eastern District of Texas, John Malcolm Bales, stated that while Craft was not speaking in any official capacity, he did not agree with the Facebook comments and considered any discriminatory sentiments to be “reprehensible.”⁹⁷ Bales also distanced his office from the comments, saying that “It speaks ill of our office in connection We don't think like that. We don't act like that.”⁹⁸ At least one defense attorney for a minority defendant being prosecuted by Craft has voiced concern about potentially “improper motivation” behind Craft's sentencing recommendations.⁹⁹

VI. *STATE V. USEE*

Abdulsalam Mohamed Usee, a Somali immigrant living in Minneapolis, Minnesota, was tried and convicted of three counts of attempted first-degree murder in connection with the shootings of three people outside a Minneapolis apartment complex on August 14, 2008.¹⁰⁰ As part of the basis for a motion for new trial, and later as one of the grounds for appeal when that motion was denied by the trial court, Usee argued that Assistant Hennepin County Attorney Gretchen Gray-Larson engaged in prosecutorial misconduct by making certain comments about the trial on her Facebook page.¹⁰¹ The jury had begun deliberations on February 2,

⁹⁶ *Id.* (internal quotation marks omitted). The post refers to the fact that Martin, who was wearing a hoodie when he was fatally shot on February 26, 2012 in Sanford, Florida, had been to a nearby store for a package of Skittles and an Arizona Iced Tea. *Id.*

⁹⁷ *Id.* (internal quotation marks omitted).

⁹⁸ *Id.* (internal quotation marks omitted).

⁹⁹ See Brooke Crum, *Beaumont Prosecutor's Comments Draw Attention From D.C., Opposing Counsel*, BEAUMONTENTERPRISE.COM (Aug. 15, 2013, 9:07 AM), <http://www.beaumontenterprise.com/news/article/Beaumont-prosecutor-s-comments-draw-attention-4733372.php> (internal quotation marks omitted).

¹⁰⁰ *State v. Usee*, 800 N.W.2d 192, 195 (Minn. Ct. App. 2011).

¹⁰¹ See *id.* at 196; Rochelle Olson, *Hennepin Prosecutor Accused of Anti-Somali Posting on*

2010, returning guilty verdicts on February 4, 2010.¹⁰² The Facebook comments in question were posted on February 1 or 2; however, Usee and his counsel didn't present this to the court until February 8, 2010, when a request for a *Schwartz* hearing was made by the defense.¹⁰³ Under Minnesota procedure, a *Schwartz* hearing is the preferred vehicle for addressing post-trial issues involving juries, including questions of jury misconduct.¹⁰⁴

The comments posted to Ms. Gray-Larson's publicly viewable Facebook page included a statement about being "comfortable" about her case given one juror's college affiliation.¹⁰⁵ They also included a statement that she was "keep[ing] the streets of Minneapolis safe from the Somalias [sic]."¹⁰⁶ These comments were made "before the case was submitted to the jury."¹⁰⁷ However, the appellate court upheld the trial court's denial of the request for a *Schwartz* hearing (and held that Mr. Usee was not deprived of his right to a fair trial before an impartial jury) because there was no evidence that any juror had been exposed to the comments and "[a]bsent evidence of juror exposure, appellant did not establish a prima facie case of juror misconduct."¹⁰⁸ In doing so, the court noted that the jury had been instructed "not to research the case, the issues, or anyone involved in the case on the Internet," and that the only evidence presented by the defendant was affidavits by his attorneys about what was posted on Facebook by the prosecutor—not evidence of any juror's awareness of the posts.¹⁰⁹

The other basis for the court's refusal to grant a new trial was the timing of the defense's motion.¹¹⁰ The court observed that the defendant's request for a *Schwartz* hearing on jury misconduct came four days after the jury had returned the guilty verdicts and been discharged, and six days after the defense became aware of the Facebook comments—at least one of which was made the same day the jury was charged and began deliberating.¹¹¹ Nowhere did the

Facebook, STARTRIBUNE (Feb. 17, 2010, 8:00 AM), <http://www.startribune.com/printarticle?id=84525452>.

¹⁰² *Usee*, 800 N.W.2d at 196.

¹⁰³ *Id.*

¹⁰⁴ *See, e.g., id.* at 200–201.

¹⁰⁵ Olson, *supra* note 101.

¹⁰⁶ *Usee*, 800 N.W.2d at 200 (alteration in original) (internal quotation marks omitted).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 201 (citing *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000); *State v. Beier*, 263 N.W.2d 622, 626–27 (Minn. 1978)).

¹⁰⁹ *Usee*, 800 N.W.2d at 201.

