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THE PROSECUTOR'S DUTY OF SILENCE

*Bennett Gershman**

I. INTRODUCTION

Prosecutors enjoy a broad array of opportunities to communicate with the public outside the courtroom. Justice Holmes's famous dictum—that "[t]he theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument . . . and not by any outside influence, whether of private talk or public print"¹—is just that, a theory. The reality is otherwise. Prosecutors, and defense lawyers too, engage in extrajudicial speech frequently, and often irresponsibly. But in contrast to other lawyers, prosecutors have a higher—a "special"—duty to serve justice rather than a private client.² Yet prosecutor speech is ubiquitous, often carefully orchestrated, and very often hard-hitting. With the collaboration of the media, prosecutors hold press conferences and issue press releases, give briefings and interviews with reporters, post Internet and Twitter comments, appear as TV "experts," speak in public forums, and write books about their exploits.³ They have also used the notorious "perp walk" as a form of communication and have been known to leak confidential information.⁴

As Justice Holmes intimated, a prosecutor's public statements are potentially dangerous. Given a prosecutor's high standing with the public as a "Champion of Justice" sworn to uphold the law and punish wrongdoers, a prosecutor has a unique ability to shape public opinion not only about fighting crime but also about specific

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¹ *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

² See STANDARDS FOR CRIMINAL JUSTICE § 3-1.2(b) (AM. BAR ASS'N 4th ed. 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the law, not merely to convict."); NAT'L PROSECUTION STANDARDS § 1-1.1 (Nat'l Dist. Attorneys Ass'n 3d ed. 2009) ("The primary responsibility of a prosecutor is to seek justice . . ."); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. 1 (AM. BAR ASS'N 2002) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.").

³ See *infra* Sections I.B.1, I.B.2, I.B.3, I.B.5, I.B.6.

⁴ See *infra* Sections I.B.4, I.B.7.

individuals who may be under investigation and prosecution. And with the ability of the media to saturate the public with pervasive, repetitive, and often inflammatory news coverage about a case, a prosecutor's public statements almost always have the potential to prejudice future jurors in that case and thereby inflict prejudice to persons suspected or charged with wrongdoing.⁵ Indeed, a prosecutor's public statements can destroy a person's reputation, prejudice his right to a fair trial, and undermine the public's respect for the way the criminal law is administered. And most tragically, a prosecutor's public statements can contribute to the conviction of innocent persons.⁶

The power of the prosecutor, combined with the influence of the media, makes for a dangerous combination. The symbiotic relationship between prosecutors and the media is well known. While banner headlines and incendiary news coverage garner prosecutors free publicity and significant leverage in getting convictions,⁷ the close collaboration with prosecutors gives the media special access to confidential information and the ability to break stories and then spin them to a large and receptive audience. To be sure, some prosecutor speech is legitimate and necessary. Speech by prosecutors may serve significant public interests—informing the public about law enforcement initiatives, alerting the public to dangerous situations, and seeking assistance from the public in investigating crimes and fugitives. But a considerable amount of prosecutor speech is illegitimate, unnecessary, and prejudicial. When a prosecutor campaigns on the death penalty, or the rights of victims, or testifies before a legislative body on law

⁵ See, e.g., Laurie L. Levenson, *Prosecutorial Sound Bites: When do They Cross the Line?*, 44 GA. L. REV. 1021, 1024 (2010) ("[T]he ethical rules have been fairly ineffective in restraining prosecutors from remarks that have a substantial possibility of affecting public opinion of the defendant before trial."); Andrew E. Taslitz, *The Incautious Media, Free Speech, and the Unfair Trial: Why Prosecutors Need More Realistic Guidance in Dealing with the Press*, 62 HASTINGS L.J. 1285, 1287 (2011) (noting that risks to a defendant's reputation and receiving a fair trial from extrajudicial comments by prosecutors in high-profile cases "always exist" and are "substantial."); See R. Michael Cassidy, *The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle*, 71 LAW & CONTEMP. PROB. 67, 68 (2008) ("Several of the statements that [the prosecutor] admittedly made to the media about the rape investigation . . . seem entirely consistent with a prosecutor's duty to inform the public about the priorities of his office, the nature and status of criminal cases, and the reasons for the discretionary law-enforcement decisions he has made. . . . These are the very types of statements that prosecutors across the country routinely make about pending criminal cases in order to keep their communities informed about threats to public safety and the ongoing enforcement activities of government officials.").

⁶ See *infra* note 222 and accompanying text.

⁷ See, e.g., Taslitz, *supra* note 5, at 1295.

enforcement initiatives to fight terrorism, there may be no direct and specific prejudice to any pending or impending prosecution. However, when a prosecutor comments about specific cases, discusses the evidence and the defendant's character, and offers opinions about the credibility of witnesses and the defendant's guilt, the prosecutor crosses the line.

Admittedly, the line between legitimate and illegitimate prosecutor speech is not clear-cut. A prosecutor who seeks to inform the public about law enforcement initiatives against terrorism—undoubtedly a legitimate topic—may intentionally or inadvertently identify individuals who are suspected of being part of a terrorist cell, link them to a broader terrorist conspiracy, and opine on the strength of the government's evidence.⁸ And if these individuals are later charged with criminal conduct, their right to a fair trial may be compromised by the prosecutor's comments.⁹ Further, the occasional efforts of courts and disciplinary bodies to hedge prosecutor speech, especially speech that flirts near the line, is often frustrated by vague legal and ethical standards, as well as the ability of some prosecutors to find ways within those standards to circumvent limitations on their speech. For these reasons, although prosecutors occasionally are disciplined for speech that violates the rules,¹⁰ or chastised by the courts,¹¹ sanctioning prosecutors for

⁸ See *United States v. Koubriti*, 305 F. Supp. 2d 723, 725 (E.D. Mich. 2003) for a discussion of two "lamentable incidents" in which United States Attorney General John Ashcroft made extrajudicial statements and erroneously stated that three defendants arrested for terrorism were "suspected of having knowledge of the September 11th attacks" and referred to the testimony of a cooperating government witness in the case as having "been of value, substantial value," to the Government's case.

⁹ See Bennett L. Gershman, *How Juries Get it Wrong – Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 339–40 (2005), which discusses the *Koubriti* trial and how "[f]ollowing a nine-month review, the government filed a memorandum . . . conceding that the convictions were flawed," that the lead witness was not credible, and that "the jury's determination was impaired" by prosecutorial misconduct.

