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John Browning  
*Passman & Jones*

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# #Snitches Get Stitches: Witness Intimidation in the Age of Facebook and Twitter

John Browning\*

## I. Introduction

As long as there are trials and witnesses, there will be the problem of witness intimidation. It is a problem that undermines the functioning of the justice system by denying crucial evidence to law enforcement and prosecutors while simultaneously eroding the public's confidence in the government's ability to protect its citizens. Intimidation can be case-specific, in which threats or violence are directed to dissuade a victim or witness from testifying in a particular case, or community-wide, in which conduct by gangs or organized crime is intended to foster a general atmosphere of fear or noncooperation within a given neighborhood or community. While recent statistics on the subject are somewhat lacking, back in 1995 the National Institute for Justice noted estimates by prosecutors that victim and witness intimidation was suspected in up to 75–100% of the violent

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\* John Browning is a Shareholder at Passman & Jones in Dallas, Texas, where he handles civil litigation in state and federal courts. Mr. Browning received his Bachelor of Arts with general and departmental honors from Rutgers University and his Juris Doctor from the University of Texas School of Law. He is the author of the books *The Lawyer's Guide to Social Networking*, *Understanding Social Media's Impact on the Law*, (West 2010), the *Social Media and Litigation Practice Guide* (West 2014); and *Cases & Materials on Social Media and the Law* (forthcoming, Carolina Academic Press), as well as numerous articles on social media and the law. He has been quoted as a leading authority on social media and the law by such publications as *The New York Times*, *The Wall Street Journal*, *TIME* magazine, *The National Law Journal*, *Law 360*, and *Inside Counsel* magazine. Mr. Browning serves as an adjunct law professor at SMU Dedman School of Law, Texas A&M University School of Law and Texas Tech University School of Law.

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crimes committed in some gang-dominated neighborhoods.<sup>1</sup>

But while witness intimidation itself has remained a constant, the forms it can assume have changed dramatically since 1995. With the advent of the Internet and the pervasiveness of social networking platforms, the criminal element has found a new tool to use in fueling an “anti-snitch culture.” Seventy-two percent of adult Americans maintain at least one social networking profile, and over 1.2 billion people worldwide are on Facebook. With the Internet fostering a sense of anonymity that may embolden many harassers, and social media sites providing opportunities to learn more about individuals than ever before, social media and online resources generally have become increasingly important weapons in the arsenal of harassment and intimidation. How important, one might ask? One New York district attorney stated that social media is the “[n]umber one impediment to doing my job as a prosecutor.”<sup>2</sup>

As with so many areas in which law has been impacted by technology, laws pertaining to witness harassment and intimidation do not reflect the importance of the Internet or social media. Take the Federal Victim and Witness Protection Act, for example.<sup>3</sup> Passed at a time when personal computing was unheard of, it could not have possibly envisioned a world in which witnesses could be targeted on Twitter or added to a Facebook page devoted to “rats” or “snitches.” Many states with witness intimidation laws have modeled them on the federal statute. They are, like the federal law, formulated with four key elements in mind: (1) the target’s status as a victim, witness, or someone otherwise connected to a case that is (2) in some stage of a criminal proceeding and (3) who experiences intimidation, force, or threats of force by (4) someone acting with the intent or purpose of influencing that person as a witness. Courts typically look to the context of the statements

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1. Kerry Murphy Healey, *Victim and Witness Intimidation: New Developments and Emerging Responses*, NAT’L INST. OF JUSTICE 2 (1995).

2. James Staas, *Man Convicted of Witness Intimidation After Grand Jury Testimony Is Posted on Facebook*, BUFFALO NEWS (Oct. 30, 2013 2:38 PM), <http://www.buffalonews.com/city-region/erie-county-court/man-convicted-of-witness-intimidation-after-grand-jury-testimony-is-posted-on-facebook-20131030>.

3. 18 U.S.C. § 1512(b) (2012).

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or conduct in determining whether the intimidation element has been satisfied.<sup>4</sup> In addition, “intimidate” is not usually construed as requiring physical violence or the threat of a specific injury.<sup>5</sup>

In order to better understand witness intimidation in the age of social media, one must examine both the forms it has taken as well as the response by law enforcement and the criminal justice system. As this article points out, the digital age has brought with it a host of new ways in which witnesses may be subjected to online harassment and intimidation across multiple platforms, and those means have been used to target not only victims and fact witnesses but even prosecutors and expert witnesses as well. The article will also examine potential responses to the problem of witness intimidation via social media, including proposed legislation. And while the focus of this article is on this problem as it currently stands in the United States, it should be remembered that just as social networking is a worldwide phenomenon, the use of such platforms for witness intimidation is an international problem. For example, Arab women living in the United States who have filed domestic abuse charges against their husbands have reported members of their families overseas being intimidated and harassed through social media postings as a form of pressure on the complaining victim.<sup>6</sup> And in Mexico, drug cartels use social media to harass and target those who report their actions.<sup>7</sup>

## II. Philadelphia—Ground Zero For Witness Intimidation Using Social Media?

In 2013, the Philadelphia District Attorney’s office described the problem of witness intimidation as being at a

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4. See, e.g., *Commonwealth v. Perez*, 954 N.E.2d 1, 19 (Mass. 2011).

5. *Commonwealth v. Brachbill*, 555 A.2d 82, 85–86 (Pa. 1989).

6. Kevin Davis, *Intimidated: Witness Harassment Has Gone Digital, and the Justice System is Playing Catch-Up*, 99 A.B.A. J. 54, 56 (2013).

7. John Burnett, *Mexican Drug Cartels Now Menace Social Media*, NPR (Sept. 23, 2011 4:04 PM), <http://www.npr.org/2011/09/23/140745739/mexican-drug-cartels-now-menace-social-media>.