¹¹⁰ *See id.*

¹¹¹ *Id.*

trial or appellate courts apparently consider the conduct of the author of the comments (the prosecutor) or the nature of the wall posts. While a prosecutor should not be commenting at all about a pending trial on her Facebook page, the effect of a remark about feeling “comfortable” with a certain juror or jurors is likely to be negligible. However, because the defense did not present any affidavits or other testimony from any of the jurors, we can only speculate as to how potentially inflammatory, or racially and culturally insensitive, a post like “keep[ing] the streets of Minneapolis safe from the Somalias [sic]” might seem to those serving on the *Usee* jury.¹¹² In a city that has struggled to assimilate one of the largest concentrations of Somali immigrants in the country,¹¹³ and in a state that has witnessed sometimes violent cultural clashes with other immigrant communities (like the Hmong¹¹⁴), the notion of a prosecutor turning to social networking to stir up fear of “the other” shortly before deliberations begin is disturbing, indeed.

VII. *PEOPLE V. DUNN*

Twenty-nine-year-old Damon Dunn was scheduled to stand trial in 2013 for the shooting death of Kenneth “Blue” Adams on May 18, 2012, at a car wash on the East Side of Cleveland, Ohio.¹¹⁵ In April 2013, Myron Watson, Dunn’s defense attorney, provided Cuyahoga County Prosecutor’s Office with the names of two alibi witnesses, women who could testify that at the time of the murder, Damon Dunn was actually miles away, on the other side of Cleveland at Edgewater Park.¹¹⁶ The Assistant County Prosecutor working on

¹¹² *Id.* at 200 (alteration in original) (internal quotation marks omitted).

¹¹³ See Elizabeth Dunbar, *Comparing the Somali Experience in Minnesota to Other Immigrant Groups*, MPRNEWS (Jan. 22, 2010), <http://www.mprnews.org/story/2010/01/25/comparing-the-somali-experience-in-minnesota-to-other-immigrant-groups-of-immigrants->; Laura Yuen, *Young Men Escape Bloodshed in Somalia, but Find Violence in Minnesota*, MPRNEWS (Jan. 25, 2010) <http://www.mprnews.org/story/2010/01/25/civil-war-kids-part1>; Laura Yuen, *The Turmoil Within: Somali Families Try to Fit In, Struggle to Forget*, MPRNEWS (Jan. 25, 2010) <http://www.mprnews.org/story/2010/01/21/civil-war-kids-part2>.

¹¹⁴ See, e.g., Julie Siple, *Hmong Leaders Call for Help with Violence Prevention*, MPRNEWS (Apr. 3, 2013), <http://www.mprnews.org/story/2013/04/03/news/hmong-violence-meeting>.

¹¹⁵ See *Case Information: The State of Ohio vs. Damon Dunn*, CUYAHOGA CNTY. CLERK COURTS, http://cpdocket.cp.cuyahogacounty.us/CR_CaseInformation_Docket.aspx?q=bzTxzpLZ-PRf0qr1MmD0Q2 (last visited Apr. 24, 2014); James F. McCarty, *Prosecutor Fired for Internet Chats with Alibi Witnesses in Murder Case Hoped to Get Women to Say They Were Lying*, CLEVELAND PLAIN DEALER, June 7, 2013, at A1, available at 2013 WLNR 14010600.

¹¹⁶ McCarty, *supra* note 115.

the case was thirty-five-year-old Aaron Brockler, who had been with the office since 2006.¹¹⁷ Conferring with the lead homicide detective on the case, Brockler considered the alibi witnesses pivotal to the case.¹¹⁸ As he would later relate to local media, “Unless I could break this guy’s alibi a murderer might be walking on the street. There was such a small window of opportunity, I had to act fast.”¹¹⁹

What Brockler did next was to engage in conduct that not only violates ethical prohibitions against acting with deception toward third parties,¹²⁰ but also is a crime in states such as Texas and California—impersonating someone else online or adopting a false online persona, sometimes referred to as “e-personation.”¹²¹ Brockler posed as a fictitious ex-girlfriend of defendant Dunn who had borne his child.¹²² He engaged in Facebook chats with both alibi witnesses as this fictional “baby mama,” urging the women to change their testimony.¹²³ According to Brockler, both witnesses went “crazy” at the supposed news that Dunn had a “baby mama” on the side.¹²⁴ The next day, Brockler spoke with each of the witnesses in his role as assistant prosecutor, never revealing that he was also posing online as the made-up baby mama.¹²⁵ According to him, one of the alibi witnesses was furious with Dunn and said, “This is bogus, I’m not going to lie for him.”¹²⁶ The other alibi witness also supposedly recanted her account of having been at the beach with Dunn, saying that she too “wasn’t going to lie for him” and “wanted the truth to be known.”¹²⁷

Brockler claims he communicated with defense counsel Myron Watson that Dunn’s alibi had evaporated, and he printed transcripts of the Facebook chats he had engaged in under the guise of being Dunn’s baby mama, placing them in the file.¹²⁸ At this point, the story takes an interesting turn. Brockler went on medical leave a few days after his online subterfuge (he was scheduled for

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (internal quotation marks omitted).

¹²⁰ OH. RULES OF PROF’L CONDUCT R. 8.4(c) & cmt.2 (2013).