¹⁰ See, e.g., *In re Members of the State Bar of Ariz.*, No. PDJ-2011-9002, at 232 (Ariz. S. Ct. April 10, 2012) (suspending and disbaring various members of the Arizona Bar for violating the Arizona Rules of Professional Conduct); *In re Brizzi*, 962 N.E.2d 1240, 1249 (Ind. 2012) (imposing public reprimand on prosecutor for his "professional misconduct"); *Attorney Grievance Comm'n v. Gansler*, 835 A.2d 548, 574, 575 (Md. 2003) (recommending reprimand of prosecutor for his out of court statements that could have likely prejudiced the outcome of numerous criminal trials); *In re Holtzman*, 577 N.E.2d 30, 31 (N.Y. 1991) (sustaining Letter of Reprimand against District Attorney for releasing a letter to the public accusing a judge of misconduct); *In re Soares*, 947 N.Y.S.2d 233, 234, 235 (N.Y. App. Div. 2012) (censuring the district attorney for publicly criticizing the judge's decision in a pending criminal case); *Zimmerman v. Bd. of Prof'l Responsibility*, 764 S.W.2d 757, 758, 763 (Tenn. 1989) (sustaining the hearing committee's verdict finding the prosecutor to be in violation of professional rules when he spoke to the press about pending proceedings); *N.C. State Bar v. Nifong*, No. 06 DHC 35 (N.C. State Bar July 31, 2007) (disbaring an attorney for extrajudicial statements made to the press that were likely to affect a pending case).

irresponsible speech is infrequent and often ad hoc. And hanging in the balance, of course, is the ever-present risk that unregulated or weakly-regulated prosecutor speech continues to impair the fair and evenhanded functioning of the criminal justice system, the confidence of the public in the integrity of the system, and the reputation and liberty of persons thrust into the system and facing the glare of public accusation and prosecution.¹²

Prosecutor speech is not fungible. Application of the legal and ethical rules that regulate a prosecutor's extrajudicial statements depends on the role the prosecutor is performing when engaging in public speech. When communicating with the public, a prosecutor occupies three distinct roles. First, a prosecutor in the vast majority of U.S. jurisdictions is an elected official who, when campaigning for office, has the right to inform the public about the qualities and characteristics that make him and his office the best-qualified for the position.¹³ Second, a prosecutor, as the chief law enforcement

¹¹ See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 360 (1966) ("The prosecution repeatedly made evidence available to the news media which was never offered at trial. Much of the 'evidence' disseminated in this fashion was clearly inadmissible."); *United States v. Bowen*, 799 F.3d 336, 341 (5th Cir. 2015) (describing the court's dissatisfaction with the Assistant U.S. Attorney's public postings regarding pending matters); *Aversa v. United States*, 99 F.3d 1200, 1203 (1st Cir. 1996) (noting that an Assistant U.S. Attorney's statements to the press were prejudicial to the pending matter); *Henslee v. United States*, 246 F.2d 190, 193 (5th Cir. 1957) ("[The prosecutor's] failure to apprehend the natural result of his act is as damaging to the cause of justice as if he had failed in his duty to act with a scrupulous regard for fairness."); *United States v. Silver*, No. 15-CR-93(VEC), 2015 WL 1608412, at *1 (S.D.N.Y. Apr. 10, 2015) ("[T]he Court does not condone the Government's brinksmanship relative to the Defendant's fair trial rights or the media blitz orchestrated by the U.S. Attorney's Office . . ."); *United States v. Corbin*, 620 F. Supp. 2d 400, 411 (E.D.N.Y. 2009) (suggesting that the prosecutor may have violated disciplinary rules by offering opinions about the evidence); *Jovanovic v. City of New York*, No. 04 Civ. 8437(PAC), 2006 WL 2411541, at *3 (S.D.N.Y. Aug. 17, 2006) ("Following the arraignment, [the prosecutor] made 'highly inflammatory and prejudicial remarks about Jovanovic to the press.'"); *Koubriti*, 305 F. Supp. 2d at 725, 744 (finding that U.S. Attorney General Ashcroft violated a court order governing public communications by making inflammatory, prejudicial, and extrajudicial statements about a pending trial); *United States v. Myers*, 510 F. Supp. 323, 325 (E.D.N.Y. 1980) ("[T]he conduct of the government officers who disclosed information [regarding] the investigation was grossly improper and possibly illegal . . ."); *State v. Hohman*, 420 A.2d 852, 854, 855 (Vt. 1980) (stating that the court condemned the misconduct of the prosecutor campaigning for reelection in making a campaign pledge to prosecute a named individual).

¹² See *Young v. United States ex rel. Vuitton Et Fils S. A.*, 481 U.S. 787, 814 (1987) ("Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual.").

¹³ See, e.g., R. MICHAEL CASSIDY, *PROSECUTORIAL ETHICS* 116 (2005) ("[T]he public has a right to be kept informed about how a prosecutor is using public resources, and what choices he is making about enforcement priorities. . . . As a public servant, the prosecutor has a fiduciary obligation to apprise his constituents of how he is managing the trust that they have placed in him.").

official in the jurisdiction, has the duty to inform the public about criminal justice policy, threats to public safety, law enforcement initiatives, and precautions the public can take to protect its safety.¹⁴ Third, a prosecutor is an advocate who has a dual responsibility to convict the guilty and protect the innocent.¹⁵ This advocacy role carries the greatest potential to inflict harm. As an advocate, a prosecutor has a right to inform the public about investigative and prosecutorial actions his office is undertaking without endangering the right of those persons accused of crimes to be treated fairly and impartially throughout the criminal justice process.¹⁶

The modes of speech by prosecutors and the protection afforded public speech vary with the role then being played by the prosecutor. Campaign speech, and speech on matters of public concern, enjoy the greatest protection because such speech typically is seen as legitimate and necessary to the democratic process and to core functions of the prosecutor's work.¹⁷ But when a prosecutor speaks in the role of an advocate, and makes statements about current prosecutions, such statements have the capacity to prejudice future criminal proceedings.¹⁸ It is with respect to advocacy speech that a prosecutor has to be most careful, and except for limited facts about a case, a prosecutor as a general rule has a duty to refrain from speaking.¹⁹

¹⁴ See, e.g., *id.* ("[A] prosecutor's public comments to the media may promote public safety by warning the public of continuing dangers in the community, or cautioning them about particularly vulnerable activities or sources of risk.").

¹⁵ The role of a prosecutor "is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁶ BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 6.1 (1998).

¹⁷ See, e.g., Scott M. Matheson, Jr., *The Prosecutor, The Press, and Free Speech*, 58 *FORDHAM L. REV.* 865, 930 (1990) ("[P]rosecutor speech is entitled to first amendment protection because the prosecutor retains a constitutional right to self-expression and because the speech informs the public about matters of public concern . . .").

¹⁸ *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 811–12 (1987) ("Justice must satisfy the appearance of justice," and a prosecutor with conflicting loyalties presents the appearance of precisely the opposite." (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)) (citation omitted)).