“near epidemic” level.<sup>8</sup> In an increasing number of cases, that intimidation takes the form of social media postings calling the witness a “rat,” a “snitch,” and worse. In December 2013, 17-year-old Nasheen Anderson pled guilty to charges of witness intimidation and making terroristic threats.<sup>9</sup> He used his Twitter account to post secret grand jury documents and photos outing witnesses to a 2007 homicide and two 2012 shootings. The caption for one of the documents he posted read “Expose all rats.”<sup>10</sup> Despite the guilty plea, it remains unclear how Anderson received the documents from the grand jury proceedings.

Anderson’s activities are a drop in the bucket compared to the impact of an Instagram account called “Rats215.” Before it was ultimately shut down, the account grew to 7,900 followers and was being updated almost daily.<sup>11</sup> Between February and November 2013, the account outed more than thirty witnesses to violent crimes, in many instances posting photos of the witnesses, their statements, and testimony.<sup>12</sup> In one example, the account posted a photo apparently taken while the witness was testifying in court. In another, photos and evidence from a shooting case heard by a secret grand jury were posted. Posts would draw dozens of approving comments and “likes” from readers, many of whom would call for “hits” to be put out on the witnesses being identified.<sup>13</sup> The account holder routinely asked followers to pass along documentation on suspected “rats.” A police detective stumbled onto the account in early November 2013 when he was monitoring social media for

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8. Kevin McCorry, *Witness Intimidation at “Near Epidemic” Level*, NEWSWORKS.ORG (Apr. 11, 2013), <http://www.nbcphiladelphia.com/news/politics/Witness-Intimidation-Near-Epidemic-Level-202572451.html>.

9. Alex Wigglesworth, *DA: Philly Teen Admits to Using Twitter for Witness Intimidation*, PHILLY.COM (Dec. 4, 2013 5:31 PM), [http://www.philly.com/philly/news/breaking/DA\\_Philly\\_teen\\_admits\\_to\\_using\\_Twitter\\_for\\_witness\\_intimidation.html](http://www.philly.com/philly/news/breaking/DA_Philly_teen_admits_to_using_Twitter_for_witness_intimidation.html).

10. *Id.*

11. #rats215, INSTAGRAM, <http://web.stagram.com/tag/rats215/>.

12. Mike Newall & Aubrey Whelan, *Police Probe Website Targeting Crime Witnesses*, PHILA. INQUIRER (Nov. 9, 2013), [http://articles.philly.com/2013-11-09/news/43827173\\_1\\_witness-north-philadelphia-instagram](http://articles.philly.com/2013-11-09/news/43827173_1_witness-north-philadelphia-instagram).

13. *Id.*

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another case.<sup>14</sup> And while the account was ultimately disabled after police obtained search warrants for the account, its very existence underscores the new dimension that witness intimidation has taken on in the age of Facebook, Instagram, and Twitter. Angela Downes, co-chair of the Victims Committee of the ABA's Criminal Justice Section, describes it as "a new frontier," "being done in a way we never could have imagined before. We see a lot more people being intimidated through Facebook and even on Twitter."<sup>15</sup>

Unlike a threatening letter that can be destroyed, witness intimidation via social media is memorialized online. It's done in a very public way, seen by many others who often throw virtual gasoline onto the fire with their comments, "likes," calls for "hits," or sharing of further information. With an account like "Rats215," a kind of online mob hysteria quickly takes shape, feeding the "snitches get stitches, or wind up in ditches" mentality.

In another Philadelphia-area case, Alisha Harmon of Pottstown, Pennsylvania was convicted in September 2012 of using Facebook to intimidate a witness to an attempted murder committed by her boyfriend.<sup>16</sup> Following her boyfriend's arrest for the September 26, 2010 shooting of a rival gang member, Harmon made a series of Facebook posts, including a copy of the statement given by an eyewitness. That post included the witness' name, address, age, and phone number, as well as a note from Harmon reading "[Racial epithet] Need 2 Exercise Their Right 2 Remain Silent!!!! Rat [expletive]."<sup>17</sup> In recorded jailhouse phone conversations between Harmon and her boyfriend, police heard Harmon admit "We put that paperwork on Facebook" so "everybody can see it."<sup>18</sup> When Pottstown detectives searched Harmon's residence, they also found a copy of the eyewitness statement in her bedroom. Harmon was

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14. *Id.*

15. Davis, *supra* note 6.

16. Carl Hessler, Jr., *Pottstown Woman Gets Jail for Facebook Intimidation*, MERCURY NEWS (Sept. 21, 2012, 4:28 PM), <http://www.pottsmmerc.com/article/MP/20120921/NEWS01/120929829>.

17. *Id.*

18. *Id.*

sentenced to two to five years in state prison.<sup>19</sup>

### III. A National Problem

The problem of witness intimidation via social media is not limited to Philadelphia, but is as pervasive as social media itself. Every conceivable communications platform in the digital age has been misused for the purpose of witness harassment and intimidation—even gaming systems. One witness in a criminal trial even received comments posted on his Xbox Live profile from the defendant warning “I wouldn’t laugh 2 much U a dead man walking” and “Rats die slow.”<sup>20</sup> To illustrate the national scope of this problem, consider the following examples:

- In Santa Fe, New Mexico, a 19-year-old man was charged with using comments on his Facebook page to intimidate a witness in a counterfeiting case pending against his father, a former police officer;<sup>21</sup>
- In Brooklyn, New York, four supporters of an Orthodox Jewish counselor charged with child molestation took a photo of his accuser while she was on the witness stand and posted it on Twitter. They were ordered to leave the courtroom and were later charged with witness intimidation;<sup>22</sup>
- In Napa County, California, 19-year-old Manuel Ramirez was arrested in September 2012 on charges of witness intimidation. Ramirez, a known gang member, posted information on a social media site about the alleged victim in an alleged gang-related fight after the victim testified in a court hearing;<sup>23</sup>

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19. *Id.*

20. *Man Gets Caught Threatening Witness on Xbox Live*, TECHEYE.NET (April 14, 2014, 3:58 PM), <http://news.techeye.net/internet/man-gets-caught-threatening-witness-on-xbox-live>.

