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Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media

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SHOULD PROSECUTORS BLOG, POST, OR TWEET?: THE NEED FOR NEW RESTRAINTS IN LIGHT OF SOCIAL MEDIA

Emily Anne Vance*

Prosecutors' extrajudicial speech is not a new problem. Indeed, prosecutors' out-of-court statements to the press and the public at large have been of concern for over a century. Consequently, ethical rules and standards have been implemented to protect defendants from undue reputational harm and to strike a balance between trial participants' right to free speech and defendants' right to due process. Although these rules and standards are periodically revised, they have not yet accounted for the differences between traditional media—for which the rules and standards were written—and social media. Recently, however, prosecutors have used social media to discuss pending cases and other aspects of the prosecutorial function, raising concern over how social media may magnify both the benefits and the risks of harm associated with prosecutors' extrajudicial statements.

This Note analyzes the differences between traditional media and social media, as well as how those differences impact the effect of prosecutors' extrajudicial speech on pending matters, the reputation of the accused, and public perception of prosecutors and the justice system as a whole. This Note argues that the increased risks of harm presented by prosecutors' use of social media necessitate new restraints to restore the free speech/fair trial balance and promote professionalism in the social media age.

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INTRODUCTION

In June 2012, Circuit Attorney Jennifer M. Joyce prosecuted a nearly twenty-year-old “cold case” involving the rape of a young girl.¹ Both before and during the trial, Joyce published several “tweets” about the case on her official Twitter² account.³ One week before the trial, just a few days

1. See *Missouri v. Polk*, 415 S.W.3d 692, 694–95 (Mo. Ct. App. 2013); Robert Patrick, *Appeals Court 'Troubled' by Top St. Louis Prosecutor's Mid-Trial Tweeting*, ST. LOUIS POST-DISPATCH (Dec. 18, 2013, 6:30 PM), http://www.stltoday.com/news/local/crime-and-courts/appeals-court-troubled-by-top-st-louis-prosecutor-s-mid/article_036c54b6-0e7c-5ed7-837c-901b03b799ec.html [<http://perma.cc/MWS3-YM6Z>].

2. Twitter is a social media website where users post “tweets,” or statements of 140 characters or fewer, that are viewable to the poster’s “followers,” who can “re-tweet” the original post or otherwise respond with comments. See Kathryn Kinnison Van Namen, Comment, *Facebook Facts and Twitter Tips—Prosecutors and Social Media: An Analysis of the Implications Associated with the Use of Social Media in the Prosecutorial Function*, 81 MISS. L.J. 549, 550–51 (2012).

3. *Polk*, 415 S.W.3d at 695.

before jury selection began, she posted, “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.”⁴ Joyce posted two additional tweets during the trial, one restating the charges against Polk⁵ and another discussing her sentiments about defending child rapists.⁶ Then, after the close of evidence, once jury deliberations began, Joyce posted, “Jury now has David Polk case. I hope the victim gets justice, even though 20 years late.”⁷

Once evidence of Joyce’s social media activity came to light, the defendant moved to dismiss the case or, alternatively, to strike the jury panel.⁸ Joyce defended her posts, stating that in addition to preserving a criminal defendant’s right to a fair trial, her position as a prosecutor and public servant requires that she keep the public informed about criminal matters and events that affect public safety.⁹ Further, each tweet was based on publicly available information about the trial.¹⁰ The Missouri Court of Appeals ultimately dismissed the defendant’s motion because the court found no evidence that any juror was aware of or swayed by Joyce’s posts.¹¹

Nevertheless, the question remains: Were Joyce’s posts ethical? Should Joyce and other prosecuting attorneys be allowed to use social media to discuss pending cases and other aspects of their role as prosecutors? Or, do the risks of harm to the defendant and to the integrity of the justice system outweigh the potential benefits of engendering a more informed citizenry?

The growth of new media, particularly social media,¹² has facilitated information sharing within a wide range of contexts, including the law.¹³

4. *Id.*

5. *Id.*

6. *Id.* (“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.”).

7. *Id.* Joyce also tweeted after the jury delivered a guilty verdict, stating, “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” and “Aside from DNA, David Polk’s victim could identify him 20 years later. Couldn’t forget the face of the man who terrorized her.” *Id.*

8. *Id.* at 694.

9. Press Release, Jennifer M. Joyce, City of St. Louis Circuit Attorney, Statement on Social Media (Dec. 19, 2013) [hereinafter “Press Release of Circuit Attorney Joyce”], <http://www.circuitattorney.org/docs/Statement%20on%20Social%20Media.pdf> [http://perma.cc/7L47-3X25].

10. *Polk*, 415 S.W.3d at 695. Specifically, each tweet was based on information contained in a felony complaint and a probable cause statement, which had been filed as part of the public record prior to Joyce’s posts. *See id.* Thus, no confidentiality issues were raised. *See id.*

11. *Id.* at 696.

12. Social media has been defined as web-based services that enable individuals to create public or semi-public profiles and communicate with others using the system. *See* Michael E. Lackey, Jr. & Joseph P. Minta, *Lawyers and Social Media: The Legal Ethics of Tweeting, Facebooking and Blogging*, 28 *TOURO L. REV.* 149, 151 (2012) (citing Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 *J. COMPUTER-MEDIATED COMM.* 210, 211 (2007)). The most popular social media websites—like Facebook, Twitter, and LinkedIn—enable individuals to engage in social or professional networking. *See id.* at 151–52; Leonard M. Niehoff, *Of Tweets and Trials*, 27 *COMM. LAW.* 10, 10 n.1 (2010). Other websites facilitate video sharing or online blogging. *See* Lackey, Jr. & Minta, *supra*, at 151–52. Users can provide their identity or post anonymously. *See, e.g.,*

Indeed, social media¹⁴ has a great potential to influence individuals' knowledge and perspectives¹⁵ in a more extensive way than has traditional or "old" media.¹⁶ The expansion of social media thus raises questions about how lawyers may properly use these new technological platforms in such a way that comports with constitutional restraints and ethical rules.¹⁷ Within the criminal justice system, the use of social media is particularly troublesome when the content or nature of the information conveyed biases jurors, unnecessarily harms the defendant, misleads the public, or otherwise tarnishes the sanctity of the judicial process.¹⁸ Restricting extrajudicial statements, however, may burden freedom of speech and provide for a less transparent and open justice system.¹⁹

This tension is particularly reflected in prosecutors' use of social media.²⁰ Although ethical rules govern extrajudicial statements²¹ made by all attorneys or personnel associated with a particular matter,²² prosecutors' extrajudicial statements are subject to additional restrictions²³ due to the prevailing view that prosecutors' statements are likely to influence the views of prospective or active jurors,²⁴ especially in criminal cases.²⁵ Although the rules of professional conduct²⁶ and other standards²⁷ governing prosecutors' extrajudicial speech have struck a balance between

THADDEUS A. HOFFMEISTER, SOCIAL MEDIA IN THE COURTROOM: A NEW ERA FOR CRIMINAL JUSTICE? 19 (2014) (discussing how "social media provides a cloak of anonymity"). The Pew Institute estimates that 65 percent of adult Americans have active profiles on at least one social networking website. See John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 204, 206 (2013).

13. See, e.g., Kendall Coffey, *Defense Perspective on Media and the Court of Public Opinion*, in MEDIA COVERAGE IN CRIMINAL JUSTICE CASES 1, 53 (Andrew E. Taslitz ed., 2013); Amy J. St. Eve et al., *More from the #Jury Box: The Latest on Juries and Social Media*, 12 DUKE L. & TECH. REV. 64, 67 (2014).

14. Although the focus of this Note is on the effects of social media on prosecutors' speech, much of the analysis applies to all forms of electronic media.

15. See St. Eve et al., *supra* note 13, at 67; see also HOFFMEISTER, *supra* note 12, at xiii–xvi.

16. See *infra* Part I.C. For the purposes of this Note, traditional, or "old," media refers to print newspapers, radios, and television broadcasts, while "new" media refers to social media, websites, and other online communications.

17. See Lackey, Jr. & Minta, *supra* note 12, at 149–50.

18. See U.S. CONST. amend VI; Coffey, *supra* note 13, at 52–56; see also *infra* Parts I.A., II.C.2.

19. See *infra* Parts I.A., II.C.1.

20. See *infra* Part II.C.

21. An extrajudicial statement is "[a]ny utterance made outside [of] court." *Extrajudicial Statement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. See MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 2013). See *infra* Part I.B.1 for further discussion of this rule.

23. See *infra* Part I.B.2–4 (discussing Rule 3.8 of the Model Rules of Professional Conduct, the ABA Standards on Fair Trial and Public Discourse, and other restraints on prosecutors' extrajudicial speech).

24. See *infra* Part I.A.

25. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 6 (AM. BAR ASS'N 2013) ("Criminal jury trials will be most sensitive to extrajudicial speech.").

26. See *infra* Part I.B.1–2.

27. See *infra* Part I.B.3.

prosecutors' First Amendment rights and the right of criminal defendants to a fair trial,²⁸ the use of social media complicates this balance because it magnifies both the benefits and the risks of harm associated with prosecutors' extrajudicial statements.²⁹

This Note addresses how social media raises new concerns regarding whether existing restraints on prosecutors' speech about pending criminal matters are sufficient to prevent undue harm to the defendant and the justice system at large. Part I provides an overview of the issues concerning extrajudicial speech and its impact on the judicial process, the rules and standards developed to help resolve these issues, as well as the differences between traditional media—for which the rules were developed—and social media. Part II highlights instances of prosecutors' recent use of social media in official and unofficial capacities. Part II also discusses the competing motivations behind prosecutors' social media activity as well as how social media both increases the benefits and exacerbates the risks of prosecutors' extrajudicial statements. Finally, Part III argues that the magnified harms presented by prosecutors' extrajudicial speech on social media necessitate new restraints to reduce the risks of harm to the defendant, the judicial process, and public perception of the legal profession.

I. OLD PROBLEM, OLD RULES, AND THE RISE OF SOCIAL MEDIA

Because prosecutors' extrajudicial statements have been a longstanding concern due to their potential to influence the outcome of an adjudicatory proceeding, organizations like the American Bar Association (ABA) have developed ethical rules and standards to promote fairness and protect the rights of defendants in pending matters. Part I.A of this section provides an overview of the issues regarding extrajudicial statements in criminal cases. Part I.B then addresses existing restraints on prosecutors' extrajudicial statements that were developed in the context of traditional media, including radio and print journalism. Finally, Part I.C assesses the differences between social media and traditional media and discusses the rise of social media as a news source, thereby raising the question of whether existing restraints are sufficient to protect the integrity of the judicial process in the new media age.

A. A Longstanding Problem: Extrajudicial Statements in Criminal Trials

Lawyers' statements to the media about pending cases have been of concern for over a century.³⁰ This concern developed within the context of

28. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2013) (addressing how and why the Model Rules must "strike a balance between protecting the right to a fair trial [while] safeguarding the right of free expression").

29. See *infra* Parts I.C, II.C.

30. See Suzanne F. Day, Note, *The Supreme Court's Attack on Attorneys' Freedom of Expression: The Gentile v. State Bar of Nevada Decision*, 43 CASE W. RES. L. REV. 1347, 1366 (1993) ("At least since the adoption of the 1908 Canons of Professional Ethics, professional legal organizations have been concerned about a lawyer's interaction with the

lawyers' interactions with newspapers, radio, and television stations.³¹ As discussed at length by many legal scholars,³² the basic premise behind the problem of lawyers' extrajudicial statements about pending matters involves a tension between the First and Sixth Amendments to the U.S. Constitution.³³ The First Amendment prohibits the government from infringing on freedom of speech or of the press,³⁴ while the Sixth Amendment guarantees criminal defendants the right to a fair trial by an impartial jury.³⁵ These rights may come into conflict when members of the jury are exposed to statements made by an attorney affiliated with the case.³⁶

In rendering a verdict in a criminal case, the jury must rely exclusively on admissible evidence offered at trial.³⁷ Statements made before and during trial can expose prospective or acting jurors to prejudicial information about the defendant, thereby affecting the defendant's right to a fair trial by an impartial jury.³⁸ Where attorneys' speech goes unrestrained, there is a risk that statements regarding inadmissible evidence or attorneys' personal

media during the pendency of a trial."); *see also* Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F.L. REV. 95, 96 & n.4 (1995) (discussing how extensive trial publicity has been at issue since at least the 1807 trial of Aaron Burr).

31. *See* Day, *supra* note 30, at 1366 (discussing how the first rules restricting lawyers' interactions with the media were developed in 1908, followed by renewed attention to attorney-media relations in the 1960s).

32. *See, e.g.*, Bryan L. Adamson, *A Criminal Practitioner's Guide to the Media in Client Representation*, in *MEDIA COVERAGE IN CRIMINAL JUSTICE CASES*, *supra* note 13, at 139, 146, 148; Alberto Bernabe-Riefkohl, *Silence is Golden: The New Illinois Rules on Attorney Extrajudicial Speech*, 33 LOY. U. CHI. L.J. 323, 323 (2002); Lonnie T. Brown, Jr., "May It Please The Camera, . . . I Mean the Court"—*An Intrajudicial Solution to an Extrajudicial Problem*, 39 GA. L. REV. 83, 87 (2004); Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1022, 1030–33 (2010). *See generally* HOFFMEISTER, *supra* note 12.

33. *See* Minnefor, *supra* note 30, at 96 & n.3; Day, *supra* note 30, at 1355.

34. U.S. CONST. amend. I.

35. *Id.* amend. VI.

36. *See* Day, *supra* note 30, at 1355; *see also* *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) ("Few, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."). There has been some debate over the extent to which publicity about a case impacts the jury. *See* Minnefor, *supra* note 30, at 99 n.15, 111–13. Nevertheless, as discussed below, this Note concludes that the rise of social media has magnified prosecutors' ability to influence jurors, which necessitates the imposition of additional restraints on prosecutors' use of this communication medium. *See* Parts II.C.2, III.

37. *See, e.g.*, *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").

38. *See* Matthew Mastromauro, *Pre-Trial Prejudice 2.0: How YouTube Generated News Coverage is Set to Complicate the Concepts of Pre-Trial Prejudice Doctrine and Endanger Sixth Amendment Fair Trial Rights*, 10 J. HIGH TECH. L. 289, 290 (2010). In general, pre-trial statements are more likely to prejudice the proceeding because the jury has not yet been empaneled and instructed to avoid news coverage of the case. *See* Minnefor, *supra* note 30, at 102. Although measures are taken to prevent empaneled jurors from obtaining extraneous information about the case, these measures are not always effective. *See* HOFFMEISTER, *supra* note 12, at 56 (discussing ways to improve the efficacy of jury instructions).

perceptions of the proceedings will reach and influence the jury.³⁹ Attorneys' unique role in the judicial process, including their access to confidential information, "bestows 'a degree of credibility to their speech' above that of an ordinary citizen" or the press, which makes it more likely that their statements will affect a given proceeding.⁴⁰ Although this is true for prosecutors and criminal defense attorneys alike, prosecutors' extrajudicial statements are of particular concern in the free speech/fair trial debate⁴¹ because prosecutors "speak with 'the inherent authority of the government.'"⁴² In other words, given the nature of the prosecutorial role, prosecutors' extrajudicial statements are considered particularly likely to influence a pending proceeding.⁴³

At the same time, however, prosecutors' extrajudicial statements may also provide the public with important information about public safety and the functioning of the judicial system within their community.⁴⁴ As prosecutors are considered public servants who are accountable to their constituents,⁴⁵ some scholars have contended that prosecutors have an

39. See Minnefor, *supra* note 30, at 100, 114–15.

40. Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 AM. CRIM. L. REV. 1513, 1533 (2010) (quoting Attorney Grievance Comm'n of Maryland v. Gansler, 835 A.2d 548, 559 (Md. 2003)). This knowledge seems to outweigh any concern that attorneys' statements are biased in favor of the side that they represent. See Minnefor, *supra* note 30, at 114.