¹²¹ CAL. PENAL CODE § 528.5(a)–(d) (West 2014); TEX. PENAL CODE ANN. § 33.07(a)–(c) (West 2014); see generally Rodolfo Ramirez, *Online Impersonation: A New Forum for Crime on the Internet*, 27 CRIM. JUST. 6, 7–8 (2012) (discussing the California and Texas online impersonation laws).

¹²² McCarty, *supra* note 115.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.* (internal quotation marks omitted).

¹²⁷ *Id.*

¹²⁸ *Id.*

eye surgery).¹²⁹ The attorney filling in for him, Assistant County Prosecutor Kevin Filiatraut, called Brockler about the Facebook chat transcripts that were in the file, and Brockler explained that he was the mystery woman.¹³⁰ Filiatraut informed his supervisors about the situation.¹³¹

To his credit, County Prosecutor Timothy J. McGinty took immediate action.¹³² He removed his now-tainted office from the case, handing it over to the Ohio Attorney General to prosecute.¹³³ McGinty also informed defense counsel as well as the court, and “[Cuyahoga County] Common Pleas Judge Jose Villanueva ordered that all future court filings in the case be sealed.”¹³⁴ McGinty also initiated a disciplinary investigation that led to Brockler’s termination in June 2013.¹³⁵ McGinty stated that Brockler was fired for good cause:

This office does not condone and will not tolerate such unethical behavior He disgraced this office and everyone who works here. . . .

By creating false evidence, lying to witnesses as well as another prosecutor, Aaron Brockler has damaged the prosecution’s chances in a murder case where a totally innocent man was killed at his work.¹³⁶

Perhaps most troubling about Brockler’s misconduct is not just the impersonation and misrepresentations themselves, but his unrepentant attitude in the wake of the scandal. The now-former prosecutor told local media that he was motivated by his sense of justice and his sympathy for the victim’s mother, saying he “felt her pain over losing her son.”¹³⁷ Brockler feels he did nothing wrong, pointing to the long history of law enforcement using schemes and ruses in the course of building a case, and saying “I think the public is better off for what I did.”¹³⁸ He added, “To me, this is all a massive overreaction I wasn’t some rogue prosecutor sitting behind a computer trying to wrongfully convict someone. I did what the Cleveland police detectives should have done before I got the

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* (internal quotation marks omitted).

¹³⁷ *Id.* (internal quotation mark omitted).

¹³⁸ *Id.* (internal quotation marks omitted).

file.”¹³⁹

Brockler’s statements demonstrate a fundamental disconnect that lies at the heart of prosecutorial misconduct. His ends-justifying-the-means rationalization—“the public is better off for what I did”—reflects the all too widely-held belief that prosecutors can not only supervise deception by investigators or other law enforcement personnel, but that they can even engage in it themselves. What Brockler likened to a mere “ruse to obtain the truth”¹⁴⁰ arguably violated ethical rules against tampering with evidence, suborning perjury, becoming a necessary witness, engaging in misrepresentation of the facts, dishonest or deceptive conduct toward a third party, and, of course, prosecutorial misconduct itself. Yet such misconduct persists. Although the *Gatti*¹⁴¹ case in Oregon in 2000 held that attorneys for the state are as restricted from using lies and deception in their practice as attorneys in private practice,¹⁴² subsequent decisions in some parts of the country have backed off from such a bright line standard. For example, in both Virginia and the District of Columbia, opinions have suggested that application of their Rule 8.4 (Misconduct) should be limited to instances where a lawyer’s deceptive investigative activities indicate that he or she lacks integrity and trustworthiness.¹⁴³ This “it’s all for a good cause” rationalization ignores the fact that lying in and of itself inherently demonstrates a lack of trustworthiness.

And if the rationalization by Brockler doesn’t sufficiently answer the question of why he would engage in such misconduct, consider the implications of this behavior in the digital age. The perceived anonymity of the Internet, combined with the immediacy and artificial intimacy of social networking platforms, are a potent combination for those who might engage in deceptive conduct. In fact, in one of the few ethics opinions that addressed attorneys engaging in case investigations using social networking tools, the New York City Bar pointed out the reason for heightened concern even as it gave its cautious approval to the notion of lawyers investigating parties and witnesses through their social media profiles.¹⁴⁴ While the New York City Bar opinion stated that

¹³⁹ *Id.* (internal quotation marks omitted).

¹⁴⁰ *Id.* (internal quotation mark omitted).

¹⁴¹ *In re Gatti*, 8 P.3d 966 (Or. 2000).

¹⁴² *See id.* at 976.

¹⁴³ *See* D.C. Bar, Ethics Op. 323 (2004), available at <https://www.dcbbar.org/bar-resources/legal-ethics/opinions/opinion323.cfm>; Va. St. Bar Standing Comm. on Legal Ethics, Legal Ethics Op. 1765 (2003), available at <http://www.vacle.org/opinions/1765.htm>.