21. Davis, *supra* note 6.

22. *Id.*

23. *Man Arrested on Suspicion of Witness Intimidation*, AM. CANYON EAGLE (Sept. 1, 2012, 6:00 PM),

- In Baton Rouge, Louisiana, Anthony Williams and Bobby Riley were indicted in July 2013 on federal witness intimidation charges after they posted threats on Instagram to harm a witness.<sup>24</sup> The witness had testified during the April 2013 trial of Angela Myers, who was convicted of filing false claims for tax refunds using the names and Social Security number of identity theft victims;<sup>25</sup>
- In Michigan, 20-year-old Jarrell Broadnax was charged with witness intimidation after he posted pictures online of two witnesses (Nicolas Gibby and Demarco Taylor) in the case of the murder of Eastern Michigan University football player Demarius Reed, and referred to them as snitches.<sup>26</sup> The judge later dismissed the charges, ruling that Broadnax was merely voicing an opinion;<sup>27</sup>
- In Virginia, U.S. Attorney Timothy Heaphy successfully prosecuted John Conner and Whitney Roberts on witness intimidation charges after they set up and used a Facebook account to expose and intimidate witnesses preparing to testify against Conner on charges that he burned two houses to punish a girlfriend and collect the insurance. Among the offending posts was one that read, “How the hell can u b a gangsta when u snitchin and lien”;<sup>28</sup>

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[http://napavalleyregister.com/eagle/news/local/man-arrested-on-suspicion-of-witness-intimidation/article\\_f9562cbc-f494-11e1-8b9f-0019bb2963f4.html](http://napavalleyregister.com/eagle/news/local/man-arrested-on-suspicion-of-witness-intimidation/article_f9562cbc-f494-11e1-8b9f-0019bb2963f4.html).

24. *2 La. Men Charged With Threatening Trial Witness*, ASSOCIATED PRESS (July 27, 2013, 4:16 AM), <http://www.goerie.com/apps/pbcs.dll/article?AID=/20130727/APN/130727058>.

25. *Id.*

26. Elisha Anderson, *Witness Intimidation Charges Dropped in Case Tied to Death of EMU Football Player*, DETROIT FREE PRESS (May 21, 2014, 7:53 PM),

<http://www.freep.com/article/20140521/NEWS05/305210192/witness-intimidation-EMU-Reed>.

27. *Id.*

28. *Inmates Use Facebook to Harass Their Victims, Intimidate Witnesses From Behind Bars*, ASSOCIATED PRESS (Nov. 21, 2011, 9:30 AM), <http://www.nydailynews.com/news/national/inmates-facebook-harass-victims-intimidate-witnesses-behind-bars-article-1.980641>.

- Upstate New York has witnessed more than its share of witness intimidation through social media. In October 2013, drug defendant David McKithen was convicted in Buffalo of intimidating a witness and witness tampering. McKithen received grand jury testimony and witness statements from his defense attorney, but then sent the material to his then-girlfriend (and later wife) Deyanna Daniels to post on Facebook on the eve of trial. After the grand jury testimony and statements were posted to Facebook, two witnesses received threats to themselves and members of their families.<sup>29</sup> It was unclear how long the material had been on Facebook, but it was removed soon after one of the witnesses' mothers discovered it. In addition, McKithen's intentions appeared clear in a phone call recorded in jail while he was awaiting trial, in which he said "Nobody talks, everybody walks."<sup>30</sup> Erie County District Attorney Frank A. Sedita III noted that criminals' use of social media for intimidation was "very troubling," saying that, "[t]hey're using technology to intimidate people. They used to show up at your door or leave a threatening note. Technology makes it easier to intimidate witnesses. All you have to do is have a keyboard."<sup>31</sup> Sedita also called such witness intimidation "the No. 1 impediment to me doing my job as a prosecutor";<sup>32</sup>
- Meanwhile, in Albany, New York, in April 2014, Rahkiem Johnson pled guilty to felony charges of intimidating a witness. The 19-year-old Johnson had posted on his Facebook page the photo and name of another young man who was a witness in a botched robbery/shooting case pending against another teen, El-Khaliem Myrick. Johnson also included the words, "WANTED," "Reward \$1,000,"

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29. Staas, *supra* note 2.

30. *Id.*

31. *Id.*

32. *Id.*

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“He’s a [expletive] RAT!” and “I Got a Bounty on His Lil [expletive] Head”;<sup>33</sup>

- In Grafton, Massachusetts, seven teenagers were arrested in January 2014 on felony witness intimidation charges for allegedly cyberbullying the 15-year-old victim of a violent crime. The teenagers were friends of the person charged with committing the crime, and they allegedly harassed the victim on Facebook and Twitter over a period of several months, making threats and demeaning comments;<sup>34</sup>
- In Steubenville, Ohio, the case of an alleged rape of a 16-year-old girl by two star Steubenville High School football players gained national exposure, in part because social media permeated the case. Evidence of the assault was posted to social media sites like Twitter and YouTube, and it was a backlash on social media to law enforcement’s initial hesitation to bring charges that put the case in the national spotlight. Prior to the conviction of the two defendants, two teenaged girls were charged with felony witness intimidation for tweets in which they harassed and threatened to kill the rape victim.<sup>35</sup> In addition, a number of other Twitter users posted messages condemning the victim’s character. Ohio Attorney General Mike DeWine stated, “People who want to continue to victimize this victim, to threaten her, we’re going to

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33. Bryan Fitzgerald, *Witnesses Exposed on the Web*, TIMESUNION.COM (May 4, 2014), <http://www.timesunion.com/local/article/Witnesses-exposed-on-the-Web-5452747.php>.

