

**NEW TECHNOLOGICAL TRENDS ARE CHANGING THE  
LEGAL, ETHICAL, AND PUBLIC POLICY  
IMPLICATIONS OF STING OPERATIONS**

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**ABSTRACT**

[1] It has long been held that a lawyer may not act deceitfully when working on a case by making false statements to the opposing party, especially to a person who has already retained counsel and the lawyer has already made statements directly to the opposing party. However, like all other legal doctrines, there are exceptions to the requirement that a lawyer should not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, as well as, the exceptions to the no-contact rule. Although there is only persuasive precedent in Virginia, it can be assumed that it is generally within the limits of professional ethics for a prosecutor to assist in an undercover (hereinafter “sting”) operation with law enforcement, even if those involved in the sting operation have reason to know that the unaware party has retained counsel.

[2] As technology progresses, the mechanisms used for law enforcement have greatly changed alongside everything else in society. The speed that technological advances often exceeds the speed at which laws can be enacted to address the new concerns that technological progressions introduce. Based on this notion, it is becoming more apparent in society that the authority of the state to enforce its laws is questionable in many of the fields in which the laws have yet to catch up with technology. One question the field of law raises is the extent to which a prosecutor may collaborate with law enforcement to use deceitful means online to gather information. Specifically, unaddressed is whether a prosecutor can legally and ethically assist law enforcement in acts, such as creating fictitious social media profiles and other types of deceptive means, over the internet when engaging in criminal investigations under Virginia law.

[3] Suppose John Doe, a man involved in a criminal enterprise, begins to get nervous that he is being investigated by the police and makes it clear to those around him that he has retained counsel and that his counsel will speak on his behalf. May the prosecutor speak directly to him? May the

prosecutor ask a law enforcement official to pretend to be a layperson who wants to buy something illegal from John Doe? May a law enforcement official working with the prosecutor make a Facebook account under a fake name and then try to buy something illegal from John Doe? This analysis aims to address some of the concerns that correlate with these questions.

[4] With technology changing, the methods of law enforcement inevitably change too. Those changes result in ethical, constitutional, and civil issues that the law has yet to address to a significant extent. This analysis will first discuss the current standards conveying the ethical and legal bounds of prosecutors using deceitful acts and trickery for legitimate law enforcement purposes. It will next analyze the general legal and ethical implications of prosecutors' involvement with the use of deceptive means or sting operations in the pre-indictment stage against a party known to already have retained counsel. The general concepts analyzed here are (a) how prosecutors can avoid Sixth Amendment<sup>1</sup> concerns when dealing with parties who have already retained counsel, and (b) the reasoning as to why both federal and state courts encourage prosecutors to use sting operations. Lastly, the analysis will delve into how the application of legal and ethical concepts affects the current technological trends used by law enforcement officers for certain investigatory procedures over social media platforms.

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<sup>1</sup> U.S. CONST. amend. VI.

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## I. THE LEGAL AND ETHICAL STANDARDS REGARDING STING OPERATIONS

[5] Prior to analyzing the issue, it is worth considering that the American Bar Association has specifically noted that if an attorney has concerns about the ethical implications of contacting a person represented by counsel, the attorney may seek a court order to remove all doubt.<sup>2</sup> “In circumstances where applicable judicial precedent has approved investigative contacts prior to attachment of the right to counsel, and they are not prohibited by any provision of the United States Constitution or the Virginia Constitution, they should be considered to be authorized by law within the meaning of the Rule.”<sup>3</sup>

[6] Additionally, should a defendant challenge the use of a sting operation by law-enforcement, the standard of review for determining the matter gives a strong deference in favor of the government’s actions.<sup>4</sup> “Courts have generally held that counsel for United States are bound by the rules of ethics of the state jurisdiction in which they are practicing.”<sup>5</sup> “As ‘a general working principle,’ the Supreme Court has held that ‘there is a presumption of legitimacy accorded to the Government’s official conduct,’ and ‘where the presumption is applicable, clear evidence is usually required to displace it.’”<sup>6</sup> “Therefore, in order for Defendant to

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<sup>2</sup> See MODEL RULES OF PROF’L CONDUCT r. 4.2 (AM. BAR ASS’N 2019) (referencing the *Rule of Law*).

<sup>3</sup> VA. SUP. CT. R. PT. 6, § II, 4.2, n.5. (2018).

<sup>4</sup> See, e.g., *United States v. Chem. Found. Inc.*, 272 U.S. 1, 14–15 (1926) (stating that in the absence of clear contrary evidence, courts presume that officers discharged their duties properly).

<sup>5</sup> *United States v. Guild*, 2008 U.S. Dist. LEXIS 7211, at \*3–4 (E.D. Va. Jan. 31, 2008) (quoting *United States v. Binder*, 167 F. Supp. 2d 862, 864 (E.D.N.C. 2001)).

<sup>6</sup> *Id.* at \*4–5 (citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 174 (U.S.

prevail on a challenge to his or her charges of prosecutorial misconduct, he or she must demonstrate clear evidence that the Government acted improperly.”<sup>7</sup>

[7] Moreover, the legal ethics implications for a prosecutor generally using deceptive tactics, will be analyzed here using the American Bar Association Model Rules of Professional Conduct<sup>8</sup> (hereinafter “Rule(s)”), but will note circumstances in which the legal ethics standards differ in Virginia. In general, the appropriate and controlling rules relative to the matter are Rule 5.3(c)(1),<sup>9</sup> Rule 8.4(a)<sup>10</sup>, and Rule 8.4(c).<sup>11</sup> Lastly and most importantly, Rule 3.8 addresses prosecutors’ ethical duties and provides that prosecutors must refrain from “taking advantage of an unrepresented defendant” or instructing another to act in a way that the prosecutors could not ethically engage in themselves.<sup>12</sup>

[8] The persuasive authority of Committee Opinions on legal ethics in Virginia has established the bounds of a prosecutor’s ethical involvement in sting operations to an extent.<sup>13</sup> The Committee Opinions state that “[i]t is generally known and very well accepted that law-enforcement

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2004)).

<sup>7</sup> *Id.* at 5.

<sup>8</sup> *See* MODEL RULES OF PROF’L CONDUCT (AM. BAR ASS’N 2019).

<sup>9</sup> *See id.* r. 5.3(c)(1).

<sup>10</sup> *See id.* r. 8.4(a).

<sup>11</sup> *See id.* r. 8.4(c).

<sup>12</sup> *See* PROF’L GUIDELINES r. 3.8(b) (VA. STATE BAR ASS’N 2009).

<sup>13</sup> *See infra* ¶¶ 4–6.

authorities, including government lawyers, are authorized to conduct or supervise undercover operations using deception to gather information about criminal conduct.”<sup>14</sup> “[T]he use of an undercover or ‘sting’ operation by a lay investigator, under the direction of Ethics Counsel and Assistant Ethics Counsel, does not violate the Rules of Professional Conduct.”<sup>15</sup> Thus, it has been conveyed through the persuasive authority that at least some types of sting operations are within ethical and legal bounds.

[9] Moreover, the Virginia Legal Ethics Opinions (hereinafter “LEO[s]”) give further guidance in interpreting the bounds of a prosecutor’s involvement in sting operations.<sup>16</sup> In LEO 1738, the Committee found, in a narrowly tailored opinion, that an attorney, who is working with law-enforcement, may tape record another party, without his consent, if a situation involves actual or threatened criminal activity.<sup>17</sup> In LEO 1765, the Committee expanded on the prior ethical rules and found that when an attorney employed by the federal government uses takes part in lawful covert activities, “those methods cannot be seen as reflecting adversely on his fitness to practice law.”<sup>18</sup> Lastly, in LEO 1845, the Committee found that under certain circumstances it was ethical for an attorney to engage or direct someone to engage in a covert activity when no other reasonable alternative is available to obtain the information needed in an investigation.<sup>19</sup> The Committee based its reasoning on the

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<sup>14</sup> VA. BAR LEGAL ETHICS COMM., OP. 1845 (2009).