¹⁴⁴ The Ass’n of the Bar of the City of New York Comm. on Prof’l Ethics, Formal Op. 2010-

attorneys can use sites like Facebook to investigate cases, they cannot “friend” an individual under false pretenses to obtain evidence from a social networking website.¹⁴⁵ As the Committee observed:

[I]t may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness’s home, view the witness’s photographs and video files, learn the witness’s relationship status, religious views and date of birth, and review the witness’s personal diary, the witness almost certainly would slam the door shut and perhaps even call the police.

In contrast, in the “virtual” world, the same stranger is more likely to be able to gain admission to an individual’s personal webpage and have unfettered access to most, if not all, of the foregoing information.¹⁴⁶

VIII. *MILLER V. STATE*

Investigative misconduct online is one thing, but what about the improper use at trial of what prosecutors find on a social networking platform? In *Miller v. State*,¹⁴⁷ the appellant and his father robbed a liquor store in Cass County, Indiana in November 2007.¹⁴⁸ In the course of the holdup, Miller pointed a shotgun at the hapless clerk’s face.¹⁴⁹ At trial, during his closing argument, the prosecutor showed the jury a video from YouTube demonstrating “how easy it was to conceal a weapon inside clothing.”¹⁵⁰ The YouTube video had *not* been admitted into evidence.¹⁵¹ In fact, the issue of a weapon being concealed had never even been raised; Miller’s defense theory was mistaken identity.¹⁵² Nevertheless, the jury convicted him and he was sentenced to eighteen years in prison.¹⁵³

2, at 2–4 (2010), <http://www.nycbar.org/pdf/report/uploads/20071997-FormalOpinion2010-2.pdf>.

¹⁴⁵ *Id.* at 2–3.

¹⁴⁶ *Id.* at 2.

¹⁴⁷ *Miller v. State*, 916 N.E.2d 193 (Ind. Ct. App. 2009).

¹⁴⁸ *Id.* at 194.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 195 (internal quotation marks omitted).

¹⁵¹ *Id.* at 195 n.3, 197–98.

¹⁵² *Id.* at 196.

¹⁵³ *Id.* at 194.

Miller appealed, arguing that it was an error for the trial court to permit the jury to see the YouTube video.¹⁵⁴ The Indiana Court of Appeals, noting that while experiments and demonstrations might be permitted when they can assist the jury, held that no such assistance could be provided by a video about concealing weapons when the defense's theory was one of mistaken identity.¹⁵⁵ Moreover, the prosecution conceded on appeal that "the whole issue about the ability to hide weapons under clothing was ultimately unimportant."¹⁵⁶

The appellate court also noted that before the video was shown, even the prosecutor acknowledged that the YouTube clip had "*nothing to do with this case.*"¹⁵⁷ The court agreed with Miller that the YouTube video brought "alive the passions of the jury . . . and suggested Miller was not only the robber but that he also . . . intended to . . . cause injury or death."¹⁵⁸ As a result, the court observed, the video that was shown to the jury "was irrelevant, prejudicial, and confused issues."¹⁵⁹

The issue of district attorneys misrepresenting evidence in order to convict defendants (some of whom later turn out to be innocent) or misrepresenting who they are in order to get a witness to change her testimony is disturbing to say the least. And while the justice system would likely demonstrate little hesitation in condemning a prosecutor's racially inflammatory statements made on the courthouse steps, making statements about "keeping the streets safe from Somalis" on a Facebook page (when "72 percent of adult Americans have at least one social networking profile"¹⁶⁰) goes unpunished if not unnoticed. Prosecutors have always had an uneasy truce with the legal profession's ethical prohibitions against engaging in dishonesty, misrepresentation, fraud, or deceit toward third parties. Yet, as cases like *Usee*, *Dunn*, and *Miller* illustrate, the ease of use and ubiquitous nature of social networking platforms make it easier than ever to violate this shaky truce.

IX. BLOGGING IN NEW ORLEANS

A prosecutor commenting online about ongoing trials is one form

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 195–96.

¹⁵⁶ *Id.* at 196 (internal quotation mark omitted).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 197.

¹⁵⁹ *Id.*

¹⁶⁰ Browning, *supra* note 13, at 960.

of potential misconduct. But what about doing so about a pending case or an open investigation? Prosecutors can alter the direction of a case, shape public opinion, and potentially taint the jury pool by engaging in such conduct. Unlike someone like Beaumont Assistant United States Attorney John Craft, who arguably is voicing personal opinions online and not acting in any official capacity, prosecutors who venture online to discuss pending investigations or cases—even using pseudonyms—are engaging in conduct prejudicial to the administration of justice and being deceptive with third parties. Depending on the content of their online posts, prosecutors who take to the Internet to comment on current investigations can endanger the integrity of that investigation by commenting on evidence that has not been vetted, much less admitted (and may never be admitted), inadvertently identifying witnesses, violating confidentiality, or even crossing the line from advocate to fact witness. Moreover, once such behavior comes to light, it cannot help but erode public trust and confidence in the fair and impartial administration of justice.