¹⁹ The duty of a prosecutor to keep silent during pending litigation is neither unreasonable nor novel. In England, the Contempt of Court Act of 1981 prohibits the media from publishing information that will prejudice ongoing legal cases and in particular trials before jury. See Contempt of Court Act 1981, c. 49, § 2(2) (Eng.). The primary function of the Contempt of Court Act is to protect the integrity of active court proceedings. See *id.* § 2(3). A strict liability rule is introduced by the Act under which any conduct that "interfere[s] with the course of justice," including extrajudicial statements by prosecutors, can be treated as contempt of court even when there was no intention to interfere. See *id.* § 1. This rule applies only to publications i.e. any form of communication addressed to any section of the

To be sure, many prosecutors carefully weigh the necessity of their public speech with the danger of public misinformation or of compromising a defendant's right to a fair trial. But, equally obvious is the fact that politics, power, and ego can drive much of prosecutor speech. And with social media, the internet, and the close relationship between a prosecutor and a voracious media eager and able to obtain and disseminate widely a prosecutor's statements, the danger to the system, and those accused of crime, is apparent. As demonstrated below, despite some very clear rules and standards, regulation of prosecutor speech is piecemeal and inconsistent. The prosecutor's duty of silence may finally depend on the prosecutor's own sense of fair play, justice, and ability to exercise self-restraint.

Part II describes the various modes of prosecutor speech, and the various roles of the prosecutor when speaking publicly. As I demonstrate, a prosecutor can occupy three separate roles when speaking: first, as a candidate for office engaged in campaign speech; second, as a law enforcement expert speaking on matters of public concern; and third, as an advocate speaking about pending or impending cases. Part III describes the various legal and ethical rules and standards that regulate and restrict a prosecutor's extrajudicial speech. Finally, Part IV explains why a prosecutor when engaged in speech as a partisan advocate has a duty to refrain from speaking except for the basic information about cases he is currently investigating and prosecuting.

II. TAXONOMY OF PROSECUTOR SPEECH

A. *By Role*

It is apparent that the permissible scope of a prosecutor's public speech depends on (1) the role that the prosecutor is performing; and (2) the forum in which the speech occurs.²⁰ That is, a prosecutor communicating with the public may do so in three roles: (1) as a campaigner for public office; (2) as a public official educating and informing the public about issues of public importance; and (3) as an advocate.²¹

public or the public at large. *Id.* § 2(1).

²⁰ See Matheson, *supra* note 17, at 868 & n.11, 886.

²¹ See *id.* at 885–86, 887, 888 (describing different roles that prosecutor play, such as unique advocate, officer of the court, executive branch employee, and political actor).

Thus, when a prosecutor runs for public office he engages in speech that typically is afforded the greatest protection; campaign speech occupies a core function of First Amendment freedom.²² Next, when a prosecutor communicates with the public about matters of public concern, including matters that affect the administration of justice, public safety, and law enforcement policies, his speech is scrutinized more closely than campaign speech, but still is afforded considerable constitutional protection.²³ However, when a prosecutor functions in the role of an advocate, and makes extrajudicial statements about specific cases, his public statements are scrutinized much more closely and are subject to the greatest restrictions in order to protect a defendant's right to a fair trial.²⁴

1. Campaign Speech

The vast majority of prosecutors at the state and local level are elected.²⁵ Campaign speech by prosecutors enjoys the greatest degree of First Amendment protection.²⁶ As the Supreme Court observed in giving broad protection to campaign speech by judges, "[d]ebate on the qualifications of candidates' is 'at the core of our electoral process and of the First Amendment freedoms,' not at the edges."²⁷ Indeed, if a judge—considered the most impartial and non-partisan government official—may not be prohibited from discussing his or her views on disputed legal and political issues, as the Supreme Court held in *Republican Party of Minnesota v. White*,²⁸ then a fortiori the campaign speech by a prosecutor—part of the politically partisan Executive Branch of government—would be afforded even greater constitutional protection.²⁹

²² See *infra* Section II.A.1.

²³ See *infra* Section II.A.2.

²⁴ See *infra* notes 41–45 and accompanying text.

²⁵ See PETER A. JOY & KEVIN C. MCMUNIGAL, DO NO WRONG: ETHICS FOR PROSECUTORS AND DEFENDERS 97 (2009) (estimating that 95 percent of chief prosecutors at state and local level are elected).

²⁶ See *Brown v. Hartlage* 456 U.S. 45, 60 (1982) ("It is simply not the function of government to 'select which issues are worth discussing or debating' . . . in the course of a political campaign." (quoting *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)) (citation omitted)).

²⁷ *Republican Party of Minn. v. White*, 536 U.S. 765, 781 (2002) (quoting *Eu v. S.F. Democratic Cent. Comm.*, 489 U.S. 214, 222–23 (1989)).

²⁸ *White*, 536 U.S. at 788.

²⁹ *Id.* at 805–06 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968); and then quoting *Brown*, 456 U.S. at 55).

Campaign speech by prosecutors ordinarily poses far less danger of impairing the judicial process or heightening public condemnation of the accused, and restricting prosecutor speech for these reasons clearly does not apply to a prosecutor's campaign speech. Still, irresponsible campaign oratory by prosecutors does occur, and has been censured.³⁰ Studies of prosecutor campaigns suggest that most of the election speech by prosecutors focuses on individual qualifications and character rather than prosecutorial practices and policies.³¹ Prosecutors often run on their record of convictions, especially capital convictions.³² A prosecutor is forbidden to permit personal or political interests to affect his prosecutorial conduct³³—including charging, plea-bargaining, and sentencing practices—nor should a prosecutor make a campaign pledge to prosecute a certain case.³⁴ A prosecutor's public statements about a specific case at the same time the prosecutor is engaged in a hotly-contested political campaign—District Attorney Michael Nifong's prosecution of the Duke Lacrosse case³⁵—presents an obvious impermissible conflict.³⁶ But the concurrence of a prosecutor's advocacy speech with campaign speech is unusual.

2. Speech on Matters of Public Concern

When a prosecutor speaks about subjects that command the public interest, such as victim's rights, public corruption, spousal abuse, drugs, and guns, a prosecutor enjoys wide latitude; there is no legitimate reason to restrict such speech.³⁷ However, a prosecutor should resist speaking to the public on any of these issues at a time when his office is prosecuting a case involving a

³⁰ See, e.g., *Vermont v. Hohman*, 420 A.2d 852, 854, 855 (Vt. 1980) (condemning a state prosecutor for statements he made regarding a pending case during his re-election campaign).

³¹ See Ronald F. Wright, *How Prosecutor Elections Fail Us*, 6 OHIO ST. J. CRIM. L. 581, 583, 591–92 (2009) (suggesting that prosecutor elections do not often force incumbents to explain priorities and practices of the office, or larger patterns and values reflected in local criminal justice, but rather about particular past cases).

³² See Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 945–47 (1994).

³³ See *infra* note 109 and accompanying text.

³⁴ See JOY & MCMUNIGAL, *supra* note 25, at 97–98.

³⁵ *N.C. State Bar v. Nifong*, No. 06 DHC 35 (N.C. State Bar July 31, 2007).

³⁶ See Matheson, *supra* note 17, at 888.

³⁷ See MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 302 (4th ed. 2010) (discussing the importance of the prosecutor's role to inform the public about crimes especially when the accused is still at large and potentially dangerous).

defendant charged with that crime.³⁸ Thus, it would be entirely proper for Michael Nifong to make public statements about campus sexual abuse by Duke University students, or the dangers of excessive alcohol at fraternity parties. But it would be improper to make these statements while his office is prosecuting a student charged with sexual abuse after drinking at a fraternity party.