41. See Lipman, *supra* note 40, at 1530; see also Peter Andrew Malanchuk, Comment, *The Court of Public Opinion: Did Former Attorney General John Ashcroft Violate Ethics Rules Regarding Extrajudicial Statements and If So, Why Was He Not Sanctioned?*, 32 J. LEGAL PROF. 237, 242 (2008) (discussing how prosecutors' extrajudicial statements are particularly likely to influence pending matters).

42. Lipman, *supra* note 40, at 1533 (quoting *Gansler*, 835 A.2d at 559); see also Brown, Jr., *supra* note 32, at 113; Scott M. Matheson, Jr., *The Prosecution, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 890 (1990) (discussing how "prosecutors can be the best source of information concerning a criminal investigation and prosecution").

43. See Brown, Jr., *supra* note 32, at 113; Matheson, Jr., *supra* note 42, at 868 & n.15, 890; Lipman, *supra* note 40, at 1533. Concern regarding prosecutors' extrajudicial speech is especially compelling in light of prosecutors' principal, overarching duty, which is to "seek justice," not merely to secure convictions. See, e.g., *Connick v. Thompson*, 131 S. Ct. 1350, 1365 (2011) ("The role of a prosecutor is to see that justice is done." (citation omitted)); *Berger v. United States*, 295 U.S. 78, 88 (1935) (discussing how the interest of the United States Attorney in a criminal prosecution "is not that it shall win a case, but that justice shall be done"); see also MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2013) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Bennett L. Gershman, *The Zealous Prosecutor as Minister of Justice*, 48 SAN DIEGO L. REV. 151, 151–52 (2011) ("[T]he prosecutor's duty [is] not to win a case but to see that justice is done . . ."); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 377 (2001). Prosecutors' statements that convey partiality do not align with this duty. See *Berger*, 295 U.S. at 87–88; K. Babe Howell, *Prosecutorial Discretion and the Duty to Seek Justice in an Overburdened Criminal Justice System*, 27 GEO. J. LEGAL ETHICS 285, 306–07 (2014).

44. See HOFFMEISTER, *supra* note 12, at 59–61; R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROBS. 67, 73 (2008).

45. See Cassidy, *supra* note 44, at 73. See generally Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983 (2009) (discussing how most chief prosecutors are elected officials).

obligation to inform the public about how they are managing their responsibilities, which may include providing information about pending matters.⁴⁶ Indeed, prosecutors' speech about pending cases can provide the public with important information regarding the operation of the justice system and other matters of public policy.⁴⁷ This type of extrajudicial speech can be quite valuable to the community because it can "educate the public about the legal system generally or regarding specific aspects of the law."⁴⁸ It can also assure members of the public that the prosecutor's office is actively responding to the needs of the community.⁴⁹

*B. Striking a Balance:
Current Restraints on Prosecutors' Extrajudicial Speech*

Professional legal organizations like the ABA have struck a balance between attorneys' freedom of speech and the defendant's right to a fair trial.⁵⁰ Since 1908, the ABA has promulgated rules and standards of ethical and professional conduct, including rules governing attorneys' extrajudicial statements about pending matters.⁵¹ The earliest rules were developed out of concern for attorneys' published statements in newspapers, or old media.⁵² Although these rules have been periodically revised,⁵³ the existing rules and standards do not distinguish between extrajudicial statements made via old media, such as newspapers and television, and those made using new media, particularly social media.⁵⁴

Part I.B.1 of this section addresses Rule 3.6 of the ABA Model Rules of Professional Conduct ("Model Rules"), which governs trial publicity for all lawyers. Part I.B.2 examines ABA Model Rule 3.8(f), which provides additional restraints on prosecutors' extrajudicial speech in criminal cases. Part I.B.3 discusses ABA standards, particularly those governing prosecutors' extrajudicial statements. Finally, Part I.B.4 provides background on other restraints on prosecutors' extrajudicial statements, such as employer guidelines and judge-imposed gag orders.

46. See, e.g., Cassidy, *supra* note 44, at 73; Lipman, *supra* note 40, at 1546; see also Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809, 1843 (1995) (noting that the public has an "interest in knowing how officials perform their tasks" and in "understanding how its government and representatives operate").

47. See Cassidy, *supra* note 44, at 73 (discussing how attorney speech about pending cases may advance public knowledge and discussion of areas of public concern).

48. Lipman, *supra* note 40, at 1545.

49. See HOFFMEISTER, *supra* note 12, at 60.

50. See *infra* Part II.B.1-4.

51. See Day, *supra* note 30, at 1366. Although the ABA Model Rules of Professional Conduct themselves are nonbinding on attorneys, most states have either adopted the rules in full or developed rules that are very similar to the ABA Model Rules, thereby giving the rules force of law. See HOFFMEISTER, *supra* note 12, at 113-14; Matheson, Jr., *supra* note 42, at 872-73.

52. See Day, *supra* note 30, at 1366.

53. See *id.* at 1368-70; see also Ted Haller, Comment, *Cleaning Out the Dirty Laundry: Washing Out Law Enforcement's Prejudicial Comments*, 11 U. ST. THOMAS L.J. 249, 252-54 (2014) (discussing various attempts by the ABA to address trial publicity).

54. See *infra* Part I.B.1-3.

1. ABA Model Rule 3.6

Rule 3.6 of the ABA Model Rules strikes a balance between the right of free speech and the right to a fair trial.⁵⁵ On the one hand, Rule 3.6(a) prohibits lawyers working on a particular matter from making extrajudicial statements that have a substantial likelihood of materially affecting the proceeding.⁵⁶ This restriction extends to other lawyers who work for the same law firm or government agency but are not working on the matter.⁵⁷ However, Rule 3.6 also delineates a safe harbor provision that allows limited disclosure in situations that are unlikely to pose a substantial risk of materially prejudicing a proceeding, such as the release of information contained in a public record or a statement that an investigation into a particular matter is taking place.⁵⁸ As such, Model Rule 3.6 provides prosecutors and other attorneys with a constitutional limit on extrajudicial statements regarding pending matters on which they or members of their office are working, while also permitting some extrajudicial speech about those matters.⁵⁹

2. ABA Model Rule 3.8

Although Rule 3.6 applies broadly to all lawyers, Rule 3.8 provides additional ethical obligations for prosecutors in criminal cases.⁶⁰ Recognizing that prosecutors' extrajudicial statements about pending matters can impose reputational harm on the accused, the ABA adopted

55. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2013).

56. See *id.* r. 3.6(a) ("A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."). Comment 5 to Rule 3.6 provides a list of certain types of information that are more likely to materially prejudice a judicial proceeding, such as information relating to "the character, credibility, reputation or criminal record of a party, suspect . . . or witness" or "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration." *Id.* r. 3.6 cmt. 5.

57. See *id.* r. 3.6(d).

58. Model Rule 3.6(b) provides that:

[A] lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of the matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case . . . (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Id. r. 3.6(b). Lawyers engaging in representation must also maintain client confidentiality and cannot knowingly make a false statement of material fact or law to another individual. See *id.* r. 1.6, 4.1.

59. See *id.* r. 3.6 cmt. 1.

60. See *id.* r. 3.8.

Rule 3.8(f).⁶¹ Rule 3.8(f) specifically provides that prosecutors in a criminal case shall “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”⁶² However, the Rule contains an exception that permits 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.”⁶³ Thus, Rule 3.8(f), in conjunction with Rule 3.6, indicates that prosecutors may discuss publicly available information about pending cases when necessary to inform the public of their actions so long as making such statements would not have a substantial likelihood of affecting the proceeding or increasing public denunciation of the accused.⁶⁴

3. ABA Standards on Fair Trial and Public Discourse

As the ABA Model Rules provide just the constitutional and ethical minimums for attorney conduct, the ABA also has adopted, and periodically revised, standards regarding attorneys’ extrajudicial statements in criminal cases⁶⁵ to provide best practices for lawyers regarding their communications with the public.⁶⁶ Most notable are the ABA Criminal Justice Standards on Fair Trial and Public Discourse,⁶⁷ which were originally developed in 1968⁶⁸ within the context of old media.⁶⁹ Though

61. *See id.* r. 3.8 cmt. 5 (“[A] prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused.”); *cf. id.* r. 3.8 cmt. 1 (“[A prosecutor’s] responsibility carries with it specific obligations to see that . . . special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

62. *Id.* r. 3.8(f). The rules further provide that a prosecutor in a criminal case must exercise reasonable care in controlling extrajudicial statements made by police officers and others working alongside the prosecutor on a particular matter. *Id.*

63. *Id.*

64. *See id.* r. 3.6, 3.8(f).

65. *See Matheson, Jr., supra* note 42, at 873 & n.37, 875. Although these standards are ethical guidelines and not laws, courts may enact local rules to give these standards binding effect. *See Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1067–68 (1991).

66. *E.g.*, FAIR TRIAL AND PUB. DISCOURSE 8-1.1(a)(i) (AM. BAR ASS’N 2013). Though not a focus of this Note, the ABA has also adopted the ABA Criminal Justice Standards for the Prosecution and Defense Functions, which closely parallel the ethical restraints imposed by Model Rules 3.6 and 3.8(f). Indeed, Standard 3-1.10(c) states that:

The prosecutor should not make, cause to be made, or authorize or condone the making of, a public statement that the prosecutor knows or reasonably should know will have a substantial likelihood of materially prejudicing a criminal proceeding or heightening public condemnation of the accused, but the prosecutor may make statements that inform the public of the nature and extent of the prosecutor’s or law enforcement actions and serve a legitimate law enforcement purpose.

CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-1.10(c) (AM. BAR ASS’N 2015).

67. Prior to the 2013 revision, these standards were titled the ABA Criminal Justice Standards on Fair Trial and Free Press.

68. *See Minnefor, supra* note 30, at 134 & n.170 (discussing the drafting of the Standards Relating to Fair Trial and Free Press, which the Standards on Fair Trial and Public Discourse have since supplanted); *see also* Brown, Jr., *supra* note 32, at 97–98.

69. *See* Mattei Radu, *The Difficult Task of Model Rule of Professional Conduct 3.6: Balancing the Free Speech Rights of Lawyers, the Sixth Amendment Rights of Criminal*

revised in 2013, the standards do not focus on the differences between old and new media, or the effect that these differences may have on pending cases, the reputations of the accused, or public perception of the legal profession.⁷⁰

Nevertheless, the standards seek to promote transparency and confidence in the criminal justice system, while also maintaining the integrity of the judicial proceedings.⁷¹ Like the Model Rules,⁷² the Standards on Fair Trial and Public Discourse indicate that lawyers involved in a criminal matter shall not make any extrajudicial statements that may have a substantial likelihood of prejudicing the adjudicatory proceeding or “unnecessarily heightening public condemnation” of the accused.⁷³ The standards further provide that attorneys should avoid making statements that negatively impact public perception of and respect for the judicial process.⁷⁴

Additionally, like Model Rule 3.8,⁷⁵ the Standards on Fair Trial and Public Discourse provide guidelines that are specific to prosecutors.⁷⁶ The standards outline topics that prosecutors should avoid discussing when making public statements about a pending case,⁷⁷ while also providing an illustrative list of subjects that are usually permissible, such as statements that are necessary to inform the public about prosecutorial action and statements that serve a legitimate law enforcement purpose.⁷⁸

4. Other Restraints

In addition to the ABA Model Rules and Standards, other measures may be used to restrain prosecutors’ speech.⁷⁹ Many prosecutors’ offices provide additional guidance and training regarding media relations and statements to the public.⁸⁰ The U.S. Attorneys’ Manual, for example, establishes standards for federal prosecutors’ engagement with the media.⁸¹

Defendants, and Society’s Right to the Fair Administration of Justice, 29 CAMPBELL L. REV. 497, 500 (2007); Esther Berkowitz-Caballero, Note, *In the Aftermath of Gentile: Reconsidering the Efficacy of Trial Publicity Rules*, 68 N.Y.U. L. REV. 494, 503–05 (1993).

70. See generally Haller, *supra* note 53, at 252–59, 272 (discussing the evolution of trial publicity rules and prosecutors’ need for more social media guidelines).

71. FAIR TRIAL AND PUB. DISCOURSE 8-1.1(b)(i)–(iii) (AM. BAR ASS’N 2013).

72. See *supra* Part I.B.1–2.

73. FAIR TRIAL AND PUB. DISCOURSE 8-2.1(a)(i)–(ii) (AM. BAR ASS’N 2013). The rules also urge lawyers to seek out the advice of their supervisors before making any public extrajudicial statements regarding a pending criminal matter. *Id.* 8-2.1(a).

74. See *id.* 8-2.1(a)(iii).

75. See *supra* Part I.B.2.

76. See FAIR TRIAL AND PUB. DISCOURSE 8-2.2 (AM. BAR ASS’N 2013).

77. See *id.* 8-2.2(a)(i)–(ix).

78. See *id.* 8-2.2(b).

79. See, e.g., U.S. DEP’T OF JUSTICE, U.S. ATTORNEYS’ MANUAL § 1-7.000 (1997) [hereinafter U.S. ATTORNEYS’ MANUAL] (establishing guidelines for relations between federal prosecutors and the media); see also Niehoff, *supra* note 12, at 10 (discussing the imposition of gag orders on trial participants).

80. See, e.g., U.S. ATTORNEYS’ MANUAL § 1-7.001.

81. See *id.* These guidelines supplement the directives codified in 28 C.F.R. § 50.2, which also regulate what federal prosecutors can and cannot disseminate to the public about pending criminal investigations. See *id.*

Like the ABA Model Rules, the U.S. Attorneys' Manual (the Manual) aims to strike a balance between defendants' right to a fair trial, the value of a free press, and the public's right to information.⁸² Chapter 1-7.000, entitled "Media Relations," provides guidance similar to that of the ABA Model Rules by indicating what type of information is "disclosable"⁸³ and, conversely, what type of information should be withheld from the public due to the likelihood that such information could influence a pending proceeding.⁸⁴

The Manual indicates that a press release is "the usual method to release public information to the media" and that press conferences should be limited to only the "most significant and newsworthy actions."⁸⁵ Where there exists a "substantial public interest" in a pending matter, the guidelines further provide that extrajudicial statements conveyed to the press should be confined to the public record⁸⁶ and should not contain any information that has a substantial likelihood of materially prejudicing the fairness of an adjudicative proceeding.⁸⁷ The guidelines also acknowledge that in some instances "the community needs to be reassured" that action is being taken in a particular matter, in which case public commentary confirming that an investigation is underway may be necessary "to protect the public interest."⁸⁸

Judges also have the ability to restrict trial participants' extrajudicial speech by issuing gag orders⁸⁹ to prevent attorneys or others from publicly discussing the case.⁹⁰ Although the standards for issuing gag orders are not uniform,⁹¹ gag orders are typically reserved for only the most newsworthy

82. *See id.* § 1-7.112; *see also* Lipman, *supra* note 40, at 1529.