<sup>15</sup> *Id.*

<sup>16</sup> *See* VA. BAR LEGAL ETHICS COMM., OP. 1738 (2000).

<sup>17</sup> *See id.*

<sup>18</sup> VA. BAR LEGAL ETHICS COMM., OP. 1765, at 2 (2003).

<sup>19</sup> *See* VA. BAR LEGAL ETHICS COMM., OP. 1845, *supra* note 14.

methodology used when the Supreme Court of Virginia specifically approved a legal ethics opinion recognizing a “law enforcement” exception to Rule 8.4(c) for prosecuting cases involving housing discrimination.<sup>20</sup>

[10] In Virginia, as well as in outside jurisdictions, it has been established that a prosecutor may contact the opposing party in a sting operation, regardless of whether the party has already retained counsel, in a pre-indictment investigation.<sup>21</sup> Precedent demonstrates that within certain limits, promoting the enforcement of laws through sting operations has been routinely encouraged by the courts at the federal and state levels.<sup>22</sup> It is ethically sound and within the legal limits for a prosecutor, or someone directed by the prosecutor, to contact a party in a sting operation, who has retained counsel, because (1) Sixth Amendment constitutional concerns do not apply to investigatory procedures, and (2) the court has excluded prosecutors from the relevant ethical concerns when acting within their duties of promoting law enforcement.<sup>23</sup>

[11] Despite reaching the conclusion that prosecutors may ethically be involved in using deceitful tactics to enforce the law, the law in Virginia remains quite vague as to how these deceitful tactics may be used in regards to computer investigations.<sup>24</sup> The law provides an explicit exception for law-enforcement officers to use “trickery or deception,” when using a computer to gather identifying information, but fails to

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<sup>20</sup> *See id.*

<sup>21</sup> *See United States v. Gouveia*, 467 U.S. 180, 189 (1984).

<sup>22</sup> *See Brinegar v. United States*, 338 U.S. 160, 174 (1949).

<sup>23</sup> *See Gouveia*, 467 U.S. at 188; *Brinegar*, 338 U.S. at 174.

<sup>24</sup> *See VA. CODE ANN. § 18.2-152.5* (2005).

specify the extent of this exception, other than that it must be while “acting in the performance of [the officers’] official duties.”<sup>25</sup> The legal limitations can be reasonably interpreted to generally permit online investigations for legitimate law enforcement purposes, but because of the contractual nature of engaging in social media, online sting operations may not be within the ethical confines of Virginia law.<sup>26</sup>

[12] However, despite the lack of precedent establishing the limits of such investigations, prosecutors should generally not engage in or encourage online law-enforcement measures that involve trickery or deceit, regardless of whether the police are involved. This refrainment should be premised on several reasons, especially on the notions that common online law-enforcement measures (1) involve entrapment concerns, and (2) using trickery or deceit online often breaches contractual duties. Thus, encouraging such actions promotes willful actions by prosecutors that are against the best interests of the law and should be viewed as unethical. Regardless, because of how extensively the unjust form of trickery is used by law enforcement, prosecutors should be quite hesitant to engage in online law enforcement measures using trickery or deceit to avoid violating their ethical duties.

[13] This analysis will first discuss the ethical limitations in Virginia of a prosecutor contacting a party who has retained counsel.<sup>27</sup> Next, the analysis will specifically apply to the implications of this conclusion

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<sup>25</sup> VA. CODE ANN. § 18.2-152.5:1 (2005).

<sup>26</sup> *See Information for Law Enforcement Authorities*, FACEBOOK, <https://www.facebook.com/safety/groups/law/guidelines/> [<https://perma.cc/4GCY-4NLH>].

<sup>27</sup> *See* U.S. CONST. amend. VI.

regarding online law enforcement measures using trickery or deceit in which prosecutors are involved.<sup>28</sup>

## II. GENERAL ETHICAL AND LEGAL IMPLICATIONS OF STING OPERATIONS

### A. Sixth Amendment Constitutional Concerns Do Not Apply to Investigatory Procedures

[14] Suppose the following hypothetical: a notorious arms dealer, John Doe, is being investigated by law enforcement for his transgressions. John Doe has retained counsel and has made it explicitly clear that he has retained counsel, who will speak on his behalf in all legal situations. If a prosecutor, who is working with law enforcement and has knowledge that a confidential informant is in contact with John Doe, is involved with the situation, the prosecutor's legal ethics requirements may be questioned regarding whether the prosecutor is prohibited from using such deceitful means and trickery in pursuing an indictment. However, the ethical and constitutional concerns regarding a lawyer contacting a person who is represented by counsel, are inapplicable during investigatory procedures. This is because an individual cannot invoke his or her Sixth Amendment rights until he or she has been formally charged, or in certain situations in which knowledge of the law would better ensure an individual of his rights.<sup>29</sup>

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<sup>28</sup> See VA. CODE ANN. § 18.2-152.5:1 (2005).

<sup>29</sup> See *Moran v. Burbine*, 475 U.S. 412, 428 (1986) (stating "absent a valid waiver, the defendant has the right to the presence of an attorney during any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches.").

[15] The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."<sup>30</sup> "The United States Supreme Court has made it abundantly clear that the violation of the Sixth Amendment right to counsel occurs at the time of the event requiring counsel."<sup>31</sup> An accused individual only has the right to the effective assistance of counsel at the "critical stages" in the criminal justice process.<sup>32</sup> The critical stages have been interpreted to include certain pretrial proceedings that might appropriately be considered parts of the trial itself, when the defendant is "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both."<sup>33</sup> The Court has held that "once the right *has* attached, it follows that the police may not interfere with the efforts of a defendant's attorney to act as a 'medium' between the suspect and the State' [sic] during the interrogation."<sup>34</sup>

[16] The Court has consistently found that investigations by government actors are not sufficient to invoke a suspect's ability to claim

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<sup>30</sup> U.S. CONST. amend. VI.

<sup>31</sup> *Terry v. Commonwealth*, 516 S.E.2d 233, 236 (Va. Ct. App. 1999); *see* *Maine v. Moulton*, 474 U.S. 159, 170 (1985) (quoting *Brewer v. Williams*, 430 U.S. 387, 398 (1977)).

<sup>32</sup> *See Moulton*, 474 U.S. at 170 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)).

<sup>33</sup> *United States v. Ash*, 413 U.S. 300, 310 (1973). *See generally* *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (stating "[i]n a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell v. Alabama*, 287 U.S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him.").

<sup>34</sup> *Moran*, 475 U.S. at 428 (emphasis in original) (citing *Moulton*, 474 U.S. at 176).

a Sixth Amendment violation.<sup>35</sup> For example, in *Moran v. Burbine*, the Court held that "a defendant's right to counsel was not violated when the police secured Miranda waivers and interviewed the defendant without informing the defendant that [the police] had been contacted by an attorney retained without his knowledge by his sister."<sup>36</sup> Furthermore, in *United States v. Gouveia*, the defendant was an inmate in prison who was suspected of committing a murder of another inmate.<sup>37</sup> The Court held that the defendant lacked the right to counsel while in administrative segregation prior to indictment, because said segregation happens before the initiation of adversary judicial proceedings.<sup>38</sup> In both cases, the Court reinforced its well-established holding that "the first formal charging proceeding [is] the point at which the Sixth Amendment right to counsel initially attaches."<sup>39</sup> *Moran* further held that the Sixth Amendment "becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the 'intricacies . . . of law,' is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'"<sup>40</sup>

[17] It would be nonsensical for the judicial system to permit one to assert his or her Sixth Amendment rights during the investigatory stage

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<sup>35</sup> See, e.g., *Moran*, 475 U.S. 412, 421–422; *United States v. Gouveia*, 467 U.S. 180, 192–193.