For example, consider the scandal that rocked the U.S. Attorney's office in New Orleans in 2012. Jim Letten, a 2001 appointee of President George W. Bush, was the U.S. Attorney for the Eastern District of Louisiana (encompassing New Orleans) at the time and, in fact, the country's longest-tenured U.S. Attorney.¹⁶¹ Yet, by December 2012, he had resigned in the midst of investigations into two of his top deputies who had gone online to pseudonymously discuss cases pending in the U.S. Attorney's office, comment on presiding judges, and attack the objects of their office's investigations.¹⁶² Sal Perricone, the first top deputy, resigned in March 2012 after it was revealed that he had made hundreds of online posts on NOLA.com (the website of the *New Orleans Times-Picayune*).¹⁶³ The posts consisted primarily of ones critical of Fred Heebe, a local landfill owner whose company was the subject of an investigation by Letten's office.¹⁶⁴ Perricone posted hundreds of times using the pseudonym "Henry L. Mencken1951."¹⁶⁵

Shortly after the revelation about Perricone, it was revealed that

¹⁶¹ Sari Horwitz, *U.S. Attorney Resigns Amid Scandal in Louisiana*, WASH. POST, Dec. 7, 2012, at A1.

¹⁶² *Id.*

¹⁶³ See John Simerman, *Jan Mann Spread Vitriol Across Political Landscape in Online Posts*, TIMES-PICAYUNE (New Orleans), Jan. 6, 2013, at A, available at 2013 WLNR 384326.

¹⁶⁴ Horwitz, *supra* note 161.

¹⁶⁵ *Id.*

another top deputy of Letten's, First Assistant Attorney Jan Mann, had also posted numerous times on NOLA.com.¹⁶⁶ Her posts included not just comments about Heebe and the investigation into his activities, but also statements criticizing colleagues and discussing open cases.¹⁶⁷ While she was apparently not as prolific as Perricone (the investigation into her online misconduct revealed approximately forty comments), federal authorities issued subpoenas seeking information on eleven aliases she was believed to have used.¹⁶⁸

The woes of federal prosecutors in New Orleans continued when it was revealed in September 2013 that Karla Dobinski, a trial attorney in the Department of Justice's Civil Rights Division in Washington, D.C., was facing an internal probe over pseudonymous comments on NOLA.com as well.¹⁶⁹ Dobinski, according to her attorney, "self-reported" her online activities.¹⁷⁰ They purportedly consisted of posts made under the name "Dipsos" (a slang term for alcoholics), and were referenced in the 129-page ruling of U.S. District Judge Kurt Engelhardt overturning the convictions of five former New Orleans police officers convicted in the shootings of civilians on the Danziger Bridge during Hurricane Katrina.¹⁷¹ Dobinski, whose twenty-eight-year career in the DOJ's Civil Rights Division had been spent investigating and prosecuting police misconduct, among other cases, had been charged with the responsibility of protecting one of the defendant officers, Kenneth Bowen, from the use of his compelled testimony from a state grand jury proceeding.¹⁷² Dobinski posted repeatedly on the progress of the trial on NOLA.com, and according to Judge Engelhardt, urged other anonymous commenters to keep posting as well, particularly those with pro-prosecutor opinions.¹⁷³ According to the court's ruling, Dobinski "*personally* fanned the flames of those burning to see [Bowen] convicted."¹⁷⁴

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; Simerman, *supra* note 163.

¹⁶⁸ Simmerman, *supra* note 163. This was in addition to her online acknowledgment to former Louisiana Governor Edwin Edwards, "eweman." *Id.*

¹⁶⁹ Naomi Martin, *DOJ Prosecutor Karla Dobinski Faces Internal Probe After NOLA.com Comments Revealed*, NOLA.COM (Sept. 24, 2013, 6:49 AM), http://www.nola.com/crime/index.ssf/2013/09/doj_prosecutor_karla_dobinski.html.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *See id.*

¹⁷³ United States v. Bowen, No. 10-204, 2013 U.S. Dist. LEXIS 134434, at *113-15 (E.D. La. Sept. 17, 2013).

¹⁷⁴ *Id.* at *116.

Dobinski's lawyer draws a stark contrast between the posts by his client compared to the online misconduct of Perricone and Mann, saying she never "comment[ed] on the substance of the case" or "the guilt or innocence of the defendant[] [officers]."¹⁷⁵ Did she fail in her responsibility to Kenneth Bowen, and fan the flames of public opinion, as Judge Engelhardt's ruling maintains? Consider one of her posts during the trial:

Saturday, July 30, 2011, 00:02:12: crawdaddy, 123ac, all of you—get to court early on Wednesday and then let the rest of us know as much as you can remember about the closing arguments—what was said, what your impressions are and if you have any more recollections of events during the trial please add them to the comments. You are performing a valuable public service!¹⁷⁶

Were comments like these inflammatory, and did they contribute to the defendants' convictions, which Judge Engelhardt described as a "wanton reckless course of action"?¹⁷⁷ The Department of Justice's Office of Professional Responsibility, which is conducting the internal investigation of Dobinski, will have the final word.¹⁷⁸

X. *STATE OF MISSOURI V. POLK*

David Polk was prosecuted in 2011 in the Circuit Court of St. Louis for forcible rape.¹⁷⁹ It was a "cold case" stemming from the January 9, 1992 sexual assault of an eleven year-old girl whom Polk snatched while "she was walking to the store."¹⁸⁰ Nearly twenty years after the rape, St. Louis law enforcement officials were notified of a match from the Combined DNA Indexing System tying Polk to DNA evidence recovered from the 1992 victim's rape kit.¹⁸¹ After being convicted of forcible rape and forcible sodomy, and being sentenced to concurrent fifteen year terms for each, Polk appealed.¹⁸² As part of the basis for this appeal, Polk argued that

¹⁷⁵ Martin, *supra* note 169.