83. *See* U.S. ATTORNEYS' MANUAL § 1-7.520. Like the ABA Model Rules, such information includes the defendant's name and age, the substance of the charge as reflected in the public record, and the time and place of arrest. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.6 (AM. BAR ASS'N 2013).

84. *See* U.S. ATTORNEYS' MANUAL § 1-7.550. Like the ABA Model Rules, the Manual indicates that Department of Justice employees should avoid discussing their observations of a defendant's character, their opinion as to the defendant's guilt or innocence, as well as commentary regarding the identity or credibility of prospective witnesses. *Id.*; *see also* MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 5 (AM. BAR ASS'N 2013).

85. U.S. ATTORNEYS' MANUAL § 1-7.401(A).

86. *Id.* § 1-7.401(D). The Manual further indicates that any public communications about pending cases made before or during the course of the trial "must be approved by the appropriate Assistant Attorney General, the United States Attorney, or other designate responsible for the case." *Id.* § 1-7.401(E).

87. *See id.* §§ 1-7.401(H), 1-7.500.

88. *Id.* § 1-7.530(B).

89. A gag order is "[a] judge's order directing parties, attorneys, witnesses, or journalists to refrain from publicly discussing the facts of a case." *Gag Order*, BLACK'S LAW DICTIONARY (10th ed. 2014).

90. *See* HOFFMEISTER, *supra* note 12, at 106–07; Niehoff, *supra* note 12, at 10. "Many judges, however, are reluctant to grant [gag] orders in light of the First Amendment." HOFFMEISTER, *supra* note 12, at 106–07.

91. *See* Minnefor, *supra* note 30, at 128–30; Niehoff, *supra* note 12, at 10. Specifically, some courts issue gag orders where "there is a reasonable likelihood that trial participants' extrajudicial statements would preclude a fair trial." Minnefor, *supra* note 30, at 128. Other courts, however, impose gag orders "if [trial participants'] comments pose a serious and

cases where the danger of unfair prejudice is particularly substantial.⁹² Thus, judges have some discretion to impose further restrictions on prosecutors' extrajudicial speech when necessary to promote fairness.⁹³

C. *The Rise of Social Media*

In determining whether existing restraints are sufficient in the new media age, it is important to consider how new media, particularly social media, has impacted the dissemination of and access to information about criminal cases and other news. Part I.C.1 addresses the ways in which social media differs from traditional media, while Part I.C.2 discusses how the public is increasingly using social media as a news source.

1. How Social Media Differs from Traditional Media

Social media is distinct from traditional media in several ways. Prior to the rise of social media and other forms of electronic communications, individuals who sought to communicate with the public had to rely on traditional media, namely print newspapers, radio, and television.⁹⁴ As these media outlets could not—and still cannot—provide news coverage for every story, and instead elect to selectively report on only the most newsworthy of events, it was quite difficult for ordinary persons and government officials alike to make public statements that would reach a large audience using traditional means.⁹⁵

Social media and other internet resources, however, enable individuals to communicate immediately and continuously with a large audience with little to no effort or cost.⁹⁶ Further, individuals can disseminate messages

imminent threat of interference with a fair trial” or where there is a “clear and present danger” of such interference. *Id.* at 128–29.

92. See Minnefor, *supra* note 30, at 126–27. Indeed, generally gag orders are only issued when the measure is narrowly tailored to restrict the likelihood of prejudice and is the least restrictive means of doing so. See Niehoff, *supra* note 12, at 10 & n.3.

93. See Niehoff, *supra* note 12, at 10. In addition to restricting the ability of prosecutors and other trial participants to make extrajudicial statements, judges can also take steps to restrict the *effect* of statements that have already been made or may be made in the future. See Minnefor, *supra* note 30, at 121. Such measures include change of venue, postponement of a trial, voir dire, jury instructions, jury sequestration, and jury questionnaires. See *id.*; see also Mastromauro, *supra* note 38, at 314 & n.110, 316.

94. See HOFFMEISTER, *supra* note 12, at 105; see also U.S. ATTORNEYS' MANUAL § 1-7.401(A).

95. See 1 AM. JUR. *Trials* § 22 (2014); see also Lauren R. Younkins, Note, *#ihatemyboss: Rethinking the NLRB's Approach to Social Media Policies*, 8 BROOK. J. CORP. FIN. & COM. L. 222, 228 (2013).

96. See HOFFMEISTER, *supra* note 12, at 61; Kathleen Elliott Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just “Face” It*, 41 U. MEM. L. REV. 355, 404–05 (2010) (discussing how social media enables individuals to have “a seemingly limitless reach”); Younkins, *supra* note 95, at 228–29; Devin Hamer, *The Twitter Effect: How Social Media Changes the News Narrative*, PBS (June 28, 2011), <http://www.pbs.org/mediashift/2011/06/the-twitter-effect-how-social-media-changes-the-news-narrative179> [<http://perma.cc/7MMB-B9G9>]. Facebook, for example, boasts over 1.32 billion monthly active users worldwide, with Americans spending an average of forty minutes per day utilizing the site. See Joshua Brunstein, *Americans Now Spend More Time on Facebook*

of their own creation without having to wait for traditional media outlets to provide coverage and without having their statements truncated.⁹⁷ Because statements on social media can be disseminated instantly with the simple click of a button,⁹⁸ social media posts are more likely to be impulsive and unrestrained than are statements made via traditional media, thereby leading individuals to “say things that they would never say in a direct, in-person exchange.”⁹⁹

Another difference between social media and traditional media is the amount of scrutiny that is accorded to statements prior to publication.¹⁰⁰ Reports and broadcasts on traditional media typically involve extensive research, fact checking, and editing prior to the issuance of any publication.¹⁰¹ Inflammatory allegations and other editorializing may be truncated, or even fully omitted, in the final publication or broadcast.¹⁰² In the criminal justice context, this type of traditional oversight substantially reduces the likelihood that one’s statements could prejudice the defendant’s right to a fair trial.¹⁰³

Further, reporters rarely rely on just one source.¹⁰⁴ Instead, reporters typically solicit information from multiple sources, select some of the information from different sources, and convey information from different sources side by side in one article or report.¹⁰⁵ As such, traditional media communications tend to be the product of thorough and rational deliberation.¹⁰⁶

In contrast, social media and other forms of electronic communications are like “open mikes,”¹⁰⁷ where individuals necessarily act as their own editors.¹⁰⁸ Indeed, all posts made on social media are unmediated and

Than They Do on Their Pets, BUSINESS WEEK (July 23, 2014), <http://www.businessweek.com/articles/2014-07-23/heres-how-much-time-people-spend-on-facebook-daily> [<http://perma.cc/4SG4-2794>].

97. See HOFFMEISTER, *supra* note 12, at 61.

98. See Younkins, *supra* note 95, at 229; Hamer, *supra* note 96.

99. Younkins, *supra* note 95, at 230. This phenomenon is commonly referred to as the “online disinhibition effect.” *Id.* “The effect operates in two directions; sometimes people will reveal personal information about themselves online that they would not share in a one-on-one conversation . . . and sometimes people will act out online and make statements, including . . . rants, that they would not make directly . . .” *Id.* at 230–31.

100. See Levenson, *supra* note 32, at 1055–56; Niehoff, *supra* note 12, at 13.

101. See Niehoff, *supra* note 12, at 13.

102. See Levenson, *supra* note 32, at 1055–56 (discussing the Society of Professional Journalists Costs of Ethics, which states that journalists should question sources’ motives, distinguish between advocacy and news reporting, show compassion for those affected by negative news coverage, and examine the accuracy of all information before publishing stories about criminal trials); Niehoff, *supra* note 12, at 13.

103. See Niehoff, *supra* note 12, at 13.

104. See Matheson, Jr., *supra* note 42, at 890.

105. See *id.*

106. See Adrienne Hacker-Daniels, *Protection or Prosecution: Julian Assange and Wikileaks Making Waves with a Cybersplash*, in REGULATING SOCIAL MEDIA: LEGAL AND ETHICAL CONSIDERATIONS 111, 113 (Susan J. Drucker & Gary Gumpert eds., 2013).

107. Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 PACE L. REV. 228, 242 (2011).

108. See Niehoff, *supra* note 12, at 13.

unfiltered¹⁰⁹ because there are “no controls or procedures to ensure that the content distributed . . . is accurate”¹¹⁰ or professional.¹¹¹ Social media therefore enables individuals to provide a clear message of their own design that is isolated from statements made by other individuals, including those that are dissonant with the message of the social media poster.¹¹²

As a result, individuals who read news on social media likely have greater difficulty obtaining balanced information because they must search through “a fog of brief snippets of first-person blog-speak” to piece together the news story on their own.¹¹³ The comparative lack of oversight also indicates that social media provides greater opportunities for individuals to act deceptively by posting false information or by commenting behind a perceived cloak of anonymity.¹¹⁴ Thus, the ability to use social media to provide one-sided information has improved one’s ability “to inform, persuade and galvanize individuals.”¹¹⁵

Social media is also distinct from traditional media due to its expansive reach. Traditional media broadcasts and reports are usually confined to a particular geographical region or local community.¹¹⁶ The reach of social media, however, is seemingly infinite.¹¹⁷ Indeed, public statements on social media can reach hundreds, thousands, or even millions of people in a matter of seconds.¹¹⁸ A post can reach an even greater number of people as other individuals “re-tweet,” or share, the post with others in their social media circles, who may further distribute the message.¹¹⁹

109. See Strutin, *supra* note 107, at 242.

110. Mastromauro, *supra* note 38, at 291; see also Michael E. Lackey, Jr. & Joseph P. Minta, *The Ethics of Disguised Identity in Social Media*, 24 ALB. L.J. SCI. & TECH. 447, 460 (2014) (discussing how some users may choose to convey “explicitly false information” on social media); Vinson, *supra* note 96, at 405 (“Ultimately the onus and responsibility of inappropriate content or reckless use of social networking lies with the user.”).

111. See Christina Parajon Skinner, *The Unprofessional Sides of Social Media and Social Networking: How Current Standards Fall Short*, 63 S.C. L. REV. 241, 252 (2011) (discussing how social media has a tendency to encourage information sharing in a way that often entails reduced consideration regarding what is professional or appropriate).

112. See HOFFMEISTER, *supra* note 12, at 61.

113. Hamer, *supra* note 96.

114. See John G. Browning, *Prosecutorial Misconduct in the Digital Age*, 77 ALB. L. REV. 881, 884 (2014); Lackey, Jr. & Minta, *supra* note 110, at 458.

115. Hacker-Daniels, *supra* note 106, at 112.

116. See Christa Corrine McLintock, *The Destruction of Media Diversity, or: How the FCC Learned to Stop Regulating and Love Corporate Dominated Media*, 22 J. MARSHALL J. COMPUTER & INFO. L. 569, 579, 603 (2004).

117. See Vinson, *supra* note 96, at 406.

118. See HOFFMEISTER, *supra* note 12, at xiv; Younkings, *supra* note 95, at 228; see also Nicola A. Boothe-Perry, *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, 143 (2013).

119. See Younkings, *supra* note 95, at 228; see also Boothe-Perry, *supra* note 118, at 143; Vinson, *supra* note 96, at 406 (discussing how social media enables individuals to have “a seemingly limitless reach”).

Finally, social media differs from traditional media because social media posts are more enduring and obtainable.¹²⁰ Statements published in print newspapers from months prior are significantly less permanent or accessible because individuals do not tend to retain newspapers for extended periods of time¹²¹ and access to newspaper archives often requires a membership fee.¹²² Similarly, a statement made in a face-to-face interview “lasts only as long as the words are being spoken,” barring any recordings of the conversation.¹²³ However, a post on a social media website never disappears;¹²⁴ even a deleted post can still linger, either because it was “shared” by other social media users¹²⁵ or because it still exists somewhere in cyberspace.¹²⁶ Thus, statements made via social media from months prior are readily available to those who seek them out by searching the internet.

2. The Increasing Popularity of Social Media as a News Source

The differences between traditional media and social media are particularly important within the context of the legal profession because social media websites have become increasingly popular places to obtain and discuss the news,¹²⁷ including news on criminal cases.¹²⁸ Given the

120. See Mastromauro, *supra* note 38, at 339; Skinner, *supra* note 111, at 270 (“[S]ocial media sharing . . . can never truly be erased or deleted.” (citation omitted)); Strutin, *supra* note 107, at 235 n.17 (citation omitted).

121. See Mastromauro, *supra* note 38, at 338–39 (discussing how news coverage on social media is distinct from traditional new media due to the permanence and accessibility of posts on social media).

122. See, e.g., N.Y. TIMES, <http://www.nytimes.com/subscriptions/Multiproduct/lp5558.html> (last visited Sept. 27, 2015) (indicating that access to the full archives from 1851 requires paying a fee of at least \$3.75 per week) [<http://perma.cc/FX4E-YCFT>]; see also NEWSPAPERARCHIVE.COM, <https://rsecure.newspaperarchive.com/RegistrationSubscribev13?plan=18401> (last visited Sept. 27, 2015) (providing limited access to newspaper archives at varying rates between six and nine dollars per month) [<http://perma.cc/MR9B-WZTD>].

123. Younkins, *supra* note 95, at 229.

124. See *id.*

125. See *id.* (“Once something is posted, the poster might not be able to delete or control it.”).

126. *Id.*

127. See Coffey, *supra* note 13, at 1; Mastromauro, *supra* note 38, at 337–38; Niehoff, *supra* note 12, at 12; Strutin, *supra* note 107, at 287; Monica Anderson & Andrea Caumont, *How Social Media is Reshaping News*, PEW RESEARCH CTR. (Sept. 24, 2014), <http://www.pewresearch.org/fact-tank/2014/09/24/how-social-media-is-reshaping-news> [<http://perma.cc/QHA8-QYJF>]; see also Pam Greenberg, *Social Media: Becoming a Trusted Source for Political Information*, THE THICKET AT STATE LEGISLATURES (Feb. 6, 2013), http://ncsl.typepad.com/the_thicket/2013/02/social-media-becoming-the-go-to-source-for-political-information-.html [<http://perma.cc/6BPK-BKFP>].