<sup>36</sup> See *Moran*, 475 U.S. at 421 – 422.

<sup>37</sup> See *Gouveia*, 467 U.S. at 182.

<sup>38</sup> *Id.* at 192 – 193.

<sup>39</sup> *Moran*, 475 U.S. at 415; see also *Gouveia*, 467 U.S. at 187.

<sup>40</sup> See *Moran*, 475 U.S. at 430.

because it would lead to an utter lack of justice. If, for instance, an apparently intoxicated individual was pulled over by the police for causing a car crash, it would not make sense to have the intoxicated driver have the police call the driver's personal attorney, and have the police attempt to investigate the event without directly speaking to the driver. In this hypothetical, the police, as enforcers of the law, not only have the duty to investigate the facts regarding the events leading up to the incident but also, to check on the health and safety of the driver.

[18] In any other situation where plausible criminal activity is involved, law enforcement has the duty to investigate the circumstances.<sup>41</sup> Should law enforcement find that the circumstances indicate that a crime has been committed, the system requires that law enforcement be able to work in tandem with prosecutors to ensure the state is able to uphold justice.<sup>42</sup> If merely having an attorney on call would be a permissible way for an intoxicated driver to escape a criminal investigation, law enforcement would be unable to investigate many circumstances and be unable to uphold the law beyond mere speculation in many instances.

[19] Moreover, the prosecutors should be able to work with law enforcement to encourage people abiding by the law. Should prosecutors be barred from working with law enforcement in such a circumstance, anyone with a lawyer on call could avoid legal trouble in many instances and ergo, would lose much of the deterrence of law enforcement's authority. It would be unreasonable for a court to limit an investigation by

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<sup>41</sup> See generally *Brinegar v. United States*, 338 U.S. 160, 178–79 (1949) (Burton, J., concurring in affirmation of conviction) (discussing the duty of law enforcement officers to investigate).

<sup>42</sup> See John Buchanan, *Police-Prosecutor Teams: Innovations in Several Jurisdictions*, 214 Nat'l Inst. Of Justice Reports (1989) (describing methods that various jurisdictions resolve the 'police-prosecutor' dilemma through cooperation among police and prosecution).

law enforcement merely because one asserts a right to have counsel speak on his or her behalf. To uphold justice, the prosecutors and police must be able to speak with individuals, regardless of whether they have counsel, to permit justice in investigatory settings.<sup>43</sup> When describing the rationale behind not applying the Sixth Amendment in investigatory proceedings, the Fifth Circuit wrote:

The dullest imagination can comprehend the devastating effect that such a rule would have on undercover operations. Any potential defendant with an attorney would be insulated from any undercover operation; any potential defendant without an attorney would hire an attorney (if he could afford to do so) in order to build a wall between himself and the government's investigators. It's [sic] effect would not be limited to undercover operations of course, but would impede, obstruct, and even eliminate many continuing investigations of organized crime, racketeering, and drug dealing.<sup>44</sup>

[20] Whether this investigation is an overt one, such as investigating a drunk driver, or a sting operation, should not change the analysis. Should John Doe, the notorious arms dealer, know or not know that he is being investigated does not change the rationale for the situation. In either situation, law enforcement must be able to work with prosecutors to investigate matters, rather than arrest individuals based on mere speculation from their notoriety. Justice is best provided to the public by determining the facts and so, impediments during investigatory procedures work against fairness and justice. Thus, regardless of whether one has

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<sup>43</sup> See, e.g., *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993); *Burns v. Reed*, 500 U.S. 478, 493 (1991); *Nero v. Mosby*, 890 F.3d 106, 118 (4th Cir. 2018).

<sup>44</sup> *United States v. Heinz*, 983 F.2d 609, 614 (5th Cir. 1993).

obtained counsel, prosecutors should not find the Sixth Amendment right to counsel to be of concern in pre-indictment stages.

### **B. Courts Encourage Prosecutors to Use Sting Operations in Both Federal and State Jurisdictions**

[21] Whether the incident being investigated is a suspected crime, such as a car crash due to an intoxicated driver, or a longer-term sting operation being conducted led by a government attorney, the judicial system encourages the gathering of information from all parties.<sup>45</sup> In either situation, the Court encourages the administration of justice through consistently finding that sting operations are generally not only ethical, but also an encouraged means of investigation.<sup>46</sup>

[22] Sting operations have long been an encouraged means of law enforcement in the United States.<sup>47</sup> As early as 1895, the standard for the ethical limitations of sting operations has been whether the offense would have been committed, *but for* the actions of the government official.<sup>48</sup> In

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<sup>45</sup> *See, e.g.*, *Maine v. Moulton*, 474 U.S. 159, 179 (“We do not question that in this case, as in many cases, it was entirely proper to continue an investigation of the suspected criminal activities of the defendant and his alleged confederates, even though the defendant had already been indicted.”).

<sup>46</sup> *See Lewis v. United States*, 385 U.S. 206, 208–09 (1966) (“[I]t has long been acknowledged by the decisions of this Court, *see Grimm v. United States*, 156 U.S. 604, 610 (1895), and *Andrews v. United States*, 162 U.S. 420, 423 (1896), that, in the detection of many types of crime, the Government is entitled to use decoys and to conceal the identity of its agents.”).

<sup>47</sup> *See Grimm*, 156 U.S. at 610 (citing a list of cases approving sting operations).

<sup>48</sup> *See id.* (holding that when a government official suspects a person is engaged in activities offensive to good morals, the official may use deceitful tactics to gather information about a suspected offense).

more recent years, the federal government has been consistent in its stance, although often unsuccessful, that there is an exclusion of the ethics concerns entirely for prosecutors in federal undercover operations.<sup>49</sup> The Department of Justice has weighed in on the question in several circumstances, and has even filed suit to enjoin a state's bar organization from enforcing its ethics rule against undercover operations.<sup>50</sup>

[23] Despite 28 U.S.C. § 530B(a) (2018) denying the federal government the ability to preempt states' enforcement of ethics requirements, *In re Gatti* demonstrates a trend showing that federal preemption may have occurred and that states may no longer be able to deny any prosecutors the ability to involve themselves in sting operations when promoting legitimate law enforcement interests.<sup>51</sup> This notion of federal preemption is reinforced by the many states more explicitly permitting all prosecutors to involve themselves in covert operations, without ethical concerns, regardless of whether the opposing side has retained counsel.<sup>52</sup> States that have explicitly made the general ethical concerns of sting operations obsolete include: New York, Colorado,

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<sup>49</sup> See Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 592, 595 (2005).

<sup>50</sup> See *In re Gatti*, 8 P.3d 966, 976 (Or. 2000) (arguing that Oregon law provides that the rules of professional conduct are binding to all members of the bar without exception); see also *United States v. Hailey*, No. WDQ-11-0540, 2012 U.S. Dist., LEXIS 82053, at \*16–17 n. 10 (D. Md. June 13, 2012) (explaining that multiple courts have recognized an exception to the contact rule in limited circumstances such as pre-indictment contacts during a criminal investigation).

<sup>51</sup> See *Gatti*, 8 P.3d at 976; see also 28 U.S.C. § 530B(a) (codifying that attorneys of the federal government are subject to state laws and rules).