Similarly, there is nothing improper in a prosecutor speaking out about the evil of public corruption, the public corruption cases he has prosecuted, and the aggressive steps his office is taking to investigate and prosecute public officials who violate their duty. What is improper is to make such statements in conjunction with his announcement of charges against a prominent public official in a high-profile case, and sprinkling details of the charges and ad hominem comments about the official's character.³⁹ There is a real danger that a prosecutor who makes relevant comments about matters of public concern—clearly a legitimate function—may in the course of that speech adopt the advocacy role and deliberately or inadvertently make impermissibly prejudicial comments about specific cases.⁴⁰

3. Advocacy Speech

With respect to advocacy speech, the ABA's Model Rules and Prosecution Standards prohibit prosecutors from making public statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding" or have a "substantial likelihood of heightening public condemnation of the accused"⁴¹ Federal rules are more restrictive; prosecutors are forbidden from making public statements that "may reasonably be expected to influence the outcome of a pending or future trial."⁴² It is with respect to his advocacy speech that a prosecutor can inflict the greatest damage.

³⁸ *Id.* at 302, 304.

³⁹ *See, e.g.*, *United States v. Silver*, No. 15-CR-93 (VEC), 2015 WL 1608412, at *5 (S.D.N.Y. Apr. 10, 2015) (describing U.S. Attorney Preet Bhahara's orchestration of a "media blitz" in announcing corruption charges against New York State Speaker of Assembly Sheldon Silver).

⁴⁰ *See, e.g.*, *United States v. Koubriti*, 305 F. Supp. 2d 723, 725, 726 (E.D. Mich. 2003) (discussing improper public comments by U.S. Attorney General John Ashcroft who, while discussing law enforcement initiatives to fight terrorism, made erroneous and prejudicial comments about defendant's culpability and credibility of government's key witness in pending terrorist trial).

⁴¹ MODEL RULES OF PROF'L CONDUCT r. 3.6(a), 3.8(f) (AM. BAR ASS'N 2013); STANDARDS FOR CRIMINAL JUSTICE § 3-1.10(c) (AM. BAR ASS'N 4th ed. 2015).

⁴² 28 C.F.R. § 50.2 (b)(2) (2015).

A prosecutor's advocacy speech has a much greater capacity to prejudice a defendant than when a prosecutor campaigns for office or engages in speech about matters of public concern. When a prosecutor speaks as an advocate about a specific case, the prosecutor plays the role of a partisan whose interests are adverse to individuals accused of crimes, and with the ability to unfairly prejudice those persons by making public statements about the accused, the evidence against him, and the prosecutor's opinions about the case.⁴³ It is with respect to advocacy speech that a prosecutor must be most careful about his public statements. A prosecutor who investigates or prosecutes a specific individual may make a public statement about that person that includes the person's identity, some basic facts about the arrest, and some comments about anticipated scheduling matters;⁴⁴ however, the prosecutor must refrain from saying anything about the merits of the case, the witnesses or other evidence, opinions as to guilt, or anything else that might be taken as a comment on the case.⁴⁵ To this extent, a prosecutor in his advocacy role has a duty to remain silent.

B. By Forum

Regardless of which role the prosecution occupies, most of a prosecutor's communication with the media and the public is about current investigations and prosecutions. Experience shows that this communication may take any of a variety of forms, each with different potential for jeopardizing the defendant's right to a fair trial and the public's need for accurate information. Those fora are: (1) press conferences; (2) press releases, press briefings, and interviews; (3) electronic speech on the Internet and Twitter; (4) unauthorized leaking of information; (5) appearances on TV as "experts"; (6) authors of books and articles; and (7) producers of "perp walks."

⁴³ See, e.g., Cassidy, *supra* note 5, at 67 (discussing former prosecutor Mike Nifong's public comments regarding the Duke lacrosse scandal, which included references to evidence from the rape examination as well as the reprehensible conduct of the accused, that were found to have violated North Carolina State Bar Rules of Professional Conduct as they impaired the ability to have a fair trial); see Jonathan K. Van Patten, *Suing the Prosecutor*, 55 S.D. L. REV. 214, 247 (2010) ("It [is] the [criminal defendants'] constitutional right to have the prosecutor refrain from making any statements not relevant to their indictment and arrest which might prejudice their obtaining a fair trial.").

⁴⁴ NAT'L PROSECUTION STANDARDS § 2-14.3 (NAT'L DIST. ATTORNEYS ASS'N 3d ed. 2009).

⁴⁵ See *infra* note 115 and accompanying text.

1. Press Conferences

The press conference is the most powerful forum for a prosecutor's communication to the public.⁴⁶ The press conference is an elaborate production in which the prosecutor usually announces an arrest, often flanked by other high-ranking law enforcement officials and surrounded with displays of contraband—drugs, guns, currency.⁴⁷ The prosecutor stands in front of microphones, TV cameras, lights, and media people and announces a dramatic, provocative, and often disparaging message about someone or some group of allegedly dangerous criminals who have been apprehended and charged by his or her office.⁴⁸ While the announcement of an arrest or indictment is a legitimate matter of public concern and therefore public comment, the content of press conferences often goes well beyond the language of the complaint or indictment to include comments about the defendant's supposedly criminal character and probable guilt and favorable opinions about the credibility of the government's witnesses and the strength of the evidence.⁴⁹ The press conference has become such a fixture in the criminal justice system that very few courts, disciplinary bodies, or commentators have examined how often these presentations violate the ethical rules and impair not only a defendant's right to a fair trial but also the public's perception of the criminal justice system.

Examples abound. Prosecutors employ colorful, hyperbolic, and often misleading rhetoric to hype the case, such as suggesting that the defendant is guilty of “the largest corruption . . . in the history of the nation”⁵⁰ or “part of the largest marijuana operation in the history of the county.”⁵¹ Some prosecutors deliver even more excitement: “I’m not sure that we ever had a drug dealer of the

⁴⁶ See, e.g., Gerald Stern, *Trial by Lawyer Press Conference: Why is Such a Fanfare Permitted?*, NAT'L L.J., May 6, 1985, at 17 (“The press conference generated massive publicity in newspapers, and on radio and television. . . . The public-relations effort was so successful that within six days of the press conference the prosecutor was twice on national television, reiterating his rhetoric, opinions and commentary.”).

⁴⁷ See, e.g., Cassidy, *supra* note 5, at 81; Stern, *supra* note 46, at 17 (noting that a total of seventeen officials were in attendance at New York City press conference).

⁴⁸ See, e.g., *id.* at 17 (detailing the plethora of TV cameras, microphones, lights, and photographers present at a New York press conference while the prosecutor described the defendants with pejorative terms, noting the significance of their crimes).

⁴⁹ See FREEDMAN & SMITH, *supra* note 37, at 303 (describing several egregious instances in which prosecutors use the press conference to stigmatize defendants); Stern, *supra* note 46, at 18.