128. See Coffey, *supra* note 13, at 1. The prosecutions of Casey Anthony and George Zimmerman are two examples of criminal trials that were surrounded by significant social media activity. See Browning, *supra* note 114, at 883. According to the jury consultant for Anthony’s defense, almost one million people blogged about the trial and thousands more discussed it on other types of social media websites while the trial was in progress. See Miland F. Simpler, III, Student Article, *The Unjust “Web” We Weave: The Evolution of Social Media and Its Psychological Impact on Juror Impartiality and Fair Trials*, 36 LAW & PSYCHOL. REV. 275, 279, 282 (2012). More recently, social media has played an important

ease of access to these various digital media fora, the public has developed a voracious appetite for near-instant media coverage of a wide variety of events, including law enforcement investigations and criminal trials.¹²⁹ According to a Pew Research Center study, half of American Facebook and Twitter users obtain news through Facebook or Twitter.¹³⁰ Furthermore, 50 percent of social media users have shared or reposted news stories, images, or videos on social media websites while 46 percent have used social media platforms to discuss issues or events in the news.¹³¹ Others post in the comment section of news articles and blog posts.¹³² Consequently, as people repost or share news on social media websites, social media users are becoming increasingly exposed to the news.¹³³ Such exposure may occur incidentally while individuals use social media on their computers or smartphones for purposes other than to follow the news.¹³⁴

The growth of social media as a tool for actively and passively obtaining news has directly impacted criminal trials.¹³⁵ Indeed, the increasing use of social media has greatly magnified the “opportunity to exercise persuasion and influence upon jurors.”¹³⁶ Because surfing social media sites or the internet at large can expose jurors to prejudicial and inadmissible

role in providing coverage of events surrounding the deaths of Michael Brown and Eric Garner as well as in igniting an international debate about race, stereotyping, and police violence in the United States. See Samantha Storey, *Outrage Over Teenager’s Death Erupts on Social Media*, N.Y. TIMES (Aug. 11, 2014), http://www.nytimes.com/2014/08/12/us/mike-brown-shooting-social-media.html?_r=0 [<http://perma.cc/J8QP-WBNF>]; Tanzina Vega, *Shooting Spurs Hashtag Effort on Stereotypes*, N.Y. TIMES (Aug. 12, 2014), <http://www.nytimes.com/2014/08/13/us/if-they-gunned-me-down-protest-on-twitter.html> [<http://perma.cc/775C-XLBM>]; see also Melanie Eversley & Mike James, *No Charges in NYC Chokehold Death; Federal Inquiry Launched*, USA TODAY (Dec. 4, 2014), <http://www.usatoday.com/story/news/nation/2014/12/03/chokehold-grand-jury/19804577> (discussing how “social media exploded with outrage and calls for demonstrations” after a grand jury declined to indict a white police officer in the death of a black man, Eric Garner, whom the officer had put in a chokehold during an arrest for selling untaxed cigarettes) [<http://perma.cc/BY48-L6NH>].

129. See Coffey, *supra* note 13, at 1.

130. See Anderson & Caumont, *supra* note 127.

131. See *id.*

132. See Thomas Roe Frazer II, *Social Media: From Discovery to Marketing: A Primer for Lawyers*, 36 AM. J. TRIAL ADVOC. 539, 542 (2013) (discussing how comment sections of blogs and newspapers are considered social media).

133. See Anderson & Caumont, *supra* note 127.

134. See *New Jersey v. Feliciano*, 2014 WL 1577768, at *4 (N.J. Super. Ct. App. Div. Apr. 22, 2014) (describing how social media coverage of a case could reach members of the jury even when jurors do not intentionally seek out that information); Nathan L. Hecht & Marisa Secco, *Juries and Technology: Revised Texas Civil Jury Instructions Include Warnings About the Internet and Social Media*, 60 THE ADVOC. (TEXAS) 50, 50 (2012); Katerina Eva Matsa & Amy Mitchell, *8 Key Takeaways about Social Media and News*, PEW RESEARCH CTR. (Mar. 26, 2014), <http://www.journalism.org/2014/03/26/8-key-takeaways-about-social-media-and-news> [<http://perma.cc/HL34-7HEN>]; see also Frazer, *supra* note 132, at 542 (discussing how social media is easily accessible on smartphones).

135. See Hecht & Secco, *supra* note 134, at 50.

136. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 10 (2012).

information about the case to which they are assigned,¹³⁷ some judges and court systems have adopted ways to curb jurors' internet usage to maintain the integrity of the judicial process.¹³⁸ The most common response has been improving jury instructions.¹³⁹ The most effective instructions not only specify what constitutes social media but also explain why jurors should not use social media to discuss or research the case and the effect of such conduct on the fairness of the trial.¹⁴⁰ Though jurors are presumed to follow jury instructions, there have been instances where jurors have used the internet to discuss or research the case while the matter is still pending, thereby raising due process concerns.¹⁴¹

II. SHOULD PROSECUTORS USE SOCIAL MEDIA?

As social media has made it easier for anyone to share and obtain information,¹⁴² it is relatively unsurprising that some prosecutors have used social media to discuss cases and other aspects of their work in both official and unofficial capacities.¹⁴³ This, in turn, has raised conflicting opinions about whether prosecutors should be allowed to use social media to discuss pending matters and other aspects of their work. Part II.A of this section highlights ways in which prosecutors have used social media to discuss pending cases and other aspects of their role as prosecutors. Part II.B addresses the competing motivations that may influence prosecutors to make extrajudicial statements. Finally, Part II.C assesses how social media has increased both the benefits and harmful risks of prosecutors' extrajudicial statements.

A. Prosecutors' Use of Social Media

As social media usage has expanded, so too has the use of social media by prosecutors and other attorneys.¹⁴⁴ A growing number of prosecutorial

137. See Jay Munisteri, Symposium, *Use of Social Media By Jurors—Death Knell or Paper Cut to Jury Trial Integrity?*, 60 THE ADVOC. (TEXAS) 55, 55 (2012).

138. See HOFFMEISTER, *supra* note 12, at 54–55 (discussing various measures to prevent social media usage, including “(1) requiring jurors to take an oath; (2) penalizing jurors; (3) investigating jurors; (4) allowing juror questions; and (5) improving jury instructions”). Relatedly, judges have also taken steps to dissuade jurors from using social media to publish information about the case or to contact attorneys, the defendant, witnesses, and fellow jurors. See Hecht & Secco, *supra* note 134, at 50–51; J. Paul Zimmerman, *A Practical Guide to the Development of Jury Charges Regarding Social Media*, 36 AM. J. TRIAL ADVOC. 641, 645–46 (2013).

139. See *id.* at 55.

140. See *id.* at 56; St. Eve et al., *supra* note 13, at 86, 88–90.

141. See, e.g., St. Eve & Zuckerman, *supra* note 136, at 12–17; see also Monique C.M. Leahy, 141 AM. JUR. 3D *Proof of Facts* §§ 7–9 (2014). Not every instance of such activity has been determined to influence the proceeding. See, e.g., *United States v. Fumo*, 655 F.3d 288, 298–99, 304–06 (3d Cir. 2011) (holding that a juror's vague comments on Facebook and Twitter about the trial did not prejudice the defendant).

142. See *supra* Part I.C.

143. See *infra* Part II.A.

144. See Robert Ambrogi, *Lawyers' Social Media Use Grows Modestly*, ABA Annual Tech Survey Shows, LAW SITES BLOG (Aug. 5, 2013), <http://www.lawsitesblog.com/2013/08/lawyers-social-media-use-continues-to-grow-aba-annual-tech-survey-shows.html>

offices have established official, online presences on social media to communicate with the public.¹⁴⁵ Additionally, some prosecutors have used social media in unofficial and unauthorized capacities to post about cases and other aspects of the prosecutorial function.¹⁴⁶ Recently there have been a few instances¹⁴⁷ in which prosecutors' social media activity has raised public or judicial concern.¹⁴⁸ Parts II.A.1 and II.A.2 below highlight instances in which prosecutors have used social media to discuss cases and other aspects of their work while posting in official and unofficial capacities, respectively.

1. Official Use of Social Media

Many prosecutors and prosecutorial offices have created official social media profiles to communicate with the public.¹⁴⁹ Some profiles, like that

[<http://perma.cc/C2AG-XC3W>]. A significant percentage of attorneys have some form of a social media presence, be it through a blog or, more simply, a profile on a social networking site. *See id.*; John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

145. *See infra* Part II.A.1.

146. *See infra* Part II.A.2.

147. Few cases may exist on this issue because social media is relatively new. *See Niehoff, supra* note 12, at 10.

148. *See infra* Part II.A.1–2. It should be noted that prosecutors are not the only members of the legal profession who have been scrutinized for their social media activity. Civil attorneys, criminal defense attorneys, and judges have similarly fallen prey to skirting ethical rules or otherwise arousing concern due to their use of social media to discuss matters pertaining to their work in the legal profession. *See, e.g.*, In re McCool, 2015-B-0284, 2015 WL 3972684 (La. June 30, 2015) (disbarring an attorney who used Twitter and an online petition in an attempt to influence the outcome of pending child custody cases by directing readers to contact the judges involved with those cases and ask the judges to review evidence that they had declined to consider); Browning, *supra* note 12, at 223 (discussing how a judge declared a mistrial after a public defender, whose client was facing murder charges, posted a photograph of her client's leopard print underwear on Facebook with the caption "proper attire for trial," in addition to a statement in which she seemed to question her client's innocence); Margaret M. DiBianca, *Ethical Risks Arising From Lawyers' Use of (and Refusal to Use) Social Media*, 12 DEL. L. REV. 179, 193 (2011) (describing how a judge was removed from the bench after evidence came to light that she had pseudonymously posted more than eighty comments on a local news website, many of which pertained to cases that were tried before her, including a high-profile murder case).

149. *See* HOFFMEISTER, *supra* note 12, at 105–06 (discussing prosecutors who have created Facebook or Twitter accounts to post information in an official capacity); Amanda Marrazzo, *Prosecutors Vary in Use of Social Media*, CHI. TRIBUNE (Mar. 27, 2013), http://articles.chicagotribune.com/2013-03-27/news/ct-tl-lake-county-social-media-20130328_1_social-media-twitter-account-facebook-page (discussing how some prosecutorial offices in Chicago created official Facebook and Twitter accounts to communicate with the public and promote transparency by publishing public information such as press releases, indictments, and information regarding public safety) [<http://perma.cc/L46V-GBKQ>]. Defense attorneys have also created social media pages to communicate with the public about pending cases. *See, e.g.*, HOFFMEISTER, *supra* note 12, at 106–08 (explaining how defense attorney Mark O'Mara used social media to communicate with the public during his representation of George Zimmerman when he was tried and acquitted of second-degree murder for the death of Trayvon Martin). Even some state court systems and bar associations have begun using social media to provide case updates. *See* Boothe-Perry, *supra* note 118, at 131.

of the U.S. Department of Justice (DOJ), represent the office as a whole,¹⁵⁰ while others represent the appointed or elected prosecutor individually.¹⁵¹ Although social media is certainly not the only means through which prosecutors inform the public,¹⁵² prosecutors and their offices are increasingly using social media to publish information about pending charges,¹⁵³ guilty pleas,¹⁵⁴ verdicts,¹⁵⁵ sentencing,¹⁵⁶ office initiatives,¹⁵⁷ and other topics of public interest.¹⁵⁸

Though the majority of posts appear to satisfy professional and ethical standards, some prosecutors go further by disseminating their personal views on crime, the law, and the justice system in ways that may seem informal and arguably less professional than statements made through

150. *E.g.*, Circuit Attorney's Office, FACEBOOK, <https://www.facebook.com/circuitattorney> (last visited Sept. 27, 2015) [<http://perma.cc/NU56-YAZJ>]; Justice Department (@TheJusticeDept), TWITTER, <https://twitter.com/thejusticedept> (last visited Sept. 27, 2015) [<http://perma.cc/JZM3-PBKL>]; US Attorney SDNY (@SDNYnews), TWITTER, <https://twitter.com/sdnynews> (last visited Sept. 27, 2015) [<http://perma.cc/427B-QS6T>].

151. *See, e.g.*, Cyrus Vance, Jr. (@ManhattanDA), TWITTER, <https://twitter.com/ManhattanDA> (last visited Sept. 27, 2015) [<http://perma.cc/Z57F-X5LU>]; Jennifer M. Joyce (@JenniferJoyceCA), TWITTER, <https://twitter.com/jenniferjoyceca> (last visited Sept. 27, 2015) [<http://perma.cc/DH29-SHB7>]. The author of this Note has no knowledge of any relation to Cyrus Vance, Jr.

152. *See, e.g.*, U.S. ATTORNEYS' MANUAL §§ 1-7.530(A)–(B) (discussing how press releases remain the usual form of communication and how press conferences are reserved for the most newsworthy of matters).

153. *See, for example*, City of St. Louis Circuit Attorney Jennifer M. Joyce's tweet from December 12, 2014, in which she posted the name of the accused, the charges against him, the neighborhood in which the conduct occurred, as well as a link to information contained in the public record. Circuit Attorney (@stlcao), TWITTER (Dec. 12, 2014, 9:53 AM), <https://twitter.com/stlcao/status/543463780949049344> [<http://perma.cc/3XPG-SLL9>].

154. *See, e.g.*, US Attorney SDNY (@SDNYnews), TWITTER (Sept. 4, 2014, 3:14 PM), <https://twitter.com/SDNYnews/status/507652986412498944> (discussing how Bitcoin exchangers entered a guilty plea for selling \$1 million in Bitcoins for use on Silk Road, a black-market website for illegal drugs, among other things) [<http://perma.cc/XA26-AD95>].

155. *See, e.g.*, Monmouth County Prosecutor's Office, FACEBOOK (Dec. 4, 2014), <https://www.facebook.com/MCProsecutors.Office/posts/727221974027337> (providing a link to a news article announcing a guilty verdict in a murder case that had been tried by his office) [<http://perma.cc/RV46-NHX5>].

156. *See, e.g.*, Justice Department (@TheJusticeDept), TWITTER (Dec. 8, 2014, 2:06 PM), <https://twitter.com/TheJusticeDept/status/542077808630304769> (stating the prison sentence for an armed drug trafficker convicted of firearms and narcotics offenses) [<http://perma.cc/3RAH-NBBY>].

157. *See, e.g.*, Cyrus Vance, Jr. (@ManhattanDA), TWITTER (Dec. 10, 2014, 12:36 PM), <https://twitter.com/ManhattanDA/status/542779891159433217> (disseminating information about a plan to increase funding "to help end rape kit backlogs") [<http://perma.cc/3NR6-JW49>]; Justice Department (@TheJusticeDept), TWITTER (Dec. 8, 2014, 12:04 PM), <https://twitter.com/TheJusticeDept/status/542047133378301952> (discussing Attorney General Eric Holder's issuance of a new federal law enforcement policy designed to reduce profiling) [<http://perma.cc/X24T-N7K7>].

158. *See, e.g.*, Eric Smith (@ProsecutorSmith), TWITTER (Dec. 8, 2014, 12:20 PM), <https://twitter.com/ProsecutorSmith/status/542051001168330753> (congratulating a local high school volleyball team for winning a state tournament) [<http://perma.cc/9KYQ-HFKF>].

traditional media.¹⁵⁹ This may cause members of the public “to question or lose faith in the criminal justice system as a whole.”¹⁶⁰ District Attorney Ray Larson of Lexington, Kentucky, for example, uses Twitter and Facebook to communicate with his constituents.¹⁶¹ His account name is “Ray the D.A.,” a phrase that is “emblazoned on a superman-like avatar” featured at the top of his page on both websites.¹⁶² Some of his posts are informative, such as those that alert the public of crime trends in the community¹⁶³ or provide parents with information regarding how to monitor their children’s internet usage.¹⁶⁴ Others, however, are less professional, such as Larson’s response to a comment made by Attorney General Eric Holder in which Larson posted:

THE EVER CLASSY ERIC HOLDER, THE MOST POLITICAL EVER U.S. ATTY. GENERAL ONCE AGAIN SHOWS HIS DISDAIN TOWARD CRITICS WHO ONLY WANT HIM TO ENFORCE THE LAWS HE SWORE HE WOULD ENFORCE. . . . By-the-way Eric, here’s your hat as you leave. Thanks for selectively enforcing only the laws you chose. You left the U.S. Dept of Justice with an historically low reputation. Great legacy. I know the “New Black Panthers” will miss you. BY THE WAY ERIC, GOODBYE!!¹⁶⁵

Although prosecutors’ official use of social media has rarely been of concern in criminal cases, there have been a few instances in which defendants have argued for striking the jury panel, dismissing the indictment, or granting a new trial based on a prosecutor’s improper extrajudicial statements on social media.¹⁶⁶ Typically, these challenges have failed because the defendant was unable to prove that the statements reached the jury and influenced the outcome of the proceeding.¹⁶⁷ In *Minnesota v. Usee*,¹⁶⁸ for example, the prosecuting attorney made comments about the trial on her public Facebook page before the case was

159. See HOFFMEISTER, *supra* note 12, at 105–06; see also Brown, Jr., *supra* note 32, at 134–35 (discussing how lawyers’ extrajudicial statements can tarnish the profession’s image as well as public perception of the fairness of the judicial process).