<sup>52</sup> See, e.g., D.C. Bar Ass'n Legal Ethics Comm., Op. 323 (2004); Utah State Bar Ethics Advisory Op. Comm., Op. 02-05 (2002).

Missouri, New Mexico, Utah, as well as many others, and Washington, D.C.<sup>53</sup>

[24] Regardless of whether or not there is federal preemption, the states that are not silent on the matter have found that Rule 4.2 (previously “DR 7-104(A)(1)”) is the relevant ethics rule, do “not prevent non-custodial pre-indictment communications by undercover agents with represented parties which occur in the course of legitimate criminal investigations.”<sup>54</sup> Hence, government attorneys cannot violate these rules by merely supervising such investigations. However, the Fourth Circuit has continuously been skeptical of the notion that prosecutors are explicitly immune from ethics concerns when involving themselves in sting operations to pursue a legitimate investigation with law enforcement.<sup>55</sup> Nevertheless, even if preemption was of concern, other states within the Fourth Circuit have continuously found that prosecutors, who are involved with sting operations, are generally exempted from the rules prohibiting

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<sup>53</sup> See *United States v. Parker*, 165 F.Supp.2d 431, 476–77 (W.D.N.Y. 2001) (rejecting the defendants’ logic that government attorneys are precluded from supervising undercover investigations); D.C. Bar Ass’n Legal Ethics Comm., Op. 323 (2004); Utah State Bar Ethics Advisory Op. Comm., Op. 02-05 (2002).

<sup>54</sup> *United States v. Grass*, 239 F. Supp. 2d 535, 541 (M.D. Pa. 2003); see also *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) (holding that a pre-indictment investigation by prosecutors is ‘authorized by law’ and exempted by the rule).

<sup>55</sup> See *United States v. Hammad*, 858 F.2d 834, 840 (2d Cir. 1988) (holding that evidence gathered from a prosecutor’s prohibited contact should be suppressed in court); see, e.g., *United States v. Acosta*, 111 F. Supp. 2d 1082, 1096 (E.D. Wis. 2000) (explaining that a “case by case basis” approach is to be used when determining whether evidence obtained by prosecutorial misconduct should be excluded). *Contra* *United States v. Worthington*, No. 89-5417, 1990 U.S. App. LEXIS 12838, at \*10–11 (4th Cir. July 31, 1990) (“We are in some doubt about the correctness of Hammad’s broad statements concerning the applicability of rules of ethical conduct to federal criminal investigations. Moreover, this case, unlike Hammad, involves a state rule of conduct.”).

communication with an opposing party, who has retained counsel, in the pre-indictment stage.<sup>56</sup>

[25] In Virginia specifically, however, there is not significant precedent establishing the exception for prosecutors in sting operations in cases in which a defendant has tried to suppress a prosecutor's evidence, because of a violation of the "no contact rule,"<sup>57</sup> the court has consistently held that the prosecutorial exception applies by basing its reasoning on precedent from outside jurisdictions.<sup>58</sup> For example, in *United States v. Guild*, a prosecutor was working with an investigative team to gather information on a matter involving an alleged sexual abuse.<sup>59</sup> There, the court held that matters in pre-indictment, non-custodial settings are an "authorized by law" exception to Rule 4.2 and that the court will follow the majority of circuits, which ruled the prosecutorial exception to be proper.<sup>60</sup>

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<sup>56</sup> See, e.g., *United States v. Binder*, 167 F. Supp. 2d 862, 866 (E.D.N.C 2001) ("The court accordingly decides that no rule of professional conduct precludes pre-indictment contacts between the government and a represented party in a non-custodial setting . . .").

<sup>57</sup> See generally U.S. CONST. amend. VI (stating that "in all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense", which provides the basis for the 'no contact rule').

<sup>58</sup> See, e.g., *United States v. Guild*, No. 1:07cr404 (JCC), 2008 U.S. Dist. LEXIS 7211, at \*4 (E.D. Va. Jan. 31, 2008).

<sup>59</sup> See *id.* at \*1–2.

<sup>60</sup> *Id.* at \*14 (citing *United States v. Balter*, 91 F.3d 427, 436 (3d Cir. 1996) (finding that "with the exception of the Second Circuit, every court of appeals that has considered a similar case has held . . . that rules such as New Jersey Rule 4.2 [identical in the relevant part to Virginia Rule 4.2] do not apply to pre-indictment criminal investigations by government attorneys").

[26] Thus, the ethical concerns are obsolete regarding the no contact rule and sting operations conducted by prosecutors for the same reasoning behind the holding in *Guild*.<sup>61</sup> Therefore, when there is an ongoing investigation in a pre-indictment stage where the attorneys are working towards a legitimate interest in promoting law enforcement; Rule 4.2 is inapplicable because there is an exception authorized by law.<sup>62</sup> Furthermore, although this matter does take place in a tribunal on the federal level, *Guild* applies the law in a manner consistent with the state's common law.<sup>63</sup> There is no indication that a state court would have ruled differently, and the ethic opinions reinforce a similar interpretation of Virginia's professional expectations in sting operations.<sup>64</sup> Therefore, in both the federal and state jurisdictions, there is expressed agreement in holding that there is generally a prosecutorial exception to the ethical standards, regarding using deceitful means and trickery when pursuing a legitimate interest for the purposes of law enforcement.

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<sup>61</sup> *See id.* at 18 (denying Defendant's Motion to Dismiss the Indictment on grounds of prosecutorial misconduct).

<sup>62</sup> *See id.* at 14.

<sup>63</sup> *See id.*

<sup>64</sup> *See* Virginia Bar Ass'n, Legal Ethics Op. 1845 (2009); Virginia Bar Ass'n, Legal Ethics Op. 1765 (2003); Virginia Bar Ass'n, Legal Ethics Op. 1738 (2000).

### III. THE ETHICAL AND LEGAL IMPLICATIONS OF PROSECUTORS HAVING INVOLVEMENT WITH ACTS OF TRICKERY AND DECEPTION IN ONLINE STING OPERATIONS

#### A. Courts Have Been Reluctant to Establish the Bounds of Online Investigations

[27] As technology continues to improve, new legal issues arise. Technology brings forth both new types of criminal conduct as well as new types of law enforcement means. An area of law enforcement that is becoming increasingly prevalent is the use of social media for investigative purposes.<sup>65</sup> From 2015 to 2016, the Deputy General Counsel of Facebook found that despite posts violating local law decreasing by 83% from 55,827 to 9,663, government requests for account information increased by 27% globally, from 46,710 to 59,229 requests.<sup>66</sup> A substantial amount of this online investigation is simply the police viewing public postings on social media, where criminals have bragged about their transgressions.<sup>67</sup> This sort of online investigation is, however, nothing new. As far back as 2008, there was a case in which a man was convicted of a gang-related murder because of incriminating words and photos that he had publicly posted on his Myspace page.<sup>68</sup>

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<sup>65</sup> See Juliana Reyes, *92% of U.S. Law Enforcement Agencies Use Social Media*, TECHNICAL.LY (Oct. 23, 2013, 9:30 AM), <https://technical.ly/2013/10/23/police-social-media/> [https://perma.cc/C6C2-QZCK]; Chris Sonderby, *Global Government Requests Report*, FACEBOOK (Apr. 27, 2017), <https://about.fb.com/news/2016/12/global-government-requests-report-6/> [https://perma.cc/9TPZ-73GC].

<sup>66</sup> See Sonderby, *supra* note 65.