⁵⁰ FREEDMAN & SMITH, *supra* note 37, at 303.

⁵¹ *Id.*

dimension of the defendant”⁵² or “[t]his indictment is shaped as a javelin to drive deep into the heart of organized crime. Now the mob is on the run.”⁵³ A prosecutor at a press conference falsely stated that a defendant charged with currency reporting violations was involved in money laundering and drug trafficking.⁵⁴ At a news conference shortly after the September 11, 2001 terrorist attack, U.S. Attorney General John Ashcroft falsely stated that three men arrested on terrorism charges on September 17, 2001, were “suspected of having knowledge of the September 11th attacks.”⁵⁵ Later, in a press conference giving an update in the War on Terror, during the trial of the three men referred to above, referring to the value of cooperating witnesses, Ashcroft described the testimony of the cooperating witness, who had just completed his testimony, as of “substantial value” to the Government.⁵⁶ In fact, the witness’s testimony was later shown to be false.⁵⁷

Because press conferences pose special dangers of prejudicing a case, some prosecutor offices have instituted guidelines to limit prejudice when announcing charges or ongoing investigations.⁵⁸ The guidelines provide that press conferences to announce formal charges should be held only for the most significant and newsworthy actions, or if a particularly important deterrent or law enforcement purpose would be served, and that “[p]rudence and caution should be exercised.”⁵⁹ The guidelines further provide that no press conference should be held regarding ongoing matters before formal charges are brought except in “exceptional circumstances” such as reassuring the public when a particularly heinous crime has been committed, alerting the public of an imminent threat to public safety, or seeking public assistance or information.⁶⁰

2. Press Releases, Briefings, and Media Interviews

In addition to press conferences, prosecutors commonly issue press releases, give press briefings, and conduct media interviews.

⁵² See Stern, *supra* note 46, at 18.

⁵³ *Id.*

⁵⁴ See *Aversa v. United States*, 99 F.3d 1200, 1204 (1st Cir. 1996).

⁵⁵ See *United States v. Koubriti*, 305 F. Supp. 2d 723, 725 (E.D. Mich. 2003).

⁵⁶ *Id.*

⁵⁷ See *supra* note 9.

⁵⁸ See, e.g., U.S. DEPT OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL § 1-7.401 (2003) (providing guidelines for press conferences and other media contacts).

⁵⁹ *Id.* § 1-7.401(A).

⁶⁰ *Id.* § 1-7.401 (C).

Prosecutor offices have institutionalized media outreach initiatives on a broad scale, presumably to maintain good relations with the media and control irresponsible contacts.⁶¹ Offices typically designate a person to serve as a point of contact with the media, coordinate press conferences, prepare press releases, coordinate requests from media organizations regarding in-depth stories and interviews, and prepare displays and handouts for press conferences and other media contacts.⁶² Guidelines for press releases, briefings, interviews, as well as supervision, authorization, and approval by senior prosecutors varies with the particular office and the case.⁶³

High profile investigations and prosecutions generate the most contacts and raise difficult and controversial questions about the scope of media contacts, leaks to the media, and the prejudicial effect of the prosecutor's statements. One of the most outrageous examples involved the conduct of Manhattan prosecutor Linda Fairstein, Chief of the Sex Crimes Unit of the New York County District Attorney's Office, in the so-called "cybersex torture" case, who made numerous statements, including a stream of leaks, throughout the criminal proceedings.⁶⁴ The victim, a 20-year-old college student, reported that she had been sexually assaulted by Oliver Jovanovic, a thirty-year-old doctoral student who had tied her up for twenty hours and burned, tortured, and violently raped and sodomized her.⁶⁵ Throughout the criminal proceedings, including a stream of leaks, Fairstein made numerous extrajudicial statements:

'He terrorized this young woman to the point that she was too frightened to call the authorities . . . He tied her to a chair, undressed her and tortured her with sex toys and other objects for almost a full day; He tortured and sexually abused the woman, burning her with candle wax, biting her, sexually assaulting her and threatening to dismember her as Jeffrey Dahmer, the serial killer, had done with his victims; He tied the woman's legs to a chair and gagged her before sexually torturing her; He was so prepared for this and carried it off so smoothly; We believe this was not the first

⁶¹ See, e.g., *id.* § 1-7.401.

⁶² See, e.g., *id.* §§ 1-7.220, 1-7.330, 1-7.401.

⁶³ See, e.g., *id.* §§ 1-7.112, 1-7.310, 1-7.320 (noting the application of the guidelines described therein involves discretion and good judgment, and also noting the distinction between coordination efforts of various offices and agencies).

⁶⁴ See *Jovanovic v. City of New York*, No. 04 Civ. 8437 (PAC), 2006 U.S. Dist. LEXIS 59165, at *1, *7, *8-9 (S.D.N.Y. Aug. 17, 2006).

⁶⁵ *Id.* at *4.

time he did something like this; and We believe there are other victims.’⁶⁶

Needless to say, Fairstein’s comments made screeching headlines in every local newspaper. One paper’s cover page featured a full page picture of the defendant with the headline: “Prosecutor: Cyber fiend struck before,”⁶⁷ and “HOW MANY MORE VICTIMS?”⁶⁸ Fairstein told the press that this case was her office’s foray into Internet-related sex prosecution and that the case represented “a ‘whole new entry in the acquaintance-rape category.’”⁶⁹ Fairstein also used selected portions of e-mail correspondence between the defendant and alleged victim that further demonized him.⁷⁰ The media coverage was so extensive that trial witnesses were influenced in their testimony of critical facts by reading a newspaper article.⁷¹ Jovanovic was found guilty by a jury, the conviction was reversed for serious trial errors, and after seeking generous plea deals involving no jail time, which the defendant refused, the District Attorney agreed to dismiss all charges with prejudice.⁷²

3. Tweeting and the Internet

Social media, including Twitter and the Internet, now allows a prosecutor a previously unheard of quick, unusually wide, and easy opportunity to transmit comments that arguably prejudice a

⁶⁶ *Id.* at *7–8.

⁶⁷ *Id.* at *8.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *See id.* at *8–9.

⁷¹ *See id.* at *9.

⁷² *See id.* at *1–2. One could assume that Fairstein was aware of the risk that she would jeopardize the defendant’s right to a fair trial. *See id.* at *44. Consider her comment in an interview with the *Media Studies Journal* about the effects of publicity on a jury:

The period of greatest impact is pretrial because that could be anywhere from three months to a year. Depending on the coverage, people can become immersed in reading about the case. And from this reading-and-listening public come (sic) the people who sit on our juries. After the trial has begun, the jurors are given a rule—that they don’t read or listen to media accounts of the case. Most people try hard to comply. But it’s almost impossible with the highest-profile cases for it to really happen. When a case like Chambers, the jogger, the subway bomber or the World Trade Center bomber is on trial in New York—and it is literally a page A1 headline—our jurors are coming to work on the subway and the bus . . . I mean you can’t sit on a train and not see what’s there. . . . And you deal with a jury pool that is just saturated with that kind of information. You hope that you get jurors who are telling you the truth, that they can set aside what they’ve heard and just listen to the evidence in the courtroom. In the end, both sides use the press to great advantage before you get anywhere near the trial stage.