34. Alyssa Creamer, *Seven Grafton Teens Arrested on Felony Witness Intimidation Charges for Allegedly Cyberbullying the Victim of a Violent Crime*, BOSTON GLOBE (Jan. 25, 2014, 7:24 PM), <http://www.boston.com/news/local/massachusetts/2014/01/25/seven-grafton-teens-arrested-felony-witness-intimidation-charges-for-allegedly-cyberbullying-the-victim-violent-crime/V7sn8b4axyorUa535jA0XK/story.html>.

35. Brittany Brady, Chelsea J. Carter & Michael Pearson, *Two Teens Charged Over Threats Via Social Media Against Steubenville Rape Victim*, CNN.COM (Mar. 19, 2013, 6:03 PM), <http://www.cnn.com/2013/03/19/justice/ohio-steubenville-case/>.

deal with them and we're going after them.”<sup>36</sup>

The national trend of witness and victim intimidation via social media also includes juror intimidation. In Cleveland, Ohio in 2010, Cuyahoga County Judge Nancy Russo was presiding over the murder trial of Dwayne Davenport, accused in the fatal 2009 shooting of Michael Grissett.<sup>37</sup> On the second day of trial, jurors noticed two men—Andre Block, a friend of the defendant, and Dwight Davenport, the defendant's cousin—pointing a flip camera and a cellphone at the jury.<sup>38</sup> The jurors brought it to the attention of Judge Russo, who promptly declared a mistrial and had the two men arrested on contempt of court charges.<sup>39</sup> She found both guilty and sentenced Davenport to 30 days in jail and Block to 60 days in jail.<sup>40</sup>

Just the mere act of pointing a cellphone at a witness in a courtroom has been held to satisfy the elements of witness intimidation. In one Massachusetts case, the defendant in a drug-related case pointed a cellphone at an undercover police officer in a courtroom hallway while the officer was waiting to testify against the defendant.<sup>41</sup> Witness intimidation charges were brought, and the officer testified about his fear of being recognized if his photo were posted online, as well as his fear of retaliation against his family.<sup>42</sup> There was no evidence of any photos actually being taken or residing on the defendant's computer, much less being shared or distributed online. Nevertheless, the appellate court upheld the witness intimidation conviction. As the court noted, “It is irrelevant whether any photographs were taken, as the police officer was made to believe that the defendant was taking pictures of him and could disseminate his likeness, an act intended to

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36. *Id.*

37. Eric Robinson, *Trial Judge Imposes Penalties for Social Media in the Courtroom*, DIGITAL MEDIA L. PROJECT (Mar. 3, 2010), <http://www.dmlp.org/blog/2010/trial-judges-impose-penalties-social-media-courtroom>.

38. *Id.*

39. *Id.*

40. *Id.*

41. *See* Commonwealth v. Casiano, 876 N.E.2d 475 (Mass. App. Ct. 2007).

42. *Id.*

intimidate.”<sup>43</sup>

#### IV. Harassing the Prosecutor?: *State v. Moller*

The digital age has done more than usher in new ways to threaten and intimidate witnesses. It has also added a chilling new dimension to one of the accompanying risks of being an officer of the court—threats and harassment from those unhappy with the prosecutor’s performance of his or her duties. With the U.S. Supreme Court’s granting of certiorari in *United States v. Elonis* for its Fall 2014 term, the debate over where the boundary lines are drawn between true threats that are unprotected by the First Amendment and legitimate criticism of public officials that does enjoy such protection is slowly becoming more focused.<sup>44</sup> In the context of using social networking platforms and other online avenues to harass or intimidate, it is hardly surprising that prosecutors may find themselves the subject of unwanted attention by those associated with the subjects of their prosecutions. One recent Wisconsin case, *State v. Moller*, illustrates how incidents of online intimidation of prosecutors can raise troubling questions for both supporters of greater prosecutorial protection and free speech advocates.<sup>45</sup> The case involved the appeal by Michel Moller of his conviction for stalking “K.C.,” an assistant district attorney in the Dane County District Attorney’s office.<sup>46</sup> Moller was apparently unhappy over the prosecution by K.C. of his wife Lynn Moller, a daycare provider who was charged with child abuse for allegedly abusing children in her care.<sup>47</sup> In March 2010, K.C. won a conviction of Lynn Moller on multiple counts of child abuse.<sup>48</sup>

In September 2010, Mark Kerman (then employed as a victim-witness specialist with the Dane County D.A.’s office)

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43. *Id.* at 479.

44. *United States v. Elonis*, 730 F.3d 321 (3d Cir. 2013), *cert. granted*, No. 13-983, 82 U.S.L.W. 3538 (June 16, 2014).

45. *State v. Moller*, No. 2013AP2147-CR, 2014 Wisc. App. LEXIS 512, at \*1 (Wisc. Ct. App. June 26, 2014).