¹⁷⁶ *Id.*

¹⁷⁷ Bowen, 2013 U.S. Dist. LEXIS 134434, at *115–16.

¹⁷⁸ See *id.* at *59 ("[T]he DOJ Office of Professional Responsibility (OPR) is required to review the conduct of the DOJ attorney involved [in prosecutorial misconduct.]; Martin, *supra* note 169 (confirming that Dobinski's online posts have been referred to OPR for internal investigation).

¹⁷⁹ State v. Polk, No. ED98946, 2013 Mo. App. LEXIS 1478, at *1–3 (Mo. Ct. App. E. Dist. Dec. 17, 2013).

¹⁸⁰ *Id.* at *2, *5.

¹⁸¹ *Id.* at *2–3.

¹⁸² *Id.* at *1.

the trial court had failed to either dismiss the case with prejudice or strike the jury panel due to purportedly “inappropriate public comments about the case on Twitter,” by Circuit Attorney Jennifer M. Joyce.¹⁸³

Indeed, Circuit Attorney Joyce began commenting on the case even before the trial started.¹⁸⁴ Just days before jury selection began Joyce tweeted on her Twitter feed “David Polk trial next week. DNA hit linked him to 1992 rape of 11 yr old girl. 20 yrs later, victim now same age as prosecutor.”¹⁸⁵ The comments continued during the trial, with Joyce tweeting: “Watching closing arguments in David Polk ‘cold case’ trial. He’s charged with raping 11 yr old girl 20 years ago,’ and ‘I have respect for attys who defend child rapists. Our system of justice demands it, but I couldn’t do it. No way, no how.”¹⁸⁶ During jury deliberations, Joyce continued tweeting, with comments like “Jury now has David Polk case. I hope the victim gets justice, even though 20 years late.”¹⁸⁷ Even after the verdict, the Twitter barrage kept going. Joyce tweeted: “Finally, justice. David Polk guilty of the 1992 rape of 11 yr old girl. DNA cold case. Brave victim now the same age as prosecutor.”¹⁸⁸ She also tweeted, “Aside from DNA, David Polk’s victim could identify him 20 years later. Couldn’t forget the face of the man who terrorized her.”¹⁸⁹

Polk argued that such comments violated the rules of professional conduct for Missouri prosecutors, specifically Rule 4-3.8(f), which provides, in pertinent part, that “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [prosecutors should] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”¹⁹⁰

The appellate court rejected Polk’s argument for one key reason. It ruled that even if the prosecutor’s public comments on Twitter were improper, the true test is whether the trial was fair.¹⁹¹ Even if improper comments were made, the court held, they could not rise

¹⁸³ *Id.* at *1, *4.

¹⁸⁴ *Id.* at *4.

¹⁸⁵ *Id.* (internal quotation marks omitted).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* (internal quotation marks omitted).

¹⁸⁸ *Id.* at 4–5 (internal quotation marks omitted).

¹⁸⁹ *Id.* at 5 (internal quotation marks omitted).

¹⁹⁰ *Id.* (alteration in original) (quoting MO. SUP. CT. R. 4-3.8(f) (2013)).

¹⁹¹ *Polk*, 2013 Mo. App. LEXIS 1478, at *6.

to the level of prosecutorial misconduct unless there was “substantial prejudice,” a standard that could only be satisfied by proving that “the misconduct substantially swayed the judgment.”¹⁹² In this case, the court noted, there was “no evidence that the jury was aware of or influenced by Joyce’s Twitter comments.”¹⁹³ The appellate court observed that none of the jurors indicated during voir dire that they followed the prosecutor on social media, and that the trial court had instructed the panel not to conduct any independent research, and to refrain from using social networking platforms like Facebook or Twitter.¹⁹⁴ Because of the lack of evidence that the jury was tainted, the court said that even if the comments were improper, no effect could be shown and so “the trial court did not abuse its discretion in denying Polk’s motion to dismiss and to strike the jury panel.”¹⁹⁵

However, the court of appeals was nevertheless “troubled” and “concerned” by Joyce’s tweets.¹⁹⁶ It pointed out that “extraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict.”¹⁹⁷ The court went on to express its “doubt that using social media to highlight the evidence against the accused and publicly dramatize the plight of the victim serves any legitimate law enforcement purpose or is necessary to inform the public of the nature and extent of the prosecutor’s actions.”¹⁹⁸ The appellate judges also noted that the nature and timing of the tweets could inflame the public and potentially poison the jury pool.¹⁹⁹ They stated,

Likewise, we are concerned that broadcasting that the accused is a “child rapist” is likely to arouse heightened public condemnation. We are especially troubled by the timing of Joyce’s Twitter posts, because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences.²⁰⁰

Yet as genuine as the court’s concern is for the risk of tainting the

¹⁹² *Id.* at *6–7 (quoting *State v. Forest*, 183 S.W.3d 218, 227 (Mo. 2006) (en banc)).