<sup>67</sup> See Heather Kelly, *Police Embrace Social Media as Crime-Fighting Tool*, CNN (Aug. 30, 2012 5:23 PM), <https://www.cnn.com/2012/08/30/tech/social-media/fighting-crime-social-media/> [https://perma.cc/ZZ7B-E32N].

<sup>68</sup> See *id.*

[28] Recently, a trend in law enforcement has been using trickery and deception to gain access to private social media accounts.<sup>69</sup> The Department of Justice has even written a guide, regarding law enforcement posing as criminals like drug buyers and prostitutes, and noted that eighty percent of the law enforcement officers surveyed found that “creating personas or profiles on social media outlets for use in law enforcement activities is ethical.”<sup>70</sup> Conversely, the Department of Justice also conveyed that an “unresolved issue is whether it is constitutionally permissible for police to set up fictitious identities in Facebook accounts or other social media in order to obtain photos, videos, and other content posted by other Facebook users.”<sup>71</sup> This presents both ethical and legal questions regarding the boundaries to which prosecutors may involve themselves in online sting operations, because of the lack of precedent, and because of the contractual nature of social media sites.

[29] As discussed above, it is well established that a prosecutor, or a law enforcement office working with a prosecutor, when acting in the performance of their official duties, may generally contact a party using trickery or deception, without a general concern for violating legal or ethical implications during investigatory stages.<sup>72</sup> Nevertheless, when a

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<sup>69</sup> See Amanda Holpuch, *Facebook Urged to Tackle Spread of Fake Profiles Used by US Police*, THE GUARDIAN (Apr. 22, 2019, 2:00 PM), <https://www.theguardian.com/technology/2019/apr/22/facebook-law-enforcement-fake-profiles-ice> [<https://perma.cc/ANE5-SK8G>].

<sup>70</sup> Jeff Welty, *May an Officer Assume a False Identity Online in Order to “Friend” a Suspect?*, N.C. CRIM. L. (May 17, 2016, 11:51 AM), <https://nccriminallaw.sog.unc.edu/may-officer-assume-false-identity-online-order-friend-suspect/> [<https://perma.cc/5LMD-B2AF>].

<sup>71</sup> *Id.*

<sup>72</sup> See *Moran v. Burbine*, 475 U.S. 412, at 430 (1986).

prosecutor begins to act through trickery or deceptive means, while investigating through a computer, the scope of the prosecutor's official duties become much less clear. Returning to the hypothetical involving John Doe, the notorious arms dealer, there is great ambiguity as to the extent to which prosecutors may work with law enforcement to investigate him through online sting operations.

[30] In Virginia, the legal and ethical confines for law enforcement using trickery or deceptive tactics online have not yet been sufficiently considered by the courts.<sup>73</sup> Section 18.2-152.5:1 of the Virginia Code states that it is a felony “for any person, other than a law-enforcement officer . . . acting in the performance of his official duties, to use a computer to obtain, access, or record, through the use of material artifice, trickery or deception, any identifying information . . . .”<sup>74</sup> This demonstrates that the legislature has explicitly carved out an exception so that law enforcement may engage in trickery or deception online to an extent, but the bounds of that extent are unclear.<sup>75</sup> Although there is not yet any binding precedent interpreting Section 18.2-152.5:1, the legislative history conveys that Section 18.2-152.5:1 is an extension of Sections 18.2-152.3 and 18.2-152.5 of the Code of Virginia, and so the precedent regarding those Sections offers some insight as to what acts of trickery or deception are within the performance of the official duties of law enforcement.<sup>76</sup>

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<sup>73</sup> See VA. RULES OF PROF'L CONDUCT (2009), *see also* VA. CODE ANN. § 18.2-152.5:1 (2019).

<sup>74</sup> VA. CODE ANN. § 18.2-152.5:1 (2019).

<sup>75</sup> See VA. CODE ANN. § 18.2-152.5:1 (2019) (stating that within this section Virginia has not yet established any mandatory authority interpreting the bounds of law enforcement's exception).

<sup>76</sup> See *id.*; S. 1002, 153th Gen. Assemb., Reg. Sess. (Va. 2005) (stating this section is “[a]n Act to amend and reenact Sections 18.2-152.3 and 18.2-152.5 of the Code of Virginia and to amend the Code of Virginia by adding a section numbered 18.2-152.5:1,

[31] An example of a computer investigation in which a law enforcement officer was acting outside the bounds of the performance of her official duties is demonstrated in *Ramsey v. Commonwealth*.<sup>77</sup> In *Ramsey*, the appellant, a state trooper, was granted access to a government database only for criminal justice purposes.<sup>78</sup> The database contained information related to records maintained by the Department of Motor Vehicles, wanted-person information, and driving records.<sup>79</sup> The appellant used the database to gain information on her girlfriend, her supervisor, as well as, multiple other people for no criminal justice purpose.<sup>80</sup> Because of these acts, the appellant was found guilty of thirteen counts of misdemeanor computer invasion of privacy.<sup>81</sup>

[32] The Court of Appeals of Virginia affirmed the conviction by broadly holding that “to be convicted under this section the evidence must establish that the offender viewed identifying information of another ‘when he knows or reasonably should know’ he is without right, agreement, or permission to do so or ‘act[ing] in a manner knowingly exceeding such right, agreement, or permission.’”<sup>82</sup> The court further

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relating to computer crimes; penalties.”); *see also* VA. CODE ANN. §§ 18.2-152.3, 18.2-152.5 (2019).

<sup>77</sup> *See* *Ramsey v. Commonwealth*, 65 Va. App. 694, 699 (2015).

<sup>78</sup> *See id.* at 696.

<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> *See id.* at 697 (charging appellant with the violation of VA. CODE ANN. § 18.2-152.5 (West 2015)).

<sup>82</sup> *Id.* at 698 (quoting VA. CODE ANN. §§ 18.2-152.2, 18.2-152.5 (West 2015) (internal edits omitted)).

noted that the charge was affirmed because (1) the appellant knew or should have known that the access was unauthorized because the system stated its permitted uses and (2) because, at the time the information was gathered, the information was not being used for criminal justice purposes, regardless of how the data could subsequently be used.<sup>83</sup> The court continued in dictum to express the persuasiveness of the similar congressional legislation, the Computer Fraud and Abuse Act,<sup>84</sup> and how there is no proof required that the unauthorized user “used the information to further another crime or to gain financially.”<sup>85</sup> The court further stated that “the crime of computer invasion of privacy is committed when a person uses a computer or computer network and *intentionally examines without authority* any . . . information . . . relating to any other person” with the use of such information being irrelevant.<sup>86</sup> Thus, the Fourth Circuit has seemingly established a very broad standard in prohibiting unauthorized access to information online.

[33] On the other side of the spectrum, simply viewing a public Facebook account for investigative purposes is within legal and ethical confines.<sup>87</sup> In fact, some states’ ethical requirements mandate lawyers to use social media for investigative purposes, such as for assessing jurors

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<sup>83</sup> See *Ramsey*, 65 Va. App. at 699.

<sup>84</sup> See generally Computer Fraud and Abuse Act (CFAA), 18 U.S.C. § 1030 (2012) (criminalizing computer hacking and other related crimes).

<sup>85</sup> See *Ramsey v. Commonwealth*, 65 Va. App. 694, 700 (2015).