46. *Id.*

47. *Id.*

48. *Id.*

discovered images relating to K.C. appearing on multiple websites, sometimes accompanied by blog entries.<sup>49</sup> Kerman informed K.C., who went to the websites herself, and saw images that included the following:

- a. a photograph of K.C.'s home, with her name and address written on it, posted on September 22, 2010;<sup>50</sup>
- b. an image of a Barbie doll in a courtroom wearing a low-cut shirt and a barrette in her hair, with the name of K.C.'s husband written on the barrette and the name of K.C.'s son tattooed above the doll's left breast (this image was posted on August 27, 2010);<sup>51</sup>
- c. a "booking photo" of a Barbie doll with a black eye and holding a sign bearing K.C.'s name, birth date, and the words "solicitation" and "Dane County Jail" (this image was posted on August 28, 2010);<sup>52</sup>
- d. an image of a Barbie doll posed with her hands down the pants of a shirtless male doll, with text reading "Dane County, Wisconsin – Assistant D.A. [KC.] working her, quote, Job?, end quote" (this image was posted on September 22, 2010);<sup>53</sup>
- e. a still shot of K.C. from a television interview that she gave, with a white mask featuring a five-pointed star in the background;<sup>54</sup>
- f. a photograph of K.C.'s daughter, modified to make her eyes reddened similar to the ruptured blood vessels in a victim of shaken baby syndrome, bearing the file name "theyshakeme.jpg";<sup>55</sup>
- g. the same photograph of K.C.'s daughter, posted directly above an article about a shaken baby

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49. *Id.*

50. *Id.* at \*4.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at \*5.

55. *Id.*

- victim;<sup>56</sup> and
- h. the identical photograph of K.C.'s daughter without the digital manipulation but bearing the file name "Abusedchild.jpg."<sup>57</sup>

The assistant D.A., K.C., testified that two of the original photographs (in their pre-altered form) of her daughter and her with her family were identical to ones on her Facebook profile, a page that she had restricted to private (access to friends only).<sup>58</sup> As at least one court noted in discussing Facebook's privacy settings, "Access can be limited to the user's Facebook friends, to particular groups or individuals, or to just the user."<sup>59</sup> K.C. learned that the contents of her social media profile could have been shared with Moller when she checked the Facebook page of her cousins, Emily and Wesley, and saw that Moller appeared in their list of Facebook friends.<sup>60</sup> As for the photograph of her house, K.C. testified that it did not come from her Facebook page, nor could it have come from a real estate listing since the house had never been listed.<sup>61</sup> Moreover, she testified, based on the growth of the bushes and shrubs depicted in the photograph of her property, that the photo must have been taken in July or August 2010.<sup>62</sup>

Moller was charged with stalking under Wisconsin Statute § 940.32(2). During the investigation, it was revealed that Moller admitted to posting and "doctoring" the photos, that he had physically observed K.C. at a hearing in another child abuse case, and that GPS surveillance of his car showed that Moller had been by K.C.'s house.<sup>63</sup> Moller acknowledged that he felt K.C. had "unfairly targeted" his wife, and that she "needed to be watched."<sup>64</sup> The jury found him guilty of

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56. *Id.*

57. *Id.*

58. *Id.* at \*15.

59. *Ehling v. Monmouth-Ocean Hosp. Serv. Corp.*, 961 F. Supp. 2d 659, 662 (D.N.J. 2013).

60. *Moller*, 2014 Wisc. App. LEXIS 512, at \*1.

61. *Id.* at \*12.

62. *Id.*

63. *Id.* at \*16.

64. *Id.* at \*14.

stalking.<sup>65</sup>

On appeal, Moller argued that the evidence was insufficient to show that he had engaged in a “course of conduct” within the meaning of Wisconsin’s statute, such that he knew that one or more of the acts would cause K.C. to suffer serious emotional distress.<sup>66</sup> The appellate court rejected this argument, finding that there was ample evidence from which a jury could have found Moller should have known that his act of—among other things—“friending” K.C.’s cousins and then disseminating private photographs of K.C. and her family was likely to cause serious emotional distress.<sup>67</sup> Besides the photos themselves, the court pointed out, there was compelling testimony from K.C. She testified that the posts seemed to have “an ongoing increasing focus on me and my family and my children.”<sup>68</sup> As K.C. testified, Moller “made it clear” that “he knew where I lived and he knew my children and he was finding everything out he could about my family. He contacted my cousins in Florida. It was disturbing and affected me.”<sup>69</sup> In fact, the court also upheld the jury’s order for Moller to pay K.C. restitution in the amount of \$1,997.64, to compensate her for the installation of a home security system.<sup>70</sup>

Some scholars may argue that the significant power and prosecutorial discretion wielded by an assistant D.A. like K.C. means that their professional decisions should be subjected to more public criticism and heightened scrutiny. After all, they might say, Moller has every right to complain that the prosecution of his wife was overzealous or improper. It is certainly true that, in the context of privacy, courts have been leery of efforts to provide a special shield to the personal information of public officials.<sup>71</sup> And in terms of defamation claims, the First Amendment provides less protection, not more, for public officials.<sup>72</sup>

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65. *Id.* at \*13

66. *Id.* at \*24.

67. *Id.* at \*7.

68. *Id.*

69. *Id.* at \*30.

70. *Id.* at \*43.

71. *See, e.g.,* Sheehan v. Gregoire, 272 F. Supp. 2d 1135 (W.D. Wash. 2003).

72. As the United States Supreme Court articulated, “The public-official

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But Moller's conduct has a threatening and violent overtone that transcends mere criticism of the professional performance of a public servant. The black eye, the five-pointed star, the undercurrent of sexual violence in one photo, and the implicit threats towards K.C.'s family take this from a professional level to one that is distinctly personal. And while information such as the photo of K.C.'s house could be gathered innocuously enough from internet resources like Google Earth, one must remember that the evidence showed Moller drove by K.C.'s house and photographed it. As for the source of the photographs of K.C. and her family, it is true that he did not contact her directly or "ping" her on social media—instead choosing the still-creepy tactic of "Facebook stalking" her cousins to gain access to the photos he used. It is doubtful whether such an indirect approach would make K.C., or any prosecutor for that matter, sleep better at night. As this case demonstrates, in the age of Facebook and Twitter, those with a real or perceived grievance against an officer of the court have a potent weapon at their disposal. The wealth of information online about virtually everyone, and the shadowy reaches of the internet for cyberstalkers to prowl make prosecutors as vulnerable to online harassment and intimidation as the witnesses they strive to protect.