Id. at *44–45.

defendant.⁷³ "Tweets" also allow a prosecutor to refer the reader to a link to other documents, such as the charging documents, press releases, and other relevant materials.⁷⁴ So, in the Silver case discussed above, U.S. Attorney Bharara, after his press conference and press release, transmitted tweets announcing the charges, referred readers to the press release, and at the same time repeated the statements he made earlier: "Silver monetized his position as Speaker of the Assembly in two principal ways & misled the public about his outside income"⁷⁵ and "[p]oliticians are supposed to be on the ppl's [sic] payroll, not on secret retainer to wealthy special interests they do favors for."⁷⁶ Upon the defendant's Motion to Dismiss the Indictment based on the prosecutor's inflammatory pre-trial statements, the federal district judge noted that one of the problems with Twitter communications is that they are read out of any context and isolated from any explanatory information.⁷⁷ Given the restrictive platform—i.e., messages are limited to 140 characters and readers are permitted to "retweet" a single communication⁷⁸—the statements typically are read in isolation, and the prejudice is enhanced.⁷⁹ A prosecutor by tweeting thereby is afforded a simple and potentially highly prejudicial form of communication.

Similarly, with the advent of the Internet, prosecutors are able to post online anonymous comments about pending criminal cases. Probably the most outrageous example of this relatively new phenomenon occurred in New Orleans, Louisiana in the chaos following Hurricane Katrina when several civilians were shot to death in shootings by local police officers at the Danziger Bridge.⁸⁰ Before, during, and after the federal prosecution of these officers for civil rights and conspiracy violations, three high-ranking federal prosecutors posted online "anonymous comments to newspaper articles about the case" under multiple assumed names that "were

⁷³ See Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367, 406 (2015) (arguing that rules restricting a prosecutor's extrajudicial speech have not been revised to account for differences between traditional media and social media).

⁷⁴ See *id.* at 404.

⁷⁵ See *United States v. Silver*, No. 15-CR-93 (VEC), 2015 U.S. Dist. LEXIS 47194, at *19 n.8 (S.D.N.Y. Apr. 10, 2015)).

⁷⁶ *Id.*

⁷⁷ See *id.* at *2, *18–19, n.8.

⁷⁸ See *id.* at 19, n.8.

⁷⁹ See *id.*

⁸⁰ *United States v. Bowen*, 799 F.3d 336, 339 (5th Cir. 2015).

inflammatory, highly opinionated, and pro-prosecution.”⁸¹ The postings “castigated the defendants and their lawyers and . . . [the New Orleans Police Department (NOPD)] as a fish ‘rotten from the head down.’”⁸² The postings contained confidential, privileged, and sensitive information that spanned the entire prosecution and went directly to the guilt of the defendants, the collective guilt of the NOPD, and the incompetence and lack of integrity of defense counsel.⁸³

When these postings came to light, and following motions by the defendants, the district court in a lengthy opinion found that the government’s misconduct was so pervasive and so prejudicial to the rights of the defendants that it “contaminated every phase of the prosecution” and required vacating the convictions.⁸⁴ The online comments, according to the court, “breached all standards of prosecutorial ethics, [and] gave the government a surreptitious advantage in influencing public opinion, the [jury] panel, and the trial itself.”⁸⁵ The government’s misconduct permeated every stage of the prosecution.

Anonymous public statements by prosecutors about pending and impending cases, the court observed, undermine the integrity, fairness, and objectivity of the criminal justice system.⁸⁶ Indeed, public statements on-the-record can be easily evaluated.⁸⁷ Statements off-the-record cannot.⁸⁸ Moreover, a prosecutor’s duty to refrain from speaking extends beyond confidential or grand jury matters, and applies beyond those actually prosecuting a case to every prosecutor in the office.⁸⁹ Nor is there any dividing line between a prosecutor’s professional and private lives with respect to the duty to remain silent.⁹⁰ Although statements to the press may be an integral part of a prosecutor’s job, that function is severely limited by the prosecutor’s responsibility to serve justice.

⁸¹ See *id.* at 339, 340, 341.

⁸² *Id.* at 341.

⁸³ *Id.* at 344; see *United States v. Bowen*, 969 F. Supp. 2d 546, 552, 598–99 (E.D. La. 2013), *aff’d*, 799 F.3d 336 (5th Cir. 2015).

⁸⁴ See *Bowen*, 799 F.3d at 351–52, 353 (citing *Bowen*, 969 F. Supp. 2d at 619); *Bowen*, 969 F. Supp. 2d at 627.

⁸⁵ *Bowen*, 799 F.3d at 353.

⁸⁶ See *Bowen*, 969 F. Supp. 2d at 574, 615.

⁸⁷ See *Bowen*, 799 F.3d at 354, 356.

⁸⁸ See Matheson, *supra* note 17, at 890–91.

⁸⁹ STANDARDS FOR CRIMINAL JUSTICE § 3-1.10 (a) & (e) (AM. BAR ASS’N 4th ed. 2015).

⁹⁰ See *id.* § 3-1.10 (a).

4. Unauthorized Leaks

As noted above, prosecutors are limited in what they can say about a case. The media, of course, are not so limited. Prosecutors therefore have the ability to evade prohibitions on prejudicial speech by leaking information to the media that may prejudice persons who either are targets of an investigation or defendants in current prosecutions.⁹¹ Anyone familiar with the criminal justice system, if candid, would acknowledge that prosecutors leak information to the media, and do it often. To be sure, leaking secret information is not only unethical but sometimes it violates criminal statutes, as when prosecutors reveal secret grand jury information.⁹²

Prosecutors rarely get caught for leaks. Prosecutors confide in friendly journalists, knowing that the “journalist’s privilege” shields the journalist from having to reveal the source of the leak,⁹³ and that revealing a source would be destructive to the journalist’s career. Moreover, even though it is often perfectly obvious that the government, and usually the prosecutor, was the source of the leak, prosecutors are easily able to deflect responsibility by demonstrating that numerous individuals who would have had the information about the matter that was leaked—either from interviews, subpoenas, or testimony—plausibly may have been the leaker.⁹⁴

5. Television Appearances as an “Expert”

Prosecutors occasionally appear on TV programs as law enforcement “experts” ostensibly to educate the public about the criminal justice system and ongoing criminal trials and investigations.⁹⁵ When speaking about current criminal trials a

⁹¹ See Matheson, *supra* note 17, at 897.

⁹² See, e.g., Richard Pérez-Peña, *Pennsylvania Attorney General, Kathleen Kane, Charged in Leak Case*, N.Y. TIMES (Aug. 6, 2015), http://www.nytimes.com/2015/08/07/us/pennsylvania-attorney-general-kathleen-kane-charged-in-leak-case.html?_r=0# (discussing Pennsylvania Attorney General charged with orchestrating the leak of confidential material to a Philadelphia newspaper and then lying about it to a grand jury).