160. HOFFMEISTER, *supra* note 12, at 105.

161. See *id.* at 105–06.

162. *Id.* at 106; Ray Larson (@RaytheDA), TWITTER, <https://twitter.com/raytheda> (last visited Sept. 27, 2015) [<http://perma.cc/PJQ4-DEDW>]; Ray the D.A., FACEBOOK, <https://www.facebook.com/RaytheDA> (last visited Sept. 27, 2015) [<http://perma.cc/LE97-3NAN>].

163. *E.g.*, Ray Larson (@RaytheDA), TWITTER (Dec. 11, 2014, 12:05 PM), <https://twitter.com/RaytheDA/status/543134504358268928> [<http://perma.cc/266A-AUMD>].

164. See Ray Larson (@RaytheDA), TWITTER (Dec. 16, 2014, 9:11 AM), <https://twitter.com/RaytheDA/status/544902632260001792> [<http://perma.cc/JT73-UF6J>].

165. Ray the D.A., FACEBOOK (Nov. 10, 2014), <https://www.facebook.com/RaytheDA/posts/10152808259881399> [<http://perma.cc/GU7Y-KQLJ>]. Some prosecutors have been fired after using social media in an unprofessional manner, such as to post politically-charged comments. See Browning, *supra* note 12, at 225–26.

166. See, e.g., *United States v. Silver*, No. 15-CR-93, 2015 WL 1608412 (S.D.N.Y. Apr. 10, 2015); *Minnesota v. Usee*, 800 N.W.2d 192 (Minn. Ct. App. 2011); *Missouri v. Polk*, 415 S.W.3d 692 (Mo. Ct. App. 2013).

167. See, e.g., *Silver*, 2015 WL 1608412, at *8; *Usee*, 800 N.W.2d at 201; *Polk*, 415 S.W.3d at 696.

168. 800 N.W.2d 192 (Minn. Ct. App. 2011).

submitted to the jury for deliberations.¹⁶⁹ Specifically, she posted a comment about one of the jurors and indicated that, by prosecuting the case, she was “keep[ing] the streets of Minneapolis safe from the Somalias [sic].”¹⁷⁰ The defendant, a Somali immigrant¹⁷¹ who was tried and convicted of assault and murder charges,¹⁷² moved for a new trial, partly on the grounds that the prosecuting attorney’s social media activity amounted to prosecutorial misconduct.¹⁷³ However, because the defendant did not present any evidence that indicated any members of the jury had been exposed to the prosecutors’ social media activity, and the judge had instructed the jury not to conduct any internet research into the case or into anyone involved with the case, the court denied the defendant’s motion.¹⁷⁴

Similarly, in *Missouri v. Polk*,¹⁷⁵ the court denied the defendant’s motion to dismiss the case with prejudice after prosecuting attorney Jennifer M. Joyce repeatedly used Twitter to make public comments about the case throughout the course of the trial.¹⁷⁶ The basis for the denial was the absence of evidence indicating that Joyce’s posts had denied the defendant his right to a fair trial by an impartial jury.¹⁷⁷ Moreover, the trial court judge had provided jury instructions prohibiting the jurors from researching the case or using social media platforms like Facebook and Twitter during the pendency of the case.¹⁷⁸ Additionally, prior to being selected, none of the jurors indicated that he or she “followed” the prosecutor’s posts on social media when asked during voir dire.¹⁷⁹

Although the court declined to determine whether Joyce’s conduct amounted to a violation of the ethical rules governing extrajudicial statements by prosecutors,¹⁸⁰ the court seemed uncomfortable with the content of Joyce’s social media activity.¹⁸¹ Indeed, even though the posts were based on facts contained in the public record,¹⁸² the court found

169. *Id.* at 200–01; *see also* Browning, *supra* note 114, at 896–97.

170. *Usee*, 800 N.W.2d at 200. At least one commentator has stated that the prosecutor’s post was “disturbing” and racially insensitive, particularly because the case took place “[i]n a city that has struggled to assimilate one of the largest concentrations of Somali immigrants in the country.” Browning, *supra* note 114, at 898.

171. *See* Browning, *supra* note 114, at 896.

172. *See Usee*, 800 N.W.2d at 195.

173. *See id.* at 200–01; Browning, *supra* note 114, at 896–97.

174. *See Usee*, 800 N.W.2d at 201.

175. 415 S.W.3d 692 (Mo. Ct. App. 2013).

176. *See id.* at 695–96; *see also supra* text accompanying notes 1–11.

177. *See Polk*, 415 S.W.3d at 696.

178. *See id.*

179. *Id.* One may wonder, however, whether asking this question during voir dire piqued any jurors’ interest, thereby inadvertently encouraging them to seek out the prosecutor’s social media postings, or whether the jury instructions prohibiting such conduct were sufficient to prevent members of the jury from seeking out this information.

180. The defendant argued that Joyce violated the state equivalent of ABA Model Rule 3.8(f) regarding the ethical standards for prosecutors’ extrajudicial statements. *See id.* at 695; *see also supra* text accompanying notes 60–64 (discussing ABA Model Rule 3.8(f)).

181. *Polk*, 415 S.W.3d at 696; *Circuit Attorney Jennifer Joyce’s Tweets Draw Ire of Judges*, CBS ST. LOUIS (Dec. 18, 2013), <http://stlouis.cbslocal.com/2013/12/18/circuit-attorney-jennifer-joyces-tweets-draw-ire-of-judges> [<http://perma.cc/VN29-TALV>].

182. *See Polk*, 415 S.W.3d at 695.

Joyce's posts "concern[ing]" and "troubl[ing],"¹⁸³ in part because they "dramatiz[e] the plight of the victim" in a way that amounted to neither a legitimate law enforcement purpose nor a necessary means to inform the public about the nature and extent of the prosecutor's actions.¹⁸⁴ The court also expressed that the prosecutor's comments characterizing the defendant as a child rapist likely "heightened public condemnation"¹⁸⁵ and that Joyce's decision to make the Twitter posts immediately before and during the trial increased the risk of prejudicing the defendant's right to a fair trial by an impartial jury.¹⁸⁶

Joyce subsequently issued a "Statement on Social Media" in response to the appellate court's decision.¹⁸⁷ She defended her tweets on the grounds that the facts underlying her statements were part of the public record and that, as a prosecutor, she had a duty to inform the public.¹⁸⁸ She further emphasized how social media sites like Twitter promote transparency and provide law enforcement officials with "valuable and legitimate ways . . . to inform and engage the public," thereby encouraging the public to become more proactive in securing the safety of the community.¹⁸⁹ In closing, Joyce expressed confidence in her office's ability to utilize social media in a way that balances the rights of the public with the rights of criminal defendants.¹⁹⁰

More recently, U.S. Attorney for the Southern District of New York Preet Bharara was criticized for extrajudicial statements made after charges were filed against Sheldon Silver, a former New York State Assembly speaker who was charged with corruption.¹⁹¹ Prior to the grand jury indictment, Bharara held a press conference, issued a press release, spoke at a televised event at New York Law School, and was interviewed on a cable news station to discuss the allegations against Silver and comment broadly on corruption in New York politics.¹⁹² Additionally, the U.S. Attorney's Office published several comments on Twitter.¹⁹³ Some of the tweets announced that Silver faced public corruption charges and provided a link to the office's press release.¹⁹⁴ Other tweets were more colorful: "Bharara:

183. *Id.* at 696.

184. *Id.*

185. *Id.*

186. *See id.*

187. *See* Press Release of Circuit Attorney Joyce, *supra* note 9; *see also* Debra Cassens Weiss, *Ill-Timed Tweets By Prosecutor Don't Merit Reversal, Appeals Court Says*, A.B.A. J. (Dec. 19, 2013, 3:37 PM), http://www.abajournal.com/news/article/ill-timed_tweets_by_prosecutor_dont_merit_reversal_appeals_court_says [<http://perma.cc/M7XJ-6S3E>].

188. *See* Press Release of Circuit Attorney Joyce, *supra* note 9.

189. *See id.*

190. *See id.*

191. *See* United States v. Silver, No. 15-CR-93, 2015 WL 1608412, at *1-3, *5 n.8 (S.D.N.Y. Apr. 10, 2015); Peter J. Henning, *Fervent Preet Bharara Gets a Judicial Scolding*, N.Y. TIMES (Apr. 13, 2015), <http://www.nytimes.com/2015/04/14/business/dealbook/fervent-preet-bharara-gets-a-judicial-scolding.html> [<http://perma.cc/Q69M-HZKV>].

192. *See* Silver, 2015 WL 1608412, at *1-3.

193. *See id.* at *2; Henning, *supra* note 191.

194. *See* Silver, 2015 WL 1608412, at *2.

Silver monetized his position as Speaker of the Assembly in two principal ways & misled the public about his outside income” and “Bharara: Politicians are supposed to be on the ppl’s payroll, not on secret retainer to wealthy special interests they do favors for.”¹⁹⁵

After the grand jury issued an indictment charging Silver with honest services mail fraud, honest services wire fraud, and extortion, Silver filed a motion to dismiss the indictment, or at least poll the grand jurors to determine if they were influenced by the extrajudicial statements.¹⁹⁶ Silver argued that the extrajudicial statements were prejudicial because they reflected Bharara’s opinion that Silver was guilty.¹⁹⁷

In denying Silver’s motion, the court noted that dismissing an indictment because of a defect in the grand jury proceedings is a “‘drastic remedy’ that is ‘rarely used’”¹⁹⁸ and that here there was no evidence that Bharara’s comments substantially influenced the grand jury’s decision to indict Silver.¹⁹⁹ Nevertheless, the court indicated that certain extrajudicial statements may “blur the distinction between legitimate public commentary and improper opinion”²⁰⁰ and further emphasized that “[t]his is especially true in the context of Twitter communications.”²⁰¹ The court found meritless the Government’s argument that Bharara’s Twitter posts should be read in the context of his other extrajudicial statements, such as the press release, which arguably made it clearer that the charges against Silver were still just allegations.²⁰² Indeed, the court explained that the aforementioned tweets²⁰³ did not contain links to the press release or complaint and that the Government’s “argument disregards the substantial known risk that, in communicating via a platform that limits messages to 140 characters and permits readers to ‘retweet’ a single communication, one’s statements will in fact be read in isolation.”²⁰⁴

2. Unofficial Use of Social Media

Although public social media profiles like the ones in *Minnesota v. Usee*, *Missouri v. Polk*, and *United States v. Silver*²⁰⁵ more naturally open prosecutors up to ethical criticism due to their accessibility, they are not “safe” from scrutiny merely because their social media profile is made private,²⁰⁶ or because they engage in social media activity anonymously.²⁰⁷

195. *Id.*

196. *See id.* at *3.

197. *See id.*

198. *Id.* at *4 (quoting *United States v. Martinez*, No. 10-CR-233S (1)(2)(4)(5), 2014 WL 1794934 (W.D.N.Y. May 6, 2014)).

199. *See id.* at *6.

200. *Id.* at *5.

201. *Id.* at *5 n.8.

202. *See id.* at *5 & n.8.

203. *See supra* text accompanying note 195.

204. *Silver*, 2015 WL 1608412, at *5 n.8.

205. No. 15-CR-93, 2015 WL 1608412 (S.D.N.Y. Apr. 10, 2015).

206. *See Lackey, Jr. & Minta, supra* note 110, at 479; *see also* Susan J. Drucker & Gary Gumpert, *Thoughts on Social Media, Law, and Ethics*, in *REGULATING SOCIAL MEDIA: LEGAL AND ETHICAL CONSIDERATIONS, supra* note 106, at 1, 1 (“[T]he distinction [between

Some prosecutors have used social media—with and without anonymity—to discuss aspects of their work, be it about the general functioning of their office or specifics about the matters on which they or members of their office are working.²⁰⁸ In rare instances, such activity has attracted the attention of the courts.²⁰⁹

Most notably, in 2012, the United States Attorney's Office for the Eastern District of Louisiana experienced a scandal when an investigation uncovered that at least two of the office's top deputies²¹⁰ had created multiple pseudonyms to discuss one of the office's pending cases and used inflammatory language to describe the subjects of the ongoing investigation.²¹¹ Indeed, the deputies each had made hundreds of posts on the comments section on the website of the *New Orleans Times-Picayune* during the weeks leading up to the trial as well as during the trial itself.²¹² The targets of some of their posts were five former officers of the New Orleans Police Department (NOPD) who had been convicted for their involvement in a controversial shooting and cover-up after Hurricane Katrina.²¹³ Specifically, the officers were accused of killing two people and injuring four others who were all unarmed at the Danziger Bridge in New Orleans.²¹⁴ The officers then planted a firearm at the scene and provided false reports about what precipitated the shootings.²¹⁵

While the matter was still pending, one prosecutor anonymously posted that the NOPD was “‘corrupt,’ ‘ineffectual,’ ‘totally dysfunctional,’ ‘an indolent agency,’ ‘a joke for a long time,’ and suffer[ed] from ‘cultural’ problems.”²¹⁶ The same prosecutor also characterized one of the

public and private social media] is increasingly blurred.”). Maintaining a private profile whereby an individual restricts access only to approved users does not ensure that one's social media activity actually remains private. Twitter, for example, enables users to “re-tweet” information that is posted by other users. When this occurs, both the post and the identity of the original poster may be shared with individuals beyond the scope of the original poster's intended audience. See *FAQs About Retweets (RT)*, TWITTER, <https://support.twitter.com/articles/77606> (last visited Sept. 27, 2015) [<http://perma.cc/D897-NUYV>]. Additionally, users can capture screenshots of activity on any social media platform and disseminate another user's post along with the other user's identity.

207. See, e.g., *United States v. Bowen*, 969 F. Supp. 2d 546, 579–603 (E.D. La. 2013); Lackey, Jr. & Minta, *supra* note 110, at 479.

208. See *infra* Part II.A.1–2.

209. See *Bowen*, 969 F. Supp. 2d at 549–50 (acknowledging the rare existence of cases to date wherein prosecutors anonymously used social media to violate ethical rules or professional responsibilities).