#### V. The Vulnerable Expert

Fact witnesses are not the only ones who can be caught in the glare of social media and subjected to ridicule, harassment, and threats online. Expert witnesses, particularly in cases garnering considerable media attention, are vulnerable as well. Consider the example of Alyce LaViolette, a counselor and psychotherapist for battered women who served as a defense expert witness in the Jodi Arias murder case in 2013. In the highly-publicized Arizona trial, Arias admitted to killing her lover Travis Alexander in 2008, but claimed that she did so in self-defense after enduring abuse at Alexander's hands. LaViolette, who has authored books on domestic violence and

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rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964).

founded programs for battered women, testified that, in her opinion, Arias had been controlled and abused physically, sexually, and emotionally by Alexander.<sup>73</sup>

From the first day she was on the stand, LaViolette faced a foe every bit as vocal as and arguably more intimidating than lead prosecutor Juan Martinez: the cybermob. Tweets and other social media posts began almost immediately, urging people to “show your disgust with LaViolette” and sharing the expert’s office telephone number and website.<sup>74</sup> Other tweets urged members of the public to write negative reviews of LaViolette’s book on Amazon.com; soon more than 500 reviews appeared, panning the book and referring to the expert witness as a “fraud” and “a disgrace.”<sup>75</sup> In a review of LaViolette’s book *It Could Happen to Anyone: Why Battered Women Stay*, one person wrote “Shame on you Alyce!!! I hope Jodi gets the death penalty and you watch your career flush down the toilet.”<sup>76</sup> During trial, others posted photos on Facebook of the 65-year-old LaViolette out at dinner with members of Arias’ defense team, implying a relationship that was too cozy.

Other attacks were directed at LaViolette as a professional. Her Long Beach, California, office was deluged with angry phone calls and emails, and at least one threat prompted her colleagues to contact the police. ABIP Training in Los Angeles, a group that provides training for abuse counselors, received numerous requests to remove LaViolette from its list of speakers.<sup>77</sup> The barrage of online attacks on her personally and professionally even prompted LaViolette to visit a hospital emergency room, seeking treatment for anxiety attacks and heart palpitations.<sup>78</sup>

While legal observers differ on whether such attacks meet the legal definition of witness tampering, others point to such targeting of an expert witness as an expansion of the trend

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73. Michael Kiefer, *Arias Trial: Witness Feels Social Media’s Glare*, REPUBLIC (Apr. 11, 2013, 2:36 PM), <http://www.azcentral.com/community/mesa/articles/20130410arias-trial-witness-feels-social-medias-glare.html>.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

toward online harassment. Sree Sreenivasay, chief digital officer and journal professor at Columbia University, said “This is a logical extension of witness intimidation, taken to an extreme conclusion.”<sup>79</sup> Retired Maricopa County Superior Court Judge Kenneth Fields was decidedly more blunt: “It’s the electronic version of a lynch mob.”<sup>80</sup>

In the digital age, in which so much of our lives are laid bare online and in which those shreds of privacy that still exist can be violated with the speed of a search engine, it would appear that no one is safe from online intimidation—not even expert witnesses.

#### VI. Responses, Legislative and Otherwise, to the Problem of Online Witness Intimidation

Responses to the problem of online witness intimidation have been essentially localized in nature. One option has been to withhold witness lists from defendants, their counsel, and the public until commencement of trial.<sup>81</sup> Florida’s Rules of Criminal Procedure, for example, authorize partial restriction of witness disclosures where circumstances pose “a substantial risk” to a party. In April 2013, the City of Philadelphia implemented a policy of holding preliminary trial proceedings before a grand jury rather than in public in response to witness intimidation concerns.<sup>82</sup> In Erie County, New York, District Attorney Frank A. Sedita III said that the prevalence of social media for witness harassment “demonstrates why criminals should not be provided with information which reveals the identity of prosecution witnesses until such time as there is a trial.”<sup>83</sup>

Another approach has been to ban cellphones, laptops,

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79. *Id.*

80. *Id.*

81. See generally Lisa Karsai, *You Can’t Give My Name: Rethinking Witness Anonymity in Light of the United States and British Experience*, 79 TENN. L. REV. 29, 49 (2011) (for a discussion of witness privacy measures).

82. Kevin McCorry, *Philly Mom Seeking Justice for Slain Son Hindered by Witness Who Won’t Talk*, NEWSWORKS.ORG (Apr. 9, 2013), <http://www.newsworks.org/index.php/local/newsworks-tonight/53292-philly-mom-seeking-justice-for-slain-son-hindered-by-witness-who-wont-talk>.