⁹³ See *Branzburg v. Hayes*, 408 U.S. 665, 697 (1972) (recognizing the privilege but finding that grand jury’s need for information outweighed privilege).

⁹⁴ See, e.g., Matheson, *supra* note 17, at 891.

⁹⁵ Some prosecutors have become celebrities by promoting themselves as TV commentators. See, for example, S. RICHARD BLASSBERG, *THE JEANINE MACHINE* 34 (2002), profiling Jeanine Pirro, Westchester District Attorney. She frequently appeared on TV on “Geraldo” and other programs during the O.J. Simpson trial. *Id.* Despite criticism of Pirro as a self-seeking Hollywood-type celebrity and an insatiable “media hound,” Pirro is an

prosecutor must ensure that her commentary does not risk prejudicing a specific criminal case by discussing the specific merits of an ongoing criminal prosecution or investigation, although a prosecutor may in a rare case address a “manifest injustice [about which] the prosecutor is reasonably well-informed.”⁹⁶ Presumably a prosecutor would be allowed to criticize a judge for excluding a defendant’s confession on dubious legal grounds, a prosecutor’s suppression of exculpatory evidence, or a defense attorney’s decision not to call the defendant as a witness.⁹⁷

6. Books and Articles

Prosecutors frequently write books about their work, and often describe some of their big victories.⁹⁸ Whether a prosecutor’s conduct in office may be influenced by future literary or media interests is almost impossible to determine. Prosecutors must be careful not to enter into a literary or media portrayal based on cases in which the prosecutor was involved prior to the conclusion of the case, nor should a prosecutor allow his judgment to be affected by the possibility of future personal literary or other rights.⁹⁹ If a prosecutor does participate in a literary or media event in which the prosecutor’s office was involved, the duty to maintain confidentiality must be respected.¹⁰⁰

attractive and well-informed lawyer, and her presence on these shows probably gave some measure of respectability to the nightly O.J. media orgy. *Id.*

⁹⁶ STANDARDS FOR CRIMINAL JUSTICE § 3-1.10 (i) (AM. BAR ASS’N 4th ed. 2015).

⁹⁷ See *Id.* § 3-1.10 (b)–(c). A prosecutor’s TV appearance may be blatant public relations disguised as a TV “documentary” to boost the prosecutor’s image. See, e.g., Joanne Wasserman et al., *Brooklyn District Attorney Charles Hynes Gets his own Reality Show Ahead of Democratic Primary*, N.Y. DAILY NEWS (March 27, 2013, 4:30 AM), <http://www.nydailynews.com/entertainment/tv-movies/b-klyn-charles-hynes-reality-show-article-1.1299899>. A so-called news program called “Brooklyn D.A.” featured prosecutors in the office of Brooklyn D.A. *Id.* Charles Hynes, whose office was currently battling misconduct charges who discussed cases currently pending in the Brooklyn criminal courts, and discussed evidence in the case that incriminated the defendant. See Joseph Berger, *Suit by a Prosecutor’s Rival Seeks to Block a TV Show*, N.Y. TIMES, (May 14, 2013), <http://www.nytimes.com/2013/05/15/nyregion/rival-sues-to-block-tv-show-about-hynes-brooklyn-prosecutor.html>; Wasserman et al., *supra*. Criticism of the show focused on alleged violations of campaign finance laws by giving the prosecutor free airtime during a heated political campaign. *Id.* Just as troubling, of course, are the extrajudicial comments by prosecutors about pending cases, displaying evidence in those cases before the cases were tried, and interviews with prosecution witnesses, including forensic experts who expressed their opinions about incriminating evidence. See, e.g., Rita M. Glavin, Note, *Prosecutors who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 FORDHAM L. REV. 1809, 1838 (1995).

⁹⁸ See *id.* at 1809.

⁹⁹ See *id.* at 1814–15.

¹⁰⁰ *Id.* at 1810. Sometimes these books discuss high-profile cases that the writer

7. "Perp Walk"

A prosecutor may engage in extrajudicial speech as effectively by conduct as by verbal communications, particularly when the conduct is tantamount to making a statement. The deliberate escorting of an arrested person by police in front of TV cameras and news reporters as a means of shaming or pressuring the suspect and garnering publicity for the prosecutor—commonly known as the “perp walk”¹⁰¹—is well within the ethical rule that prohibits extrajudicial comments that might prejudice an adjudicative proceeding as well as heightening public condemnation of the defendant.¹⁰²

Prosecutors justify the perp walk as a legitimate exercise of discretion to (1) deter others from committing crimes; (2) ameliorate public outrage at the defendant's alleged conduct; (3) “encourage guilty pleas and cooperation”; (4) “induce victims and witnesses to come forward’ with information”; (5) provide public access to the operation of the justice system; and (6) expose a suspect's physical condition to avert charges of physical abuse.¹⁰³ But commentators have noted that the perp walk gives publicity-hungry prosecutors

prosecuted personally, without excessive self-glorification. Books such as “Helter Skelter,” describing the celebrated 1970 trial of Charles Manson and his followers, and “Murder Along the Way,” describing three sensational murder trials in suburban Rockland County, New York, are examples of riveting and vivid crime dramas that remain objective and descriptive. See VINCENT BUGLIOSI & CURT GENTRY, *HELTER SKELTER: THE TRUE STORY OF THE MANSON MURDERS* 300, 323, 448, 489 (1974); KENNETH GRIBETZ & H. PAUL JEFFERS, *MURDER ALONG THE WAY: A PROSECUTOR'S PERSONAL ACCOUNT OF FIGHTING VIOLENT CRIME IN THE SUBURBS* 46, 95 (1989). Sometimes the book is a self-glorifying diatribe in florid prose against perceived excesses in the criminal justice system. One such book, “To Punish and Protect,” describes the District Attorney's Office as the “battleground where the fight between good and evil unfolds,” in which the writer sees herself as the victim's “avenger,” and to “[c]age the [b]astards.” JEANINE PIRRO & CATHERINE WHITNEY, *TO PUNISH AND PROTECT: AGAINST A SYSTEM THAT CODDLES CRIMINALS* 1, 7 (2003). The death penalty works, and the insanity defense is a “travest[y].” *Id.* at 186. While perhaps not unethical or illegal, this type of hyperbole would seem to ignore the fact that these books do have the power to impact the public's perception of law enforcement and crime, and should be written with that in mind.

¹⁰¹ See *Caldarola v. Cty. of Westchester*, 343 F.3d 570, 577 (2d Cir. 2003) (upholding “Perp walk,” finding that arrestee's privacy interest was outweighed by legitimate government interests). But see *Lauro v. Charles*, 219 F.3d 202, 216 (2d Cir. 2000) (stating that staging a “Perp walk” violated arrestee's Fourth Amendment rights).