210. See *id.* at 550–51. Neither prosecutor was assigned to work on the case. See *id.* at 554 & n.9.

211. See Browning, *supra* note 114, at 904.

212. See *Bowen*, 969 F. Supp. 2d at 552; Browning, *supra* note 114, at 904. During the period leading up to the trial, the website, NOLA.com, was a popular news and information source in the community. See *Bowen*, 969 F. Supp. 2d at 621.

213. See *Bowen*, 969 F. Supp. 2d at 548, 550; Brielynn Neumann, Note, *The 21st Century Online Carnival Atmosphere: Ethical Issues Raised by Attorneys' Usage of Social Media*, 27 GEO. J. LEGAL ETHICS 747, 749 (2014); Campbell Robertson, *Officers Guilty of Shooting Six in New Orleans*, N.Y. TIMES, Aug. 6, 2011, at A1.

214. See *Bowen*, 969 F. Supp. 2d at 550; Neumann, *supra* note 213, at 749.

215. See Robertson, *supra* note 213, at A1.

216. *Bowen*, 969 F. Supp. 2d at 579.

prospective defense witnesses as “‘racist,’ ‘inept,’ and ‘delusional’ and proclaimed generally that NOPD officers are ‘crap.’”²¹⁷ Other comments further criticized the defendants’ attorneys, defenses, witnesses, evidence, and testimony.²¹⁸

After the jury rendered a guilty verdict, evidence of the prosecutors’ conduct came to light, prompting the defendants to appeal their convictions on the grounds that the prosecutors’ conduct was so egregious that it warranted overturning the convictions and granting a new trial.²¹⁹ The court found in the defendants’ favor in a 129-page order, which began:

With a history of unprecedented events and acts, consideration of the defendants’ motion has taken the Court on a legal odyssey unlike any other. With the relatively recent advent of the age of cyberspace and social media/networking, courts have anticipated a myriad of issues and potential controversies. This Court is unaware of any case, however, wherein prosecutors acting with anonymity used social media to circumvent ethical obligations [and] professional responsibilities. . . . Hence, to the Court’s knowledge, there is no case similar, in nature or scope, to this bizarre and appalling turn of events.²²⁰

The Government contended that the comments posted about the pending trial “were neither front-page headlines nor breaking news stories; rather, they were remarkably low-profile musings of an unrecognizable citizen not known to be associated with the government, commenting beneath articles that related directly to the ongoing trial and were therefore expressly off limits to the jurors.”²²¹ Further, there was no evidence that any jurors read the comments on the online news source or, even if they had, as to whether they attributed that information to someone with authority.²²²

The court, however, determined that the prosecutors’ conduct was so “egregious,” “deliberate,” and “offensive” that it “infected” the “integrity of the proceeding,”²²³ thereby rendering it impossible to “cure such a grave

217. *Id.* at 580.

218. *See id.* at 590.

219. *See id.* at 574. Typically a demonstration of actual prejudice is required in order for the judge to grant a new trial or impose similar significant remedies. *See, e.g., id.*; *Missouri v. Polk*, 415 S.W.3d 692, 696 (Mo. Ct. App. 2013).

220. *Bowen*, 969 F. Supp. 2d at 549–50.

221. *Id.* at 618 (citing Government’s Resp. to Defs.’ Mot. for a New Trial Based on (Alleged) Prosecutorial Misconduct).

222. *See id.* at 619. The court did, however, examine the jurors’ responses to the pre-trial questionnaire that was administered a few weeks before the trial. *See id.* at 621. The seven jurors who indicated that they utilized the NOLA.com website also provided responses that indicated that they were more likely to perceive officers of the NOPD as dishonest than were the other jurors who had not visited the NOLA.com website. *See id.* at 621–22. The court acknowledged that there were many possible explanations for this correlation and further determined that, if questioned at an evidentiary hearing regarding whether they actually read the online comments in question, the jurors likely would be unable to recall which posts they had read or not read given that several years had passed. *See id.* at 622.

223. *Id.* at 575, 619. In determining that no demonstration of actual prejudice was required, the court relied on the U.S. Supreme Court’s opinion in *Brecht v. Abrahamson*, 507 U.S. 619, 638 n.9 (1993), in which the Court indicated that in some “unusual” circumstances, prosecutorial misconduct could be so “deliberate” and “egregious” as to warrant the granting of habeas relief even where the prosecutors’ conduct did not

appearance of unfairness” even if the jury was not aware of or influenced by the prosecutors’ statements.²²⁴ Thus, no showing of actual prejudice was necessary to grant the defendants’ motion for a new trial, and the defendants’ convictions were vacated.²²⁵

The Government appealed this decision, arguing that the district court abused its discretion in granting a new trial.²²⁶ A divided panel of the U.S. Court of Appeals for the Fifth Circuit, however, affirmed the lower court’s decision, holding that the “unusual” and “extraordinary” nature of the misconduct indicated that the defendants did not need to demonstrate the prejudice ordinarily required for the grant of a new trial.²²⁷ Indeed, the court characterized the prosecutors’ online comments as “bullying,” analogizing the conduct to “a mob protesting outside the courthouse”²²⁸ and determining that the commentary “breached all standards of prosecutorial ethics, [and] gave the government a surreptitious advantage in influencing public opinion, the venire panel, and the trial itself.”²²⁹ The Fifth Circuit also rejected the Government’s argument that the anonymity of the posts mitigated the severity of the misconduct,²³⁰ finding instead that “the anonymous nature of the comments . . . increase[d] their pernicious influence”²³¹ and that “[a]nonymity provokes irresponsibility in the speaker.”²³² The court further expressed that the anonymous nature of the online posts was particularly problematic because it “gave the prosecution a tool for public castigation of the defendants that it could not have used against them otherwise”²³³ and eliminated the ability to measure the extent of the improper influence on the venire panel, the jury, as well as the trial “participants’ approaches to their defense, testimony, or decisions to testify.”²³⁴

substantially affect the jury’s deliberations. *See Bowen*, 969 F. Supp. 2d at 575, 619. *But see United States v. Jackson*, 22 F. Supp. 3d 636, 645 (E.D. La. 2014) (declining to warrant the same remedy to another defendant about whom at least one member of the U.S. Attorney’s Office had posted because that prosecutor’s conduct was “insufficient to establish . . . a pattern, policy or practice of using online comments to bias the Grand Jurors” against this particular defendant); *see also Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 554 (1976) (noting that “even pervasive, adverse publicity” does not by itself render a trial unfair).

224. *Bowen*, 969 F. Supp. 2d at 619.

225. *See id.*

226. *See United States v. Bowen*, No. 13-31078, 2015 WL 4925029, at *9 (5th Cir. Aug. 18, 2015). The Government also contended that the district court judge was a non-neutral arbiter and moved for his removal from future proceedings. *See id.* at *19. The Fifth Circuit, however, held that the Government’s motion was meritless. *See id.* at *20.

227. *Id.* at *14, *16. *But see United States v. McRae*, No. 14-30995, 2015 WL 4542651, at *1, *7–8 (5th Cir. July 28, 2015) (denying a new trial request to a former New Orleans police officer convicted of different crimes in the aftermath of Hurricane Katrina because he failed to establish actual or presumed prejudice stemming from the same anonymous postings at issue in *Bowen*).

228. *Bowen*, 2015 WL 4925029, at *18.

229. *Id.* at *14.

230. *See id.* at *14, *17.

231. *Id.* at *15.

232. *Id.* at *18.

233. *Id.* at *16.

234. *Id.* at *18.

In addition to anonymous posts on news sites, some prosecutors engage in unofficial use of social media by maintaining anonymous blogs.²³⁵ Some blog to vent or provide humor.²³⁶ Other prosecutors blog to promote transparency, at least in part, by providing information about the scope of the prosecutorial role²³⁷ and the nature of the criminal justice system.²³⁸ Sometimes this includes discussing high profile cases with which they and their offices are unaffiliated.²³⁹ When it comes to their own matters, however, at least some prosecutors who blog strive to avoid discussing their pending cases.²⁴⁰ Nevertheless, even some prosecutors who have expressly

235. See, e.g., MISTER DISTRICT ATTORNEY, <http://misterda.blogspot.com> (last visited Sept. 27, 2015) [<http://perma.cc/R7J7-888Q>]; PROSECUTOR'S DISCRETION, <http://prosecutorsdiscretion.blogspot.com> (last visited Sept. 27, 2015) [<http://perma.cc/YX9B-9EKG>]. The ABA nominated *Prosecutor's Discretion* as one of the top legal blogs, or "blawgs," of 2014. *Blawg 100*, A.B.A. J., <http://www.abajournal.com/blawg100> (last visited Sept. 27, 2015) [<http://perma.cc/YTZ3-H2J2>]; *ABA Top 100 Nominee!*, PROSECUTOR'S DISCRETION (Dec. 10, 2014, 10:16 AM), <http://prosecutorsdiscretion.blogspot.com/2014/12/aba-top-100-nominee.html> [<http://perma.cc/2M3X-P9W4>]. Although prosecutors are the focus of this Note, some criminal defense attorneys and judges have also maintained blogs to discuss aspects of their work and the legal profession. See, e.g., A PUBLIC DEFENDER, <http://apublicdefender.com> (last visited Sept. 27, 2015) (blog maintained by a criminal defense attorney) [<http://perma.cc/C52D-W9AZ>]; DEFENDING PEOPLE, <http://blog.bennettandbennett.com> (last visited Sept. 27, 2015) (same) [<http://perma.cc/M3YV-9ME2>]; NEW YORK CRIMINAL DEFENSE ATTORNEY BLOG, <http://www.newyorkcriminaldefenseattorneyblog.com> (last visited Sept. 27, 2015) (same) [<http://perma.cc/45TL-TJDQ>]; see also David G. Savage, *Judge Under Fire for Blog Post on Hobby Lobby Case*, L.A. TIMES (July 9, 2014), <http://www.latimes.com/nation/la-na-blogging-judge-20140710-story.html> (discussing the content of and reactions to blog posts of a federal judge) [<http://perma.cc/P9FE-YX8A>].

236. See, e.g., WHAT THE PROSECUTORS, <http://whattheprosecutors.tumblr.com> (last visited Sept. 27, 2015) [<http://perma.cc/D9TN-TTQD>].

237. See *A Trial Nobody Cares About*, PROSECUTOR'S DISCRETION (Oct. 27, 2014, 9:53 PM), <http://prosecutorsdiscretion.blogspot.com/2014/10/a-trial-nobody-cares-about.html> ("Part of this site's purpose is to provide a glimpse into the world of the prosecutor.") [<http://perma.cc/T63X-SGG2>]; *Welcome!*, PROSECUTOR'S DISCRETION (Aug. 21, 2011, 11:10 PM), <http://prosecutorsdiscretion.blogspot.com/2011/08/welcome.html> [<http://perma.cc/KU8V-JZ33>]; see also *So, What Do Prosecutors Do, Anyway?*, MISTER DISTRICT ATTORNEY (Oct. 12, 2004, 6:59 PM), <http://misterda.blogspot.com/2004/10/so-what-do-prosecutors-do-anyway.html> (discussing some of the roles and responsibilities of prosecutors) [<http://perma.cc/5VRW-XFAE>].

238. See, e.g., *Confessions of a Facebook Stalker*, PROSECUTOR'S DISCRETION (Sept. 11, 2011, 9:48 PM), <http://prosecutorsdiscretion.blogspot.com/2011/09/beware-facebook-posts.html> (describing how prosecutors use Facebook to cross-examine witnesses to test their credibility) [<http://perma.cc/X8AR-KLTY>]; *Path of a Criminal Case*, PROSECUTOR'S DISCRETION (Sept. 8, 2011, 10:59 PM), <http://prosecutorsdiscretion.blogspot.com/2011/09/path-of-criminal-case.html> (discussing the various steps in the criminal justice process) [<http://perma.cc/UX4K-GJE4>]; *Plea Bargaining*, PROSECUTOR'S DISCRETION (Oct. 10, 2011, 1:21 PM), <http://prosecutorsdiscretion.blogspot.com/2011/10/plea-bargaining.html> (discussing the various factors that prosecutors consider in offering a reduced plea) [<http://perma.cc/HH8V-2C66>].

239. See, e.g., *Trayvon Martin and Justification*, PROSECUTOR'S DISCRETION (Mar. 28, 2012, 7:45 AM), <http://prosecutorsdiscretion.blogspot.com/2012/03/trayvon-martin-and-justification.html> [<http://perma.cc/W7FR-XBE5>].

240. See *A Difficult Week*, PROSECUTOR'S DISCRETION (May 8, 2014, 10:35 PM), <http://prosecutorsdiscretion.blogspot.com/2014/05/a-difficult-week.html> ("One of the rules of this blog is that I cannot discuss pending cases, for both legal and ethical reasons.") [<http://perma.cc/7UN4-KHR2>]; see also *A Trial Nobody Cares About*, *supra* note 237.

articulated that they cannot blog about ongoing matters have discussed pending cases to which they have been assigned in their blog posts.²⁴¹ Although such posts typically do not contain any names, legal analysis, or discussion of the particular evidence intended to be introduced at trial, some posts seem to convey a presumption of the defendants' guilt,²⁴² which arguably runs afoul to the prosecutor's role as a minister of justice.²⁴³

In addition to anonymous blogging, some prosecutors post unofficially and without authorization by way of their personal social media profiles. One assistant state prosecutor, for example, posted on his private Facebook page about his "trial from hell," characterizing the defendant as a "gang banger" and the defense attorney as a "weasel face" in a poem that he wrote to the tune of the *Gilligan's Island* theme song.²⁴⁴ He posted the poem

241. The anonymous prosecutor who maintains the *Prosecutor's Discretion* blog, for example, posted on the morning of a trial, "Trial today. Robbery case. Four men (16 year old boys really) jumped and robbed a man of money and a cell phone as he walked to the store." *One Witness Too Many*, PROSECUTOR'S DISCRETION (Apr. 9, 2012, 8:57 AM), <http://prosecutorsdiscretion.blogspot.com/2012/04/one-witness-too-many.html> [<http://perma.cc/K72K-XAMJ>]. In another post, he discussed another upcoming trial, stating, "The defendant and his buddy burglarized a string of stores across New York State. Jury selection on Monday and the trial should begin on Tuesday. So far, we've pre-marked 75 pieces of evidence and are calling twenty witnesses." *A Difficult Witness*, PROSECUTOR'S DISCRETION (Feb. 3, 2012, 9:08 AM), <http://prosecutorsdiscretion.blogspot.com/2012/02/difficult-witness.html> [<http://perma.cc/PCT4-U4RL>].

242. See, e.g., *A Difficult Witness*, *supra* note 241 (affirmatively stating that the defendant "burglarized a string of stores" even though he had yet to be convicted for such offenses); *One Witness Too Many*, *supra* note 241 (stating that four individuals "jumped and robbed a man" although they had yet to be found guilty of these charges).

243. See *United States v. Bowen*, No. 13-31078, 2015 WL 4925029, at *15 (5th Cir. Aug. 18, 2015) (discussing how prosecutors' duty to do justice requires that prosecutors limit their public statements and "respect the presumption of innocence even as [they seek] to bring a defendant to justice"); see also *supra* note 43.