<sup>86</sup> See *id.*

<sup>87</sup> See Thebestvpn Ltd., *Can The Police Use Facebook to Investigate Crimes?*, GOV’T TECH. (Mar. 5, 2017), <https://www.govtech.com/public-safety/can-the-police-use-facebook-to-investigate-crimes.html>. [<https://perma.cc/M3XS-7D3Q>].

prior to trial.<sup>88</sup> Courts have increasingly been holding that lawyers who fail to eliminate partial jurors because of not checking for biased social media posts, breach their ethical duties as advocates for their clients.<sup>89</sup>

[34] Moreover, James A. King, Vice-chair of the ABA Section of Litigation's Trial Evidence Committee, stated that "Facebook is the modern equivalent of a diary. A diary is discoverable as long as you can show that there is some potentially relevant information in it. The court can put protections in place to shield other, private information in the diary. But the relevant information is discoverable."<sup>90</sup> The ABA, has, thus, found that not only public Facebook postings, but also, private postings can be obtained through legal and ethical means by using the judicial system.<sup>91</sup> Nonetheless, viewing public profiles by searching online or private postings through court orders, leaves a substantial amount of gray area between not accessing unauthorized information for a personal agenda, when determining whether an online investigation is ethical.

[35] An example of the confusion in this gray area of online investigations was presented in *Collins v. Virginia*.<sup>92</sup> In *Collins*, a police investigation discovered a picture of a stolen motorcycle on the

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<sup>88</sup> See, e.g., ASS'N OF THE BAR OF THE CITY OF N.Y. COMM. ON PROF'L ETHICS, FORMAL OP. 2012-02 ("Indeed the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

<sup>89</sup> See *Burden*, 2011 U.S. Dist. LEXIS 94809, at \*28.

<sup>90</sup> Katerina Milenkovski, "Private" Postings Nevertheless Discoverable: Judge Orders Forensic Expert to Review Facebook Posts, A.B.A. (Aug. 2, 2013), <https://www.americanbar.org/groups/litigation/publications/litigation-news/top-stories/2013/private-postings-nevertheless-discoverable/> [<https://perma.cc/L2F7-SQ6K>].

<sup>91</sup> See *id.*

<sup>92</sup> See *Collins v. Virginia*, 138 S. Ct. 1663 (2018).

defendant's Facebook page, using it to track down the physical motorcycle, confirm it was stolen, and arrest the defendant.<sup>93</sup> Nevertheless, the Supreme Court reversed the judgment of the Supreme Court of Virginia because it found that the Supreme Court of Virginia had a "mistaken premise about the constitutional significance of visibility."<sup>94</sup> The Court held that Virginia did not establish probable cause to search the defendant's premise without a warrant because the officer had not discovered the contraband "in plain view."<sup>95</sup> On remand, the Supreme Court of Virginia upheld the defendant's conviction on grounds wholly unrelated to the Facebook search.<sup>96</sup>

[36] *Collins* presents many questions about evidence discovered on Facebook. It could be broadly interpreted as establishing that law enforcement must see evidence without the aid of technology to have probable cause, or it could narrowly be asserting that law enforcement must view evidence in real-time to have probable cause to search a vehicle without a warrant.<sup>97</sup> In either situation, *Collins* demonstrates that the Supreme Court and Virginia Courts have quite different stances on the value of evidence obtained through online investigations, and it demonstrates how courts are reluctant to make holdings establishing the ethical boundaries of online investigations.<sup>98</sup>

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<sup>93</sup> *See id.* at 1666.

<sup>94</sup> *Id.* at 1675.

<sup>95</sup> *See id.* at 1672.

<sup>96</sup> *See Collins v. Commonwealth*, 297 Va. 207, 232 (2019).

<sup>97</sup> *See Collins*, 138 S. Ct. at 1663.

<sup>98</sup> *See id.*

## **B. Public Policy Concerns Arise in Online Sting Operations Because of Criminal Statutes and Contractual Terms**

### **1. Criminal Concerns Arising from Online Sting Operations**

[37] The question still remains as to whether a prosecutor may be directly or indirectly involved with using trickery or deceptive measures on Facebook to gather information. As previously mentioned, viewing public profiles is not only a permissible use for investigative purposes, but is often a requirement for attorneys to remain ethical.<sup>99</sup> However, the value of this information, and the bounds of the permissibility of online searches of public accounts has been only vaguely addressed by the courts.<sup>100</sup> Additionally, there are ethical means through which private Facebook information can be obtained through a court order.<sup>101</sup> Despite these other means of obtaining information, law enforcement still commonly uses sting operations online because, much like in-person sting operations, it is an effective means of gathering necessary information on a criminal enterprise.<sup>102</sup>

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<sup>99</sup> See *Burden*, 2011 U.S. Dist. LEXIS 94809, at \*25–26.

<sup>100</sup> See, e.g., *Collins*, 138 S. Ct. at 1663.

<sup>101</sup> See *Burden*, 2011 U.S. Dist. LEXIS 94809, at \*25–26.

<sup>102</sup> See, e.g., *United States v. Gatson*, 2014 WL 7182275 at \*22 (D.N.J. Dec. 16, 2014) (holding that an online sting operation in which a fake account became Instagram friends with the defendant amounted to a “consensual sharing” of the images by the defendant). *But see*, Larry Bodine, *Montana Judge Rules Warrant Required for Social Media Profiles*, THE NAT’L TRIAL LAW. (Mar. 6, 2015), <https://www.thenationaltriallawyers.org/2015/03/montana-judge-rules-warrant-required-for-social-media-profiles/> [<https://perma.cc/8XG2-ZPHQ>].

[38] However, a major distinction between an in-person sting operation and an online sting operation is that it is not uncommon for online sting operations to use social media sites with limited privileges offered to users.<sup>103</sup> For example, Facebook has certain contractual provisions indicating the privileges of its users and what acts violate Facebook's terms and conditions.<sup>104</sup> In Facebook's terms and conditions, it states, "People on Facebook are required to use the name they go by in everyday life and must not maintain multiple accounts. Operating fake accounts, pretending to be someone else, or otherwise misrepresenting your authentic identity is not allowed, and we will act on violating accounts."<sup>105</sup> In a sting operation, not involving a confidential informant, it would presumably involve a police officer with a fake account, using a fictitious name, for the sole purpose of misrepresenting his or her authentic identity to the suspect. Because one can assume that a sting operation, without a confidential informant, involves the use of a pseudonym, a sting operation on Facebook would typically be an unauthorized use of the application.

[39] It could be argued that there are many fictitious names or nicknames used on Facebook and that the application has left this term unenforced for so long that using a false identity is presumed to now be an acceptable use.<sup>106</sup> However, this particular clause is directed solely at law

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<sup>103</sup> See Rick Sallinger, *Police Using Social Media for Marijuana Stings, Some Call It Entrapment*, CBS DENVER (Jan. 4, 2016), <https://denver.cbslocal.com/2016/01/04/police-using-social-media-for-marijuana-stings-some-call-it-entrapment/> [<https://perma.cc/ZV4Y-TZA3>].

<sup>104</sup> See *Community Standards*, FACEBOOK, <https://www.facebook.com/communitystandards/> [<https://perma.cc/M2GM-K8N4>].

<sup>105</sup> See *Information for Law Enforcement Authorities*, *supra* note 26.

<sup>106</sup> This notion has generally not been argued because courts have been too quick to assume waiver of the argument through having a public account or accepting a friend request. See, e.g., generally David Goldman, *Cops Can Use Fake Facebook Accounts to Lure Suspects, Says Judge*, CNNMONEY (Dec. 24, 2014, 11:01 AM),

enforcement, rather than towards general users, and Facebook has been quite vocal regarding the clause's enforcement.<sup>107</sup>

[40] For example, Facebook found that the Memphis Police Department was using the Facebook application to “friend” and spy on Black Lives Matter activists, and in response, took several actions, including deactivating seven police accounts.<sup>108</sup> There was also legal action taken against the Police Department, and a warning sent to the Memphis Police Director.<sup>109</sup> In the letter, Facebook's Director and Associate General Counsel wrote, “We regard this activity as a breach of Facebook's terms and policies, and as such we have disabled the fake accounts that we identified in our investigation.”<sup>110</sup> Additionally, due to the intrusiveness by the government and its abuse of Facebook, Mark Zuckerberg, CEO of Facebook, has been working towards implementing end-to-end encryption on the application “to hedge against guaranteeing full privacy protections for users.”<sup>111</sup> Thus, an argument that Facebook has left the contractual provision prohibiting online sting operations unenforced is without merit.