¹⁹³ *Id.* at *7.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *6.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *See id.*

²⁰⁰ *Id.*

jury and whipping the public into a pro-prosecution fervor with inflammatory tweets, how realistic is its faith in admonishments and instructions by the trial court, or its belief that just because none of the jurors admitted following the circuit attorney on Twitter, no harm could result? Even without being Twitter followers of a given individual, people can be exposed to a tweet through a variety of different means, including retweets, mentions, and links to those tweets by others.²⁰¹ Tweets can spread in as viral a manner as other forms of social media content, regardless of the number of followers of the original tweeter. And while admonishments against venturing online to research a case are well-intentioned, such instructions exist primarily because of the widespread problem of mistrials and overturned verdicts resulting from the online misconduct of jurors.²⁰² In most instances, the court and counsel only become aware of the influence of outside tweets or other online activities involving jurors when one juror comes forward and implicates another; it is rarely discovered through the investigation of the attorneys involved in the case or the court itself. It would be naïve of any court to assert that if it is not aware of any effect on the jury of extrajudicial statements posted on social networking platforms, then no such effect occurred.

For her part, Circuit Attorney Jennifer Joyce remained unrepentant and even buoyed by the court of appeals's ruling.²⁰³ She released a public statement applauding the decision and emphasizing that the majority of her tweets had been posted "only *after* the jury had been instructed to refrain from consulting any external news sources including social media."²⁰⁴ But she voiced disagreement with the court on the role of social media for law enforcement and prosecutors.²⁰⁵ Joyce stated,

I believe communication tools such as Twitter and Facebook are valuable and legitimate ways for law enforcement officials to inform and engage the public. . . .

²⁰¹ See Adam S. Nelson, Note, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in the Twittersphere*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 706 (2012).

²⁰² See Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS (Dec. 8, 2010, 3:23 PM), <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>.

²⁰³ See Press Release, Statement on Social Media, Jennifer M. Joyce, Circuit Attorney, City of St. Louis (Dec. 19, 2013), *available at* <http://www.circuitattorney.org/Article.aspx?ArticleID=559> (follow the "Statement Regarding Social Media" link).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

While I understand some members of the legal community are uncomfortable with social media, the advent of non-traditional media, such as Facebook, Twitter, and websites, have allowed elected officials and government agencies to more directly and transparently communicate and engage with the public.

I am confident that continued use of social media by the Circuit Attorney's Office will balance the competing rights of all citizens.²⁰⁶

The Missouri Public Defender's office also weighed in, calling Joyce's tweets in the *Polk* case "prosecutorial misconduct."²⁰⁷ In addition, the chief public defender for the City of St. Louis, Mary Fox, noted that her office had raised the issue of Joyce's tweets in motions filed in other cases.²⁰⁸ She was encouraged by the concerns voiced in the court of appeals ruling, saying "now the court of appeals has, in their opinion, indicated that they are in agreement. If the behavior is not going to stop, then perhaps the next step is a bar complaint—either an attorney or by a defendant."²⁰⁹

XI. *People v. Armstrong*

Earlier this year, a California appellate court also confronted the dangers of extrajudicial statements made by prosecutors via social media. In *People v. Armstrong*,²¹⁰ Bruce Armstrong sought the reversal of his conviction on counts of domestic violence, claiming numerous acts of prosecutorial misconduct.²¹¹ In addition to claims of witness intimidation and threats to arrest his wife Sunnie (the alleged victim who refused to testify), Armstrong argued that Facebook postings by the prosecutor on her Facebook page a week before voir dire began amounted to prosecutorial misconduct. In what the appellate court called "an incredible display of poor judgment," the prosecutor posted the following comment on Facebook on the very day that she'd been ordered to make the defendant's 13 year-old daughter (identified in court records only as

²⁰⁶ *Id.*

²⁰⁷ Robert Patrick, *Appeals Court "Troubled" by Top St. Louis Prosecutor's Mid-Trial Tweeting*, STLTODAY.COM (Dec. 18, 2013, 6:30 PM), <http://goo.gl/wIHjQk>.

²⁰⁸ *Id.*

²⁰⁹ *Id.* (internal quotation marks omitted).

²¹⁰ *People v. Armstrong*, No. F064006, 2014 Cal. App. Unpub. LEXIS 192 (Cal. App., Fifth Dist. Jan. 13, 2014).

²¹¹ *Id.* at *1.