244. See Browning, *supra* note 114, at 895; DiBianca, *supra* note 148, at 191; Kashmir Hill, *Lawyer of the Day: Brandon White Stranded in Gilligan's Trial*, ABOVE THE LAW (Apr. 22, 2010, 12:47 PM), <http://abovethelaw.com/2010/04/lawyer-of-the-day-brandon-white> [<http://perma.cc/A5UP-J58S>]. The full text of the post was 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.
The lead prosecutor was a good woman, the 2nd chair was totally awesome,
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*.
The trial started Tuesday, continued til Wednesday
And then Thursday, with Robyn and Brandon too,
The weasel face
The gang banger defendant
The Judge, clerk, and Ritzline
Here in St. Lucie.
So this is the tale of the trial
it's going on here for a long, long time,
The prosecutors will have to make the best of things,
It's an uphill climb.
The New Guy and Robyn
Will do their very best,

after the start of jury deliberations but before the jury had rendered a verdict.²⁴⁵ The case ultimately resulted in a mistrial for reasons unrelated to the prosecutor's social media activity.²⁴⁶ Another state prosecutor made national news and ultimately resigned from her job after publishing an inflammatory post on Facebook in which she stated that the best way to handle violent demonstrations in Baltimore arising from the death of a man who died from a spinal injury sustained while in police custody was to shoot the protestors.²⁴⁷

B. Prosecutors' Competing Motivations to Make Extrajudicial Statements

In evaluating what, if any, additional restraints should be put in place to restrict prosecutors' social media activity, it is important to consider *why* prosecutors may choose to post information or comment on social media. Prosecutors may have many different reasons for engaging in such activity, some of which may raise concerns. Parts II.B.1 and II.B.2 address some of the legitimate and illegitimate motivations behind prosecutor's extrajudicial speech on social media, respectively.

1. Legitimate Motivations

As Circuit Attorney Joyce articulated in her Statement on Social Media, prosecutors are government officials and public servants who have an informational motive for making extrajudicial statements.²⁴⁸ Thus, some prosecutors may elect to make extrajudicial statements to warn the public of certain dangers, update the public on events occurring within the prosecutor's office or justice system, or provide information about matters that may not be receiving attention from the press.²⁴⁹ Additionally, the interests of justice and a fair judicial process might motivate prosecutors to correct inaccuracies in stories that are being reported in the press.²⁵⁰

To make sure justice is served
 In the hornets [sic] nest.
 No rules of evidence or professionalism,
 Not a single ounce of integrity
 Like My Cousin Vinny,
 No ethics involved, no ethics involved.
 DiBianca, *supra* note 148, at 191 n.99.

245. See DiBianca, *supra* note 148, at 191.

246. See Browning, *supra* note 114, at 895.

247. See Kate Abbey-Lambertz, *Michigan Assistant Prosecutor Resigns After Calling for Baltimore Protesters to Be Shot*, HUFFINGTON POST (May 1, 2015, 4:13 PM), http://www.huffingtonpost.com/2015/05/01/teana-walsh-protesters_n_7190944.html [<http://perma.cc/L86K-ZJ59>].

248. See Press Release of Circuit Attorney Joyce, *supra* note 9; see also Matheson, Jr., *supra* note 42, at 888.

249. See FAIR TRIAL AND PUB. DISCOURSE 8-1.1(a)(i) (AM. BAR ASS'N 2013) (discussing situations in which prosecutors may make extrajudicial statements in order to inform the public); U.S. ATTORNEYS' MANUAL § 1-7.530 (same); see also 1 AM. JUR. *Trials* § 22 (2014).

250. See Boothe-Perry, *supra* note 118, at 149. In some situations, online reporting or "courtroom blogging" has resulted in news coverage that forsakes accuracy for expedience and newsworthiness. See Coffey, *supra* note 13, at 1, 18.

The natural desire to articulate one's thoughts or express one's viewpoint may also motivate prosecutors to engage in extrajudicial speech. By assuming the role of a prosecutor, one sheds neither his innate need to communicate nor his First Amendment protections.²⁵¹ Although legal professional codes limit attorneys' "freedom to vent, complain, and gripe" to a greater extent than that of the average citizen,²⁵² many attorneys naturally still seek to express feelings of joy and frustration regarding their day-to-day experiences.²⁵³

2. Illegitimate Motivations

Prosecutors may also have less legitimate motivations for engaging in extrajudicial speech. Reputational concerns, for example, may incentivize prosecutors to make extrajudicial statements.²⁵⁴ Although federal prosecutors like U.S. Attorneys are appointed, most head prosecutors are elected.²⁵⁵ Prosecutors seeking to enhance their reputation may make certain statements that demonstrate that they subscribe to a particular view on crime or that they are effectively serving the public interest.²⁵⁶ Personal concerns, such as the desire to be viewed positively by the public or the press, may motivate such statements. Additionally, political pressures, such as reelection concerns or the desire to advance to a higher position, may incentivize prosecutors to make extrajudicial statements.²⁵⁷

In some situations these pressures may result in a "win-at-all-costs mentality," which can encourage some prosecutors to skirt ethical rules to secure convictions that increase the likelihood of being reelected by the public or of being appointed or hired for a different job in the future.²⁵⁸ Thus, some prosecutors may intentionally seek to manipulate the press and

251. See Skinner, *supra* note 111, at 258; see also *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075 (1991) (discussing how the government's interest in regulating speech must always be weighed against an individual's First Amendment interests).

252. Shannon Awsumb & Karen Wells Roby, *The Intersection of Online Communications and Legal Ethics*, 59 FED. LAW. 33, 33 (2012).

253. See Skinner, *supra* note 111, at 258 ("[A]ttorneys, like other professionals, vent about work and clients through social media." (citation omitted)); see also Glavin, *supra* note 46, at 1809 (discussing how some attorneys provide "behind-the-scenes" accounts of certain cases by writing books).

254. See Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2472 (2004) ("Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch."); Michael C. Smith, *Social Media Update*, 62 THE ADVOC. (TEXAS) 197, 205 (2013).

255. See Bibas, *supra* note 45, at 985–86.

256. See *id.* (discussing how prosecutors may seek to show that they are "tough[] on crime" or that they support initiatives like less punitive measures for drug crimes).

257. See *id.* at 983; Malia N. Brink, *A Pendulum Swung Too Far: Why the Supreme Court Must Place Limits on Prosecutorial Immunity*, 4 CHARLESTON L. REV. 1, 9 (2009); Matheson, Jr., *supra* note 42, at 888; Victor Streib, *Media Misuse: Criminal Lawyer Advertising and Prosecutor Campaigning Under the Guise of the Public's Need to Know*, 34 OHIO N.U. L. REV. 703, 703 (2008) (noting that lawyers may be tempted to use trial publicity to enhance their own image or career). See generally Smith, *supra* note 43, at 399 (discussing how political and public pressure is impossible for prosecutors to avoid).

258. See Brink, *supra* note 257, at 9, 18.

prospective or active jurors by leaking false, inadmissible, or misleading information to advance the government's case against a particular defendant.²⁵⁹ Others may seek to influence the defendant, hoping that particularly extensive media coverage might entice the defendant to enter a guilty plea.²⁶⁰ These influences are particularly prominent in high profile cases in which prosecutors face immense pressure to make arrests and secure convictions quickly.²⁶¹

C. How Social Media Increases the Benefits and Exacerbates the Harms of Prosecutors' Extrajudicial Statements

As social media makes it easier for prosecutors to act on these competing motivations when deciding whether to make extrajudicial statements,²⁶² it is also important to consider how social media changes the effects of prosecutors' extrajudicial speech. Part II.C.1 of this section addresses the increased benefits of prosecutors' extrajudicial speech on social media while Part II.C.2 discusses how social media magnifies the harmful risks associated with prosecutors' extrajudicial statements.

1. Increased Benefits of Prosecutors' Extrajudicial Speech

Prosecutors' use of social media may positively impact relations between prosecutors' offices and the public at large. This section explores how prosecutors can use social media to more easily communicate with the public and provide greater transparency that may improve public perception of prosecutors.

Prosecutors' use of social media may engender a more informed citizenry.²⁶³ As previously discussed, the public increasingly uses social media to obtain news and exchange information,²⁶⁴ which has led some to contend that law enforcement officials can connect with citizens successfully only through social media.²⁶⁵ Because social media is cheap and easy to use,²⁶⁶ prosecutors can easily disseminate information about matters of public interest and potentially better reach more citizens more regularly than can be accomplished through traditional media, which may

259. See Minnefor, *supra* note 30, at 100, 114–15.

260. See Matheson, Jr., *supra* note 42, at 889; see also *United States v. Bowen*, 969 F. Supp. 2d 546, 620 (E.D. La. 2013) (discussing an FBI Agent's comments that pre-trial media coverage can put pressure on subjects to confess or cooperate in a pending investigation or trial).

261. See Brink, *supra* note 257, at 9; see also Bibas, *supra* note 45, at 984 (discussing how O.J. Simpson's acquittal likely contributed to Los Angeles District Attorney Gil Garcetti's defeat in the 2000 election).

262. See *supra* Part I.C.1.

263. See HOFFMEISTER, *supra* note 12, at 105; see also Boothe-Perry, *supra* note 118, at 131 (discussing how social media affords the public "easier access to the intricacies of the wheels of justice"); MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (discussing how vital societal interests are advanced through the dissemination of information regarding legal matters).

264. See *supra* Part I.C.2.

265. See HOFFMEISTER, *supra* note 12, at 59.

266. See *supra* note 96 and accompanying text.

not provide complete coverage (or any coverage at all) on matters of public interest.²⁶⁷

Furthermore, prosecutors can use social media to make statements that solicit responses from the community.²⁶⁸ Unlike traditional media, social media provides for two-way communication.²⁶⁹ Prosecutors therefore may use social media to engage with the public to assess community needs and concerns in a more impactful and direct way.

A more informed citizenry may result in further benefits to the prosecutor's office and to the public at large. More information about the nature of the prosecutorial function and the matters to which the prosecutor is attending can increase transparency and openness²⁷⁰ as well as improve the public's perception of the prosecutor's office and the justice system as a whole.²⁷¹ Prosecutors' blogs, for example, can provide the public with a more comprehensive understanding of prosecutorial discretion and decision making.²⁷² Improved public perception of the prosecutor's office may have the added benefit of strengthening community ties and improving support for law enforcement, which may in turn help disincentivize criminal activity.²⁷³

2. Exacerbated Harms of Prosecutors' Extrajudicial Speech

Prosecutors' use of social media to make extrajudicial statements also exacerbates the potential harms stemming from prosecutors' speech. This section explores such risks, which include influencing a pending matter, imposing reputational harm on the accused, misleading the public, and tarnishing public perception of prosecutors or the justice system as a whole.²⁷⁴

Prosecutors' use of social media increases the risk that their extrajudicial statements will affect a pending investigation or proceeding.²⁷⁵

267. See *supra* Part I.C.1; see also Boothe-Perry, *supra* note 118, at 131.

268. See generally HOFFMEISTER, *supra* note 12, at 60–61 (discussing how police departments have used social media to converse with local citizens).

269. See *id.* at 61.

270. See HOFFMEISTER, *supra* note 12, at 60. An open criminal justice system is widely considered fundamental to a democratic society as it ensures that the administration of justice is open to scrutiny, which in turn promotes fairness. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 565 (1980) (plurality opinion); *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

271. See HOFFMEISTER, *supra* note 12, at 60–61 (discussing how using social media can help law enforcement officials build rapport with the local community); Bernabe-Riefkohl, *supra* note 32, at 324 (discussing how transparency and openness regarding criminal proceedings is essential for maintaining public confidence in the administration of justice); Matheson, Jr., *supra* note 42, at 884 (“Secrecy regarding the administration of justice may have a detrimental effect on public confidence.”).

272. See generally Glavin, *supra* note 46, at 1844–45 (discussing how books written by prosecutors may provide the public with a better understanding of how prosecutors operate).

273. See HOFFMEISTER, *supra* note 12, at 59–60; Matheson, Jr., *supra* note 42, at 889.

274. See *infra* Part II.C.2.

275. See generally Part I.A. (discussing how extrajudicial statements and other outside influences on jurors may thwart a defendant's right to a fair trial, thereby impeding the fair administration of justice).

Traditionally, prosecutors avoid speaking about pending matters because the so-called “trial in the newspapers” routinely draws the ire of judges.²⁷⁶ Press conferences and other announcements that attract journalists are typically reserved only for the most newsworthy cases once an indictment is filed, and rarely afterward.²⁷⁷ Consequently, most matters do not generate much, if any, media attention. Social media, however, “has the potential to give many trials a higher profile than they might otherwise enjoy.”²⁷⁸ This is true even for seemingly mundane cases.²⁷⁹

Further, given their public nature and ability to be “shared” or otherwise redistributed by members of the public, prosecutors’ statements on social media have a nearly limitless reach²⁸⁰ and are more permanent and accessible than prosecutors’ statements published via traditional media reports.²⁸¹ Because citizens are becoming increasingly exposed to news coverage on social media,²⁸² prospective jurors are more likely to become aware of pre-trial publicity for a particular case. This risk may increase as citizens become more aware of the social media presence of their local prosecutors, whose social media posts they may elect to actively follow.

The risks of prosecutors’ social media use to the fairness of a proceeding may persist even after jurors are selected and have been instructed by the judge not to discuss or conduct any research.²⁸³ The ubiquity of social media and individuals’ attachment to it increase the likelihood that jurors will violate instructions, either intentionally or accidentally.²⁸⁴ Moreover, as social media statements are unfiltered and often one-sided, prospective and active jurors are also more likely to be exposed to editorialized coverage of the case through social media. This medium is more likely to influence jury deliberations than is traditional media coverage, which typically provides more balanced accounts of criminal matters.²⁸⁵ Thus, prosecutors’ statements on social media increase the likelihood that prospective or active jurors will view extraneous coverage of the trial.

Although there may be no constitutional deprivation of a right to a fair trial if prosecutors’ extrajudicial statements do not impact the jury’s deliberations,²⁸⁶ the prosecutors’ statements may nevertheless inflict

276. Minnefor, *supra* note 30, at 120.

277. *See id.*

278. Niehoff, *supra* note 12, at 12.

279. *Id.* (noting how a defendant’s use of social media to discuss his less-than-newsworthy case prompted major local newspapers to cover the trial).

280. *See supra* Part I.C.1.

281. *See supra* Part I.C.1.

282. *See supra* Part I.C.2.

283. *See* HOFFMEISTER, *supra* note 12, at 51.

284. *See id.* The risk of inadvertently stumbling upon prosecutors’ statements on social media is likely greater in small towns where the prosecuting attorney may be more visible and where criminal prosecutions are rare, thereby potentially making it more likely that members of the community would follow and share the prosecutor’s statements on social media.

285. *See supra* Part I.C.1.