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<https://money.cnn.com/2014/12/24/technology/social/fake-facebook-accounts/index.html> [<https://perma.cc/LC3P-PPXU>].

<sup>107</sup> *See id.*

<sup>108</sup> *See* Andy Meek, *Facebook Scolds Police: Stop Making Fake Profiles to ‘Friend’ and Monitor Activists*, *BGR* (Sept. 25, 2018, 7:26 PM), <https://bgr.com/2018/09/25/facebook-police-fake-profiles/> [<https://perma.cc/2EK5-26J6>].

<sup>109</sup> *See id.*

<sup>110</sup> *Id.*

<sup>111</sup> David Ingram, *Zuckerberg's End-To-End Encryption Plan Could Put Facebook at Odds with Law Enforcement*, *NBC NEWS* (Mar. 8, 2019, 5:24 PM), <https://www.nbcnews.com/tech/tech-news/zuckerberg-plan-could-put-facebook-collision-course-law-enforcement-n981246> [<https://perma.cc/S75S-KL9Y>].

[41] The broad holding in *Ramsey* indicated that Sections 18.2-152.3 and 18.2-152.5 of the Code of Virginia are violated when the evidence establishes “that the offender viewed identifying information of another ‘when he knows or reasonably should know’ he is without right, agreement, or permission to do so or ‘act[ing] in a manner knowingly exceeding such right, agreement or permission.’”<sup>112</sup> In a sting operation on Facebook, law enforcement has a reason to know that using trickery or deception, through creating a false account, is an unauthorized use of the information on the computer because law enforcement would have had to enter into a contract with Facebook prohibiting such an act. Moreover, there was notice through the many media publications regarding Facebook’s stance, blocked law enforcement users for using false identities, and through receiving a letter directly from Facebook.<sup>113</sup> Thus, it seems that if the *Ramsey* test were to be used in court, the actions of law enforcement would be in violation of the law.<sup>114</sup>

[42] Because the police are acting as agents of the state for the purpose of enforcing the law, it could reasonably be assumed that it would be unethical for a prosecutor to encourage criminal misconduct by the police by using evidence obtained through illegal means based on public policy concerns. However, whether the matter is unethical is actually not so certain. The Supreme Court has occasionally encouraged the prosecution of defendants, when also finding that law enforcement committed illegal acts.<sup>115</sup> In *Utah v. Strieff*, the Court stated that “[i]n some cases, for

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<sup>112</sup> *Ramsey v. Commonwealth*, 780 S.E.2d 624, 626 (Va. Ct. App. 2015) (quoting VA. CODE ANN. §§ 18.2-152.2 (2019)).

<sup>113</sup> See Meek, *supra* note 108.

<sup>114</sup> See Ingram, *supra* note 111.

<sup>115</sup> See *Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016).

example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression,” and held that evidence from an unconstitutional investigation may be used to prosecute a defendant when there is “no flagrant police misconduct.”<sup>116</sup> Whether violating Section 18.2-152.5 of the Code of Virginia constitutes *flagrant police misconduct* has not yet been challenged in court.<sup>117</sup> Thus, whether ethical concerns arise for online sting operations that are found to be illegally conducted is a fact-intensive analysis that has no overt answer.

## 2. Contractual Concerns Arising from Online Sting Operations

[43] Nonetheless, the larger ethical concern for prosecutors regards the violation of Facebook’s contractual provisions.<sup>118</sup> When a law enforcement officer creates a Facebook account under a fictitious identity, he or she is entering into a contractual arrangement with Facebook in order to gain access to the application.<sup>119</sup> Because law enforcement has agreed to not use a fictitious identity in the contract,<sup>120</sup> each time law enforcement engages in such trickery and deception, it is purposefully breaching this contract. Despite it being most likely that the investigated suspect is not in privity to the contract, there are substantial public policy concerns at issue with this breach of contract. Most significantly, giving law enforcement the authority to breach contracts that affect third-parties

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<sup>116</sup> *Id.* at 2059, 2063.

<sup>117</sup> *See* Va. Code Ann. § 18.2-152.5 (2019); *see cf.* *Strieff*, 136 S. Ct. at 2059, 2063.

<sup>118</sup> *See Information for Law Enforcement Authorities*, *supra* note 105.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

with no repercussions greatly undermines the entirety of the judicial system.

[44] Although the judicial system is often pictured as a system in which accused individuals go to trial and defend their innocence in front of a jury, an occurrence of that sort is the rarity.<sup>121</sup> Conversely, the criminal justice system is mostly a system of contractual arrangements in which ninety-seven percent of criminal cases over the last fifty years were resolved through plea agreements.<sup>122</sup> The Supreme Court has continuously analyzed the importance of treating plea agreements as equivalent to contracts for the public policy reason that the judicial system rests on the notion that the people believe the government will be bound to its contractual agreements.<sup>123</sup> Should law enforcement be entitled to breach contracts whenever it sees fit, there is the public policy concern that the people have no reason to believe that the government should be trusted. If the people do not have a reason to believe that the government will not breach contracts, then there is no reason to think that the people will be

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<sup>121</sup> See Innocence Staff, *Report: Guilty Pleas on the Rise, Criminal Trials on the Decline*, INNOCENCE PROJECT (Aug. 7, 2018), <https://www.innocenceproject.org/guilty-pleas-on-the-rise-criminal-trials-on-the-decline/> [<https://perma.cc/F7UB-PHT3>].

<sup>122</sup> *Id.*

<sup>123</sup> See generally *Puckett v. United States*, 556 U.S. 129, 137 (2009) (stating “plea bargains are essentially contracts” and “[w]hen the consideration for a contract fails—that is, when one of the exchanged promises is not kept—we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken” (citing *Mabry v. Johnson*, 467 U.S. 504, 508 (1984); 23 RICHARD A. LORD, *WILLISTON ON CONTRACTS* § 63.1 (4th ed. 2002))); *United States v. Gillion*, 704 F.3d. 284, 292 (4th Cir. 2012) (stating “a proffer agreement operates like a contract”); *United States v. Daniels*, 189 F. App’x. 199, 201 (4th Cir. 2006) (stating “[a] proffer agreement operates like a contract; accordingly, to discern whether [defendant] breached the agreement, we must examine its express terms.”); *United States v. Partman*, No. 3:11-2063-JFA-10, 2018 U.S. Dist. LEXIS 21701, at \*15–16 (D.S.C. Feb. 9, 2018).

willing to enter into plea agreements; the contractual system upon which the judiciary is currently based. Although the contractual breaches of Facebook's terms may seem trivial in comparison to taking down a criminal enterprise, the implications of such an acceptance of practice would devastate the foundation of the judiciary.

[45] Nevertheless, it should be considered that the use of non-fictitious social media accounts for sting operations do not give rise to the same contractual or criminal concerns that arise with the use of fictitious accounts. For example, in *United States v. Hassan*, law enforcement was able to work with numerous confidential informants, who seemingly did not use trickery or deception in regards to their identities, but rather, only in their motives.<sup>124</sup> In *Hassan*, several individuals were willing to assist the FBI with both an in-person and online sting operation that led to the successful prosecution of seven out of eight individuals involved in offenses arising from terrorist activities.<sup>125</sup> Despite *Hassan* not directly challenging the use of sting operations over social media, the opinion substantially considers evidentiary challenges regarding whether social media evidence is admissible in court.<sup>126</sup> The court found that the wide variety of social media evidence that was gathered did not create any evidentiary concerns.<sup>127</sup>

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<sup>124</sup> See *United States v. Hassan*, 742 F.3d 104, 115–16 (4th Cir. 2014).