“T”) available for an interview with defense counsel: “After I spent the day trying to prevent my 13 year old star witness from being kidnapped, I found out I am getting the Prosecutor of the Year Award from the Victims Service Center. I almost cried when they called and told me.”²¹²

The Court of Appeals stated that suggesting there was a plot to kidnap the minor child

would appear to violate Rule 5-120 of [California’s] Rules of Professional Conduct, which prohibits members of the bar from making extrajudicial statements when “the member knows or reasonably should know that [the statement] will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”²¹³

As the court went on to point out, not only did this act of “poor judgment” violate Rule 5-120, “it also created the potential of creating a mistrial and thus wasting valuable government resources.”²¹⁴ Noting that such a comment on the internet is “available to anyone with access to a computer,” and that “a posting on the internet is available to more people than a local newspaper in a magnitude impossible to comprehend,” the court opined that “[a]ll that is required is for one juror to learn of such comments, either directly or indirectly, to sabotage the entire trial.”²¹⁵

Yet despite the display of “extremely poor judgment” that violated the Rules of Professional Conduct with its “inflammatory” comments, the court held that the prosecutor’s “foolishness” did not rise to the level of prosecutorial misconduct.²¹⁶ It reasoned that there was no evidence that a juror had learned of the comment, nor any evidence that the comment was intended to persuade the jury. Accordingly, it declined to order a new trial for Armstrong.²¹⁷

XII. CONCLUSION

The early years of the twenty-first century have witnessed a perfect storm of technological innovation and changing social norms. The ubiquity of handheld wireless devices capable of real-time electronic communication and the infrastructure for more

²¹² *Id.* at *40.

²¹³ *Id.* *40–41. (quoting California Rules of Professional Conduct Rule 5-120).

²¹⁴ *Id.* at *41.

²¹⁵ *Id.* at *41, 42.

²¹⁶ *Id.* at *41.

²¹⁷ *Id.* at *42.

sharing with large audiences which platforms like Facebook and Twitter provide form a potent combination. Nearly three-quarters of all online adults (72 percent) use social media profiles to provide what amount to open, running diaries of their daily lives,²¹⁸ while 73 percent use their mobile devices (we can hardly call them “phones” anymore, can we?) for text messaging as they maintain an ongoing—if abbreviated—dialogue with friends and business associates.²¹⁹ Adults who text “send or receive an average of 41.5 messages per day, with the median user sending or receiving 10 texts daily.”²²⁰

The resulting electronic deluge has proven to be a digital treasure trove for attorneys in a variety of practice areas as they retrieve often invaluable evidence for a wide variety of uses: witness impeachment, proof of motive, and establishing or contradicting alibis, to name just a few. Yet like any tool, new technologies are capable not just of use but of misuse. Time and time again, attorneys on both sides of the bar and in virtually all areas of practice have demonstrated how being unfamiliar with such technologies (or, alternatively, *too* familiar and casual with social media tools and text messaging) can lead that lawyer into an ethical morass. It is especially troubling that such technologies also present fertile ground for new forms of prosecutorial misconduct. Whether blogging about a pending case in the perceived, if illusory, anonymity of the internet, using Facebook and Twitter as a digital bully pulpit to condemn the accused and arouse public opinion, or even more egregious and cringe-worthy actions like exchanging *ex parte* text messages with a judge or impersonating a witness online, prosecutors have shown that misconduct has already assumed a new, digital dimension.²²¹ Do new forms of prosecutorial

²¹⁸ See Browning, *supra* note 13, at 960.

²¹⁹ AARON SMITH, AMERICANS AND TEXT MESSAGING 3 (2011), <http://goo.gl/Ah5N82>.

²²⁰ *Id.*

²²¹ One example of this new potential for misconduct is the “digital perp walk,” in which prosecutors engage in online public shaming of those who have been accused but not convicted. The D.A.’s office in Montgomery County, Texas took to Twitter in December 2009 to publish the names of those charged with driving while intoxicated (“DWI”) between Christmas and New Year’s Eve. See Robert McMillan, *Texas County to Name Drunk Drivers on Twitter*, PCWORLD (Dec. 24, 2009, 12:30 PM), <http://www.pcworld.com/article/185483/article.html>. County Vehicular Crimes Prosecutor Warren Diepraam said, “It’s not a magic bullet that’s going to end DWIs, but its [sic] something to make people think twice before they get behind the wheel of a car and drive while they’re intoxicated.” *Id.* Critics of the policy, which would soon expand to other holidays, included Houston defense attorney Paul Kennedy, who asked, “[S]hould the DA dismiss a case against a motorist or should a motorist be acquitted by a jury of his peers, will Mr. Diepraam offer a public apology on Twitter as well?” *Id.* (internal quotation mark omitted).

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misconduct demand new rules of professional conduct? Hardly. These may be different forms of communication, but they are communication nonetheless. *Ex parte* is *ex parte*, just as witness tampering is witness tampering, whether it takes place in person, on the telephone, or in cyberspace. Analog rules remain applicable in a digital world, but like all rules, they must be enforced.