286. *See* Part I.A.; *see also* United States v. Modica, 663 F.2d 1173, 1184 (2d Cir. 1981) (“Prosecutorial misconduct that causes no substantial prejudice has, by definition, not resulted in a constitutional deprivation . . .”).

substantial reputational harm on the accused.²⁸⁷ Central to the American criminal justice system is the presumption that the defendant is innocent until proven guilty and that the sentence imposed upon an individual who has plead or been found guilty is the appropriate punishment for that individual's illegal conduct.²⁸⁸ Given that social media activity is largely unmediated, permanent, and far-reaching,²⁸⁹ prosecutors' statements may result in irreparable damage²⁹⁰ that goes beyond the reputational harm that is an inevitable byproduct of the indictment itself.²⁹¹ Indeed, a simple internet search of the accused's name can instantly uncover harmful media coverage, even when the case occurred several years prior and the accused was ultimately not convicted.²⁹²

Prosecutors' statements on social media also pose a greater risk of misleading the public and tarnishing public perception of the justice system.²⁹³ As previously discussed, social media makes it much easier for prosecutors and non-prosecutors alike to publish information that is inaccurate.²⁹⁴ Social media's perceived anonymity may breed indiscretion,²⁹⁵ leading some to mistakenly believe that they can circumvent ethical rules so long as their statements remain anonymous.²⁹⁶ Indeed, purported anonymity likely influenced the prosecutors in *United States v. Bowen*²⁹⁷ when they decided to comment pseudonymously on the NOPD and the conduct of its officers.²⁹⁸

Moreover, even social media activity that is not anonymous or misleading can compromise public perception of prosecutors, attorneys, and the integrity of the judicial system as a whole.²⁹⁹ Due to the ease of use and wide reach of social media, prosecutors' statements are more likely to be informal, impulsive, and arguably less professional than are statements

287. See, e.g., R. Taylor Matthews III, Comment, *The Duke Lacrosse Rape Case—A Public Branding, Is There a Remedy?*, 52 ST. LOUIS U. L.J. 669, 670–72 (2008) (discussing how Durham District Attorney Mike Nifong's extrajudicial statements regarding his certainty that three members of the Duke lacrosse team were involved in a brutal gang rape tarnished the players' reputations even though the Attorney General of North Carolina subsequently determined and publicly announced that the players were innocent).

288. See Margaret Tarkington, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*, 66 FLA. L. REV. 1873, 1990 (2014).

289. See *supra* Part I.C.

290. See Glavin, *supra* note 46, at 1814; see also Matthews, *supra* note 287, at 676–77.

291. See Matthews, *supra* note 287, at 676.

292. See *id.* at 676–77.

293. See HOFFMEISTER, *supra* note 12, at 105–06; see also Brown, Jr., *supra* note 32, at 134–35.

294. See *supra* Part I.C.1.

295. See Skinner, *supra* note 111, at 253.

296. See Awsumb & Roby, *supra* note 252, at 34.

297. 969 F. Supp. 2d 546 (E.D. La. 2013).

298. See *supra* notes 210–18 and accompanying text.

299. See Matheson, Jr., *supra* note 42, at 867. See generally HOFFMEISTER, *supra* note 12, at 146 (discussing how social media use in general may negatively impact the sanctity of the judicial process).

made via traditional media.³⁰⁰ This may lead the public to question the efficacy of its local prosecutors and the fairness of the justice process.³⁰¹

III. THE NEED FOR ADDITIONAL RESTRAINTS ON PROSECUTORS' EXTRAJUDICIAL SPEECH IN LIGHT OF SOCIAL MEDIA

As the public becomes more interested in the news³⁰² and increasingly skeptical of prosecutors and the justice system as a whole,³⁰³ prosecutors and other government officials may need to take more meaningful steps to promote transparency and increase public confidence in the criminal justice system. Social media is a potential avenue through which prosecutors can achieve these goals successfully.³⁰⁴ However, there is little doubt that prosecutors' use of social media may also exacerbate the harms of prosecutors' extrajudicial speech, including denying defendants' their right to due process, imposing undue reputational damage, misleading the public, and more.³⁰⁵ As such, additional restraints are needed to curb the potential damage that social media can have on defendants, the public, and the justice system as a whole.

This Part argues that ABA Standards, state and local ethical rules, employer manuals like the U.S. Attorneys' Manual, and other resources that provide guidance on the prosecutorial function should include specific restraints on prosecutors' use of social media to maintain the balance between prosecutors' freedom of speech and the fair administration of justice in the social media age. Part III.A contends that prosecutors should not editorialize on social media. Part III.B advocates for restrictions on the content and timing of prosecutors' social media posts about pending matters. Part III.C addresses the need for restraints that promote professionalism. Finally, Part III.D argues that prosecutors should not post about pending cases or other aspects of their job without authorization or supervision.

A. *Prosecutors Should Not Editorialize When Posting About Pending Cases*

Prosecutors posting in either official or unofficial capacities on social media should not editorialize when making extrajudicial statements about pending cases. Prior to the growth of social media, prosecutors traditionally relied on old media to disseminate information to the public.³⁰⁶ A prosecutor provided statements in a press release, in a news interview, or at

300. See HOFFMEISTER, *supra* note 12, at 105–06; see also Brown, Jr., *supra* note 32, at 134–35.

301. See HOFFMEISTER, *supra* note 12, at 105–06.

302. See *supra* Part I.C.2.

303. See Brent Staples, Editorial, *Hope and Anger at the Garner Protests*, N.Y. TIMES, Dec. 6, 2014, at A22 (discussing civilian protests in the wake of the grand jury decision not to indict a police officer in the death of Eric Garner); see also *supra* note 128.

304. See *supra* Part II.C.1.

305. See *supra* Part II.C.2.

306. See *supra* Parts I.C.1, II.C.2.

a press conference.³⁰⁷ A reporter would subsequently conduct further research. The final coverage would include parts of the prosecutor's statements alongside statements by others with information about the particular case.³⁰⁸ Thus, any editorializing that the prosecutor may have engaged in would likely be counterbalanced by the reporter's other sources, making the prosecutor's editorializing less likely to raise due process or reputational concerns.³⁰⁹

Social media, however, does not have these same checks. As previously discussed, social media platforms are unmediated, leaving prosecutors free to provide commentary about pending matters.³¹⁰ Any editorializing on social media stands alone on the prosecutor's official or unofficial social media page without being counterbalanced by statements from other sources, such as defense counsel.³¹¹ Further, such statements can remain permanently on the prosecutor's social media page as well as on the pages of any social media users who "share" or repost the prosecutor's comments on their social media pages.³¹² As prospective jurors and other members of the public can seek out this information or access it inadvertently, such statements may potentially influence the trial or impose greater reputational harm on the defendant.³¹³

Thus, while some editorializing may be acceptable at a press conference, it poses a substantial and unique risk of harm to the defendant and the functioning of the judicial process when articulated in the social media realm.³¹⁴ Consequently, prosecutors posting on social media in official or unofficial capacities should avoid editorializing when discussing pending matters.

*B. The Content and Timing of Prosecutors' Social Media Posts
About Pending Cases Should Be Restrained*

The increased risk of harm to the defendant and the functioning of the judicial process also necessitate restraints on the content of prosecutors' social media posts about pending cases. Prosecutors should restrict the content of their social media posts to procedural information, such as the time and place of a particular proceeding that is open to the public, and factual information contained within the public record.³¹⁵ Furthermore, prosecutors should provide a neutral synopsis of the charge, including words such as "alleged," "accused," or "charged with," when discussing pending matters in order to reduce the risk of harm to the fair administration

307. See *supra* notes 152, 276–77 and accompanying text.

308. See *supra* Part I.C.1.

309. See *supra* Part I.C.1.

310. See *supra* notes 107–12 and accompanying text.

311. See *supra* Part I.C.1.

312. See *supra* Part I.C.1.

313. See *supra* Parts I.A, I.C.1, II.C.2.

314. See *supra* Parts I.C.1, II.C.2.

315. See *supra* note 10; see also *supra* note 64 and accompanying text (discussing how the Model Rules permit prosecutors to discuss publicly available information within certain limitations).

of justice or to the reputation of the defendant, as well as to avoid the appearance of partiality or unfairness.³¹⁶ For example, a tweet stating, “Man who committed 5 burglaries to be tried next month,” is more likely to convey bias and produce harm than a tweet stating, “Man accused of 5 burglaries to be tried next month.” Posted links should likewise be limited to publicly available news articles, press releases, and other documents that are also solely based on information contained within the public record.³¹⁷

Nevertheless, including links to neutral documents, “sprinkling the words ‘allege(d)’ or ‘allegation(s)’ liberally throughout” an extrajudicial statement, or “inserting a disclaimer that the accused is ‘innocent unless and until proven guilty’ at the end of an otherwise improper [statement]” will not “magically dispel[]” the prejudicial effect of otherwise improper extrajudicial commentary.³¹⁸ Thus, prosecutors and their offices should take steps to ensure that each isolated, pre-conviction statement on social media clearly conveys that the charges against the accused are merely allegations that have yet to be proven in court.³¹⁹

The timing of prosecutors’ statements on social media should also be restrained. As previously discussed, traditionally prosecutors have tended not to speak about pending matters after an initial press conference upon filing an indictment to avoid the ire of judges.³²⁰ Social media, however, enables prosecutors to provide continuous updates about a pending matter both before and during trial.³²¹ As continuous posting right before and during trial may draw publicity that could taint the fairness of the proceeding, prosecutors should not post on social media about pending cases from the beginning of jury selection until after the verdict is entered in order to reduce the likelihood of impacting a pending proceeding.³²² Any need to provide the public with information to further some legitimate law enforcement purpose can be conveyed through traditional media, which

316. *See* *United States v. Silver*, No. 15-CR-93, 2015 WL 1608412, at *5 & n.7 (S.D.N.Y. Apr. 10, 2015) (“A better word choice, and one that more clearly conveys to the listener that the facts being relayed are merely allegations, would be: ‘Silver *allegedly* figured out how to monetize his position as Speaker of the Assembly in two principal ways. In both cases, Silver *allegedly* cynically abused his law degree and New York’s lax disclosure rules to disguise kickbacks as legal referrals. . . . So he *allegedly* asked the doctor to refer people who have asbestos diseases to Silver at the firm of Weitz & Luxenberg with which Silver had conveniently formed an affiliation.” (alteration in original) (emphasis added)).

317. *See id.* at *5. For an example of such a post, see US Attorney SDNY (@SDNYnews), TWITTER (Dec. 17, 2014, 1:21 PM), <https://twitter.com/SDNYnews/status/545328074100068352> (discussing arrest of international arms traffickers while posting a link to a press release containing information based on the public record) [<http://perma.cc/6NYE-7MDZ>].

318. *Silver*, 2015 WL 1608412 at *5.

319. *See id.* at *5 & n.7.

320. *See* Minnefor, *supra* note 30, at 120; *see also supra* Part II.C.2.

321. *See supra* note 96 and accompanying text (discussing how social media enables individuals to communicate continuously with little effort or cost).

322. *See supra* Part II.C.2; *see also supra* note 259 and accompanying text.

serves as a better check on prosecutors' statements during this period when the jurors are most susceptible to influence.³²³

C. Prosecutors' Social Media Posts Should Demonstrate Professionalism

Although the legal profession requires that all attorneys adhere to a certain level of professionalism,³²⁴ demonstrating professionalism is especially important for prosecutors, "who are not only government officials but [are] also responsible for ensuring that justice is fairly administered."³²⁵ Prosecutors who utilize social media, be it in an official or unofficial capacity, should therefore ensure that their posts are professional and do not undermine public perception of prosecutors or the legal profession as a whole.³²⁶ Thus, in addition to posts about pending matters that are conveyed in a biased manner,³²⁷ politically charged posts, like District Attorney Larson's Facebook posts regarding Eric Holder,³²⁸ should generally be avoided, particularly when posted in an official capacity. Further, prosecutors should not forsake accuracy or completeness in order to adhere to social media norms such as brevity or speediness.

In addition to avoiding making statements that may undermine public perception of the profession, prosecutors can, and should, use social media to promote professionalism.³²⁹ As previously discussed, prosecutors can use social media to inform the public and promote transparency, thereby building community relations and increasing public confidence in the profession.³³⁰ Thus, prosecutors posting in an official capacity should be encouraged to provide information about the general nature of the justice process, initiatives on which the office is working,³³¹ and other matters of public interest³³² so long as their posts do not affect a pending proceeding or risk imposing additional reputational harm on the defendant.³³³

D. Unofficial, Unauthorized Posts Should Be Avoided

Additionally, prosecutors should not post on social media about cases or office operations without authorization or oversight.³³⁴ Although blogging

323. See *supra* Part I.C.1.

324. See Awsumb & Roby, *supra* note 252, at 33; see also *supra* Part I.B.

325. HOFFMEISTER, *supra* note 12, at 105.

326. See *supra* Part II.C.2; *supra* notes 165, 300–01 and accompanying text. See generally Nicola A. Boothe-Perry, *Friends of Justice: Does Social Media Impact the Public Perception of the Justice System?*, 35 PACE L. REV. 72, 73–74 (2014) (discussing how legal professionals' use of social media has consequences on the general public's perception of the legal profession).

327. See *supra* Part III.A–B.

328. See *supra* note 165 and accompanying text.

329. See *supra* Part III.C.1 (discussing how social media can be used to promote public confidence in prosecutors and the judicial system).

330. See *supra* Part III.C.1.

331. See, e.g., *supra* note 157 and accompanying text.

332. See, e.g., *supra* notes 158, 164.

333. See *supra* Part II.C.2.

334. Cf. *supra* notes 210–20, 235–47 and accompanying text (highlighting instances of prosecutors' unauthorized use of social media).

and other unauthorized social media activity by prosecutors may promote transparency by providing greater insight into the prosecutorial function,³³⁵ the risk of posting in an unprofessional manner, be it about pending cases or other topics, is substantial.³³⁶ Individuals posting in an official capacity are more likely to self-censor either by obtaining approval from their public relations team or by recognizing that their post reflects an official stance, which in turn may give individuals more reason to pause before posting than they would when posting in an unofficial capacity. As previously discussed, social media typically involves less inhibition than statements made through other mediums.³³⁷ This is especially true when an individual is posting anonymously, after a long day of work, or during a quick break when they do not have time to thoroughly consider whether they should post a particular statement, all of which are characteristic of social media activity. Further, the effective permanence of posts on social media indicates that there is no turning back once a prosecutor has pressed “send,” leaving the information readily accessible online even for months after the initial post.³³⁸

Nevertheless, even if prosecutors do post on social media in an unofficial capacity, discussion of pending cases should be avoided, as should discussion of other aspects of the office that could be viewed as unprofessional.³³⁹ Instead, prosecutors should confine their posts to general discussions about the law, the stages of the judicial process, and other aspects of the prosecutorial function that may promote transparency without hindering a particular defendant’s reputation or right to due process, the fair administration of justice, or the public’s view of the profession.³⁴⁰

CONCLUSION

Prosecutors’ use of social media has destabilized the balance that was previously struck between prosecutors’ First Amendment right to free speech and defendants’ Sixth Amendment rights to a fair trial and due process of law. Although prosecutors’ use of social media can promote transparency, which is arguably much needed to engender greater public confidence in prosecutors and the justice system as a whole, social media exacerbates longstanding concerns regarding prosecutors’ extrajudicial statements. The vast differences between traditional media and social media, including the way in which social media is far-reaching, unmediated, informal, and uniquely permanent, increase the likelihood that prosecutors’ extrajudicial speech will harm the defendant, the fair administration of justice, and public perception of the legal profession. Thus, additional restraints are needed to restore the free speech/fair trial balance and promote professionalism in the social media age.

335. *See supra* Part II.C.1.

336. *See supra* Part I.C.1.

337. *See supra* note 99 and accompanying text.

338. *See supra* Part I.C.1.

339. *See supra* Part II.C.2.

340. *See supra* Part II.C.2.