<sup>125</sup> See *id.* at 110–11, 111 n.1, 114–115.

<sup>126</sup> See *id.* at 132–34 (finding that screenshots of Facebook pages and YouTube videos are self-authenticating under Federal Rule of Evidence 902(11), and thus admissible as business records).

<sup>127</sup> See *id.* at 133–34.

[46] Although *Hassan* does not explicitly mention that confidential informants were the ones who gained access to the social media evidence, if the informants did gain access, it would demonstrate that online sting operations can be conducted in a manner that neither violates the contractual terms of social media sites nor involves law enforcement illegally accessing unauthorized information, while still being sufficiently effective to demolish terrorist agendas.<sup>128</sup> Thus, certain online sting operations, such as using confidential informants, can be adequately effective in fulfilling law enforcement's needs to conduct thorough investigations, while also not raising considerable public policy concerns related to the government breaching contracts. Therefore, law enforcement has an adequate alternative means for conducting online sting operations, which does not implicate the use of a fictitious social media account. Ergo, there is no compelling reason to justify the use of trickery and deception, when a plethora of criminal and civil concerns are raised.

[47] Because the judicial system is based upon the people trusting the government to abide by its contractual agreements, and because there are apparent alternative means available to adequately investigate a suspect without the use of fictitious social media accounts, public policy concerns should bar prosecutors from using evidence gathered through fictitious social media accounts during online sting operations. The significant detrimental effects that may arise as a result of such acts of trickery and deception could plausibly lead to encouraging criminal acts, contractual breaches, and a decrease in the use of plea agreements to the detriment of all parties involved. Rule 8.4 states that "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."<sup>129</sup> Because a prosecutor's job requires them to act in the best

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<sup>128</sup> See *Hassan*, 742 F.3d 104.

<sup>129</sup> MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2020) (ellipsis added).

interests of the judiciary and to promote justice, there is no justifiable means for the law to hold an exception for the ethics violation.<sup>130</sup> Certain types of sting operations, more specifically, ones that involve fictitious social media accounts on Facebook, the best interests of the judiciary are not served because the effects are unjustifiably prejudicial to promoting justice.

#### IV. CONCLUSION

[48] Returning to the initial premise regarding whether a lawyer may be involved in acts of trickery or deception, the answer has become quite convoluted as technology has progressed the means of communication amongst parties and practices of law enforcement.

[49] Generally, Rule 8.4 provides that “it is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation; [or] . . . engage in conduct that is prejudicial to the administration of justice . . . .”<sup>131</sup> Moreover, the Sixth Amendment provides that “[in] all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his [defense].”<sup>132</sup> Nonetheless, the law has made an exception for prosecutors to use acts involving dishonesty, fraud, deceit or misrepresentation for certain purposes, such as aiding law enforcement in sting operations, and has held an exception for the constitutional concerns regarding contacting an

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<sup>130</sup> *See id.*

<sup>131</sup> *Id.*

<sup>132</sup> U.S. CONST. amend. VI.

opposing party who has retained counsel in the pre-indictment stage.<sup>133</sup> Assuming an offense would be committed, regardless of the actions of a government official, in-person sting operations are generally found to be well within the legal and ethical confines of the law.<sup>134</sup>

[50] However, should a prosecutor use acts of trickery or deception online, there are numerous factors changing the question of whether a prosecutor may engage in conduct involving dishonesty, fraud, deceit or misrepresentation. One of these factors is that there are criminal statutes that both exempt and prohibit such behavior, regarding online investigations, depending on the particular circumstance.<sup>135</sup> A second factor to consider is the contractual nature of using online applications and whether law enforcement may ethically disregard contracts that injure third parties. Despite the law prohibiting law enforcement from viewing identifying information of another, when the officer knows that he or she is without right, agreement, or permission to do so, or is knowingly exceeding such right, agreement, or permission, this has become a standard means of law enforcement through the creation of fictitious Facebook account.<sup>136</sup> Law enforcement has knowledge that the creation of

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<sup>133</sup> See *Grimm v. United States*, 156 U.S. 604, 609–11 (1895) (holding that when a government official suspects a person is engaged in activities offensive to good morals, the official may use deceitful tactics to gather information about a suspected offense). See, e.g., *Maine v. Moulton*, 474 U.S. 159, 191 (1985) (“[A]pplying the [exclusion] rule to cases where the State deliberately elicits statements from a defendant in the course of investigating a separate crime excludes evidence that is ‘typically reliable and often the most probative information bearing on the guilt or innocence of the defendant.’” (quoting *Stone v. Powell*, 428 U.S. 465, 490 (1976)) (Burger, J., dissenting).

<sup>134</sup> See *Grimm*, 156 U.S. at 611.

<sup>135</sup> See, e.g., Va. Code Ann. § 18.2-152.5:1 (2019).

<sup>136</sup> See VA. CODE ANN. §§18.2-152.2, 18.2-152.5 (2019); see, e.g., *Ramsey v. Commonwealth*, 780 S.E.2d 624, 625 (Va. Ct. App. 2015); see also *Jon Schuppe*,

these profiles is explicitly against the terms of the contractual agreement entered into, upon creating the account, however, law enforcement has continued to enter into these contracts with the willful intention of breaching the agreements.<sup>137</sup>

[51] Should the court consider whether prosecutors may themselves, or direct others, to engage in acts of trickery and deception, through online sting operations targeting plausible criminal activity and willful breaches of contracts involved, the court should find any involvement by prosecutors to be unethical due to public policy concerns.<sup>138</sup> Although a breach of a Facebook agreement may seem relatively trivial compared to indicting an arms dealer or some other sort of criminal involved in acts of violence, the repercussions of permitting such behavior set a precedent undermining the entirety of the judicial system.

[52] The American criminal justice system is founded upon plea agreements being the foundation of the court system; this system necessitates the people's trust in the government to abide by its contractual agreements, which in turn permits everyone to have a fair chance of justice being served.<sup>139</sup> Should the use of fictitious accounts continue on Facebook, the people would rightfully believe that the government will enter into agreements with bad faith and with a reasonable chance of

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*Undercover Cops Break Facebook Rules to Track Protesters, Ensnare Criminals*, NBC NEWS (Oct. 5, 2018, 6:08 AM), <https://www.nbcnews.com/news/us-news/undercover-cops-break-facebook-rules-track-protesters-ensnare-criminals-n916796> [<https://perma.cc/W75H-K83U>].

<sup>137</sup> See *Information for Law Enforcement Authorities*, *supra* note 105.

<sup>138</sup> See generally MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2020) (providing the rules for attorney professional conduct).

<sup>139</sup> See Innocence Staff, *supra* note 121.

breaching the agreement at its convenience. Moreover, there are adequate alternative means for the government to acquire the same information in an investigation, such as through confidential informants, court orders, or in-person sting operations. Additionally, the court should not encourage crime and civil wrongs, regardless of who the party is involved. The court and judiciary should promote justice above all else. Because of these reasons, the public policy concerns of permitting acts of trickery and deception should not permit for the involvement of prosecutors in online sting operations in which fictitious accounts are made in knowing breaches of contracts. To find trickery and deception of this sort ethical would be valuing convenience over promoting substantial interests the judicial system has in promoting justice.