83. See Staas, *supra* note 2.

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tablets, and other electronic devices from the courtroom. In 2013, Cook County, Illinois—home to the highest homicide rate of any large U.S. city and a place where gang intimidation has been a persistent, widespread problem—enacted a ban on cellphones, tablets, and any other electronic device used to communicate or record. Chief Judge Timothy C. Evans said the ban is intended

to provide safety within the courts, prevent pictures from being taken with electronic devices and help to protect innocent individuals and those testifying in court. We want to do everything we can to ensure that justice is properly done by preserving the integrity of testimony and maintaining court decorum. We understand this may be an inconvenience to some, but our primary goal is to protect those inside our courthouses and perhaps save lives in the process.<sup>84</sup>

Joe Magats, deputy chief of criminal prosecutions for the Cook County State’s Attorney’s Office, describes the measure as a reaction to incidents where defendants’ family members have taken pictures of witnesses, prosecutors, and even judges. Social media, he says, “really ramps up the level of threats and the level of discomfort the victim might feel because now it’s out there in public . . . [V]ictims should not be subject to that kind of intimidation in the courthouse. It’s supposed to be a place of sanctuary and security.”<sup>85</sup>

Yet even Magats acknowledges that the ban on electronic devices has its problems. “[F]or victims of domestic violence who must come to the courthouse,” he says, “it will present problems because many are in fear for their lives and safety and need phones as lifelines.”<sup>86</sup> Marijane Placek, a public defender in Chicago, calls this ban “a draconian solution to what isn’t really a problem . . . [T]hese are public courtrooms

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84. *See* Davis, *supra* note 6.

85. *Id.*

86. *Id.*

and anyone can come in. You can't tell me someone isn't going to find a way to intimidate a witness if they want to."<sup>87</sup> Such bans also pose potential First Amendment issues, although the subject of restrictions on cameras in the courtroom and how that impinges journalistic freedom is an oft-discussed topic that is beyond the scope of this article.

Witness protection and relocation programs are another option, albeit a costly and largely impractical one. In an area like Philadelphia alone, there have been more than 2,000 arrests for witness intimidation just within the last three years.<sup>88</sup> Moreover, witness protection programs usually require proof of imminent danger, a difficult burden to satisfy when intimidation is essentially being crowdsourced through social media. Evaluating the source of the threat and its imminence can be a daunting task.

Another approach taken by law enforcement has been to fight fire with fire—or Facebook with Facebook if you will. Law enforcement nationally has been increasingly active on social media in terms of tracking criminal activity and developing leads (especially with gang activity) as well as community outreach. For many departments, the anonymity of the internet has proven useful in undercover efforts to gain information on gang-related criminal enterprises and gang efforts at witness intimidation.<sup>89</sup>

Yet another avenue for response has been to seek cooperation from the social networking sites themselves. Given the privacy concerns that sites like Facebook and Twitter publicly espouse, reaction from these sites has been mixed at best. For example, Instagram has been fairly responsive to requests to disable accounts or remove dangerous material in witness intimidation cases. The site cooperated with

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87. *Id.*

88. Maryclaire Dale, *Philly DA: 2k Witness Intimidation Cases Since '11*, WASH. TIMES (Feb. 26, 2014), <http://www.washingtontimes.com/news/2014/feb/26/philly-2k-witness-intimidation-cases-since-2011/>.

89. See, e.g., Julie Edwards, *Gangs in Anne Arundel Use Social Media to Recruit and Intimidate*, WASH. POST (Apr. 13, 2013), [http://www.washingtonpost.com/local/gangs-in-anne-arundel-use-social-media-to-recruit-and-intimidate/2013/04/13/5fc64b64-97d1-11e2-b68f-dc5c4b47e519\\_story.html](http://www.washingtonpost.com/local/gangs-in-anne-arundel-use-social-media-to-recruit-and-intimidate/2013/04/13/5fc64b64-97d1-11e2-b68f-dc5c4b47e519_story.html).

Wilmington, Delaware law enforcement to remove an account called “wilmington\_snitches” aimed at exposing the identities of people who cooperated with the police.<sup>90</sup> In another instance, Instagram deactivated the “Rats215” account in November 2013. The account, which had 7,900 followers by the time it was shut down, had been outing witnesses of violent crimes in Philadelphia. Since February 2013 alone, it had posted photos, police statements, and testimony of at least 30 witnesses—in one instance posting about a shooting victim whose case was handled by a secret grand jury.<sup>91</sup> An Instagram spokesperson commented,

Instagram has a clear set of community guidelines which make it clear what is and isn't allowed. This includes prohibiting content that bullies or harasses. We encourage people who come across content that they believe violates our terms to report it to us using the built-in reporting tools next to every photo or video on Instagram.<sup>92</sup>

Facebook, on the other hand, has been less receptive to such requests from law enforcement, at least in one well-publicized case in Philadelphia. Twenty-year-old Freddie Henriquez was arrested December 17, 2012, and charged with witness retaliation, witness intimidation, and terroristic threats after allegedly using his Facebook page to solicit the killing of a witness in a case involving illegal gun purchases.<sup>93</sup> The Philadelphia District Attorney's office made numerous

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90. Ifeoluwa E. Afolayan, *Intimidation Gone Digital Witness Victim Intimidation in the Age of Social Media*, CRIM. L. PRAC. (Nov. 26, 2013, 6:00 AM), <http://wclcrimallawbrief.blogspot.com/2013/11/intimidation-gone-digital-witness-and.html>.

91. William Bender, *Rats215 Instagram Account Deactivated*, PHILLY.COM (Nov. 10, 2013), [http://articles.philly.com/2013-11-10/news/43889770\\_1\\_witness-intimidation-philadelphia-police-kaboni-savage](http://articles.philly.com/2013-11-10/news/43889770_1_witness-intimidation-philadelphia-police-kaboni-savage).

92. *Id.*

93. Joseph A. Slobodzian, *Phila. D.A. Asks Facebook's Zuckerberg to Intervene and Take Down Page*, PHILA. INQUIRER (Feb. 6, 2013), [http://articles.philly.com/2013-02-06/news/36767056\\_1\\_facebook-founder-mark-zuckerberg-facebook-s-zuckerberg-facebook-account](http://articles.philly.com/2013-02-06/news/36767056_1_facebook-founder-mark-zuckerberg-facebook-s-zuckerberg-facebook-account).

requests to Facebook to take down the page (which labeled a witness a “rat,” published her entire eight-page statement to police, and urged third parties to “kill rats”), only to be rebuffed repeatedly by Facebook’s Law Enforcement Response Team, who maintained that the page’s content did not violate Facebook policy.<sup>94</sup> Philadelphia D.A. Seth Williams called on Facebook founder Mark Zuckerberg to be “a good corporate citizen” and remove Henriquez’s page and deactivate his Facebook account.<sup>95</sup> Facebook’s response was to issue a generic statement that “Facebook works with law enforcement to the extent required by law and where appropriate to ensure the safety of Facebook users. We work very hard to be a good partner to law enforcement, and any assertion to the contrary is false.”<sup>96</sup>

Finally, legislative efforts to address witness intimidation through social media have also sprung up. In May 2014, Delaware’s House unanimously passed a bill (the Senate version of which passed the previous month) aimed at toughening penalties for violations of the state’s existing witness protection law. It reclassifies the crimes as a Class D felony for intimidation and a Class B felony for aggravated intimidation. While the bill is silent as to social media, media reports indicate that it was inspired by Delaware’s problems with witness intimidation efforts on Instagram.<sup>97</sup> For embattled Philadelphia, measures have included efforts to allocate more funds for witness protection programs,<sup>98</sup> a proposal to make witness intimidation a federal crime in all cases,<sup>99</sup> and a ban on cellphones and electronic devices in

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94. *Id.*

95. *Id.*

96. *Id.*

97. Jon Offredo, *Witness Intimidation Bill Awaits Martell’s Signature*, DEL. ONLINE (May 3, 2014, 10:52 PM), <http://www.delawareonline.com/story/news/local/2014/05/03/witness-intimidation-bill-awaits-markells-signature/8674899/>.

98. Toim MacDonald, *State Study: Philly Needs More Funds to Fight Witness Intimidation*, NEWSWORKS (Jan. 8, 2013), <http://www.newsworks.org/index.php/local/philadelphia/49315-state-study-philly-needs-more-funds-to-fight-witness-intimidation>.

99. Joseph A. Slobodzian, *Casey, Williams Introduce Bill to Make Witness Intimidation a Federal Crime*, PHILA. INQUIRER (Feb. 14, 2012), [http://articles.philly.com/2012-02-14/news/31059017\\_1\\_witness-intimidation-](http://articles.philly.com/2012-02-14/news/31059017_1_witness-intimidation-)

courthouses.<sup>100</sup> And like Delaware, the Pennsylvania Legislature has crafted a bill to address social media's impact on witness intimidation. Pennsylvania Senate Bill 1263, the Website Witness and Victim Protection Act, would amend the state's existing witness intimidation criminal statute.<sup>101</sup> The elements consist of: (1) an electronic publication (2) of either an individual's or victim's name (3) "as it relates to a criminal investigation" (4) "with intent to or with the knowledge that the person's conduct will obstruct, impede, impinge, prevent or interfere with the administration of criminal justice." The bill, which makes such witness intimidation a second-degree felony punishable by one to ten years in prison or a fine of up to \$25,000, is currently being evaluated by the Senate's Judiciary Committee.

The Website Witness and Victim Protection Act is an example of how the legal system can respond to the challenges of harassers using new technology. While reminiscent of earlier witness intimidation laws, its broad definition of "internet" provides flexibility for continuing to address other platforms beyond Facebook, YouTube, Twitter, and Instagram. In short, it represents at least an effort at helping the law keep pace with technology.

## VII. Conclusion

According to the latest Pew Center research on the Internet, 25% of Americans report being attacked or treated unkindly online.<sup>102</sup> While the Internet in general and social media platforms in particular have been a source of great good for society, they have also been put to more nefarious purposes, such as witness harassment and intimidation as this article demonstrates. More information than ever before is more

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prison-terms-federal-crime.

100. Kevin McCorry, *Could Cell Phone Ban in Philly Courts Lessen Witness Intimidation?*, NEWSWORKS (Apr. 10, 2013), <http://www.newsworks.org/index.php/local/newsworks-tonight/53348-could-cell-phone-ban-in-philly-courts-lessen-witness-intimidation>.

101. 18 PA. CONS. STAT. § 4952 (2014).

102. Susanna Fox and Lee Rainie, *The Web at 25 in the U.S.*, PEW RES. INTERNET PROJECT (Feb. 27, 2014), <http://www.pewinternet.org/2014/02/27/the-web-at-25-in-the-u-s/>.

accessible than ever imagined, at the speed of a search engine. Consequently, prosecutors face more complex challenges than ever before when it comes to protecting witnesses. While the struggle to address this new technological wrinkle to an age-old problem continues through updated witness intimidation statutes, perhaps the most important weapon for combating witness intimidation through technology is education. When the public, law enforcement, prosecutors, and judges are better educated about this problem, they can respond accordingly. One case in point comes from Chicago, where a defendant out on bond on an attempted murder charge took a photo of one of the witnesses and posted it to Instagram, along with the caption, “[t]hese people are getting ready to take me down.” The judge was promptly informed, and when the defendant returned to court for a hearing, his bail was revoked. On the harasser side, an informal survey of some “snitch sites” reveals the mistaken belief on the part of many laypersons that they cannot be liable for witness intimidation if they are not parties to the pending criminal case.<sup>103</sup> Education—about the problem, its consequences, and potential solutions—may be the most important tool of all.

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103. See, e.g., #rats215, *supra* note 11; #killrats, INSTAGRAM, <http://web.stagram.com/tag/killrats/>.