¹⁰² The so-called “perp walk” was popularized by U.S. Attorney Rudolph Guiliani in 1987 when he locked up three Wall Street bankers “who were ‘handcuffed and arrested at their desk.’” Since then other defendants—particularly White Collar suspects—have been subjected to the “perp walk.” See Ernest F. Lidge III, *Perp Walks and Prosecutorial Ethics*, 7 NEV. L.J. 55, 55 n.4 (2006); Leigh Jones, *Perp Walk? Blame Guiliani*, REUTERS, (May, 19, 2011, 12:23 AM), <http://www.reuters.com/article/us-eddie-strausskahn-perpwalk-idUSTRE74H71720110518>.

¹⁰³ Lidge, *supra* note 102, at 66–67.

an opportunity to enhance their careers and police a chance to get on television.¹⁰⁴ The perp walk displays the accused in a way that damages his character and stigmatizes him as guilty.¹⁰⁵ In suggesting guilt in this way the prosecutor is also conveying his opinion about the accused, an illegitimate subject for comment.¹⁰⁶ The perp walk may also constitute a form of pre-trial punishment and an erosion of the presumption of innocence.¹⁰⁷

III. REGULATING PROSECUTOR SPEECH

Extrajudicial statements by prosecutors are subject to a wide array of legal and ethical rules that address the content, circumstances, and timing of the statements.¹⁰⁸ Whenever a prosecutor speaks publicly, especially those prosecutors who are elected, there is always the concern that the prosecutor's statements may be influenced by the prosecutor's personal and political interest in potential media contacts and attention. Almost everything a prosecutor does or says may be motivated, at least in part, by personal or political interests. Aware of this danger, the ethics standards provide in several sections that a prosecutor's professional judgment and conduct must never be influenced by personal or political interest and considerations.¹⁰⁹ With respect to the broad and recurring modes of speech discussed above, there is always a special danger that a prosecutor's personal and political interests might well conflict with a prosecutor's duty to do justice, and the need to avoid speech that may prejudice the rights of an accused or the administration of justice. However, absent an admission by the prosecutor, it is difficult if not impossible to show

¹⁰⁴ See *id.* at 57, 72 (arguing that "perp walks" often violate prosecutor's ethical duties).

¹⁰⁵ See *id.* at 61.

¹⁰⁶ See *id.* at 58.

¹⁰⁷ *Id.* at 60, 61.

¹⁰⁸ See *id.* at 69–70.

¹⁰⁹ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(a) (AM. BAR ASS'N 4th ed. 2015) ("A prosecutor should not use other improper considerations, such as partisan or political or personal considerations, in exercising prosecutorial discretion."); *id.* § 3-1.7(f) ("The prosecutor should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal, political, financial, professional, business, property, or other interests or relationships. A prosecutor should not allow interests in personal advancement or aggrandizement to affect judgments regarding what is in the best interests of justice in any case."); *id.* § 3-1.10(h) ("The prosecutor should not allow prosecutorial judgment to be influenced by a personal interest in potential media contacts or attention."); *id.* § 3-1.11(b) ("The prosecutor should not allow prosecutorial judgment to be influenced by the possibility of future personal literary or other media rights."); *id.* § 3-4.4(b)(i) ("In exercising discretion to file and maintain charges, the prosecutor should not consider partisan or other improper political or personal considerations.").

that a prosecutor's public statements are motivated by a hidden personal or political agenda rather than a disinterested desire to protect the public and fight crime effectively. The typical inquiry by courts and disciplinary bodies, however, is whether the statements, viewed objectively, violate a legal or ethical rule regulating prosecutor speech.¹¹⁰

A. *Statements About Pending Cases*

A prosecutor in his advocacy role is allowed to make limited public statements about pending cases.¹¹¹ These matters include:

(a)[Defendant's] name, age, residence, occupation, family status, and [other background information]; (b) The substance or text of the charge; . . . (d) The identity of the investigating and arresting agency, [and] the length and scope of the investigation; (e) The circumstances . . . [of] the arrest, including the time and place of arrest, . . . resistance, pursuit, possession and use of weapons, and a description of items seized at the time of arrest.¹¹²

A prosecutor is prohibited from making public statements about pending cases that he knows or should know have a "substantial likelihood of materially prejudicing an [adjudicative proceeding]" or have a "substantial likelihood of heightening public condemnation of the accused."¹¹³ The rules identify several subjects that are more likely than not to have a materially prejudicial impact on future proceedings in a case. These subjects are generally seen as creating a risk of prejudice without serving any legitimate or necessary law enforcement function.¹¹⁴ Thus, prosecutors are cautioned to refrain from communicating on the following subjects:

[A] defendant's prior criminal record. . . . Observations about a defendant's character. Statements, [particularly] admissions [or] confessions, . . . attributable to a defendant, or the [defendant's] refusal . . . to make a statement.

¹¹⁰ See *In re Holtzman*, 577 N.E.2d 30, 31 (N.Y. 1991) (citing *La. State Bar Ass'n v. Karst*, 428 So. 2d 406, 409 (La. 1983)).

¹¹¹ See 28 C.F.R. § 50.2(b)(3), (6) (2013); MODEL RULES OF PROF'L CONDUCT r. 3.6(a) (AM. BAR ASS'N 2013); NAT'L PROSECUTION STANDARDS § 2-14.3 (NAT'L DIST. ATTORNEYS ASS'N 3d ed. 2009).

¹¹² *Id.* § 2-14.3.

¹¹³ MODEL RULES OF PROF'L CONDUCT r. 3.6(a), 3.8(f); see 28 C.F.R. § 50.2 (b)(4), (6); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10 (c); NAT'L PROSECUTION STANDARDS § 2-14.4.

¹¹⁴ 28 C.F.R. § 50.2(6); MODEL RULES OF PROF'L CONDUCT, r. 3.6, cmt. 5.

Reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal by the defendant to submit to such tests or examinations. Statements concerning the identity, . . . or credibility of prospective witnesses. Statements concerning evidence or argument in the case [O]pinion[s] as to the accused's guilt, or the possibility of a plea of guilty¹¹⁵

In addition, prosecutors should refrain from communicating the fact that a defendant has been charged, unless there is also "a statement explaining that the charge is merely an accusation and that the [accused] is presumed innocent."¹¹⁶

Examples of prosecutors speaking about these subjects are legion. U.S. Attorney Preet Bharara's announcement of the corruption charges against New York State Speaker Sheldon Silver, which created a "media circus" due to his over-the-top "uncensored views" disparaging Silver's character, announcing his opinion on Silver's guilt, and bundling together factual allegations with a broad attack on public corruption and Silver's crimes.¹¹⁷ Additionally, District Attorney Michael Nifong, in a succession of numerous press statements about the Duke Lacrosse case, demonized the three defendants charged with raping a woman at a party as "a bunch of hooligans" who committed a "gang rape" based on "racial hostility," denounced them for not "want[ing] to admit to the enormity of what they ha[d] done," branded their conduct as "offensive," "unconscionable," "reprehensible," "appall[ing]," asserted that they were "not telling the truth about it," and also stated his opinion that "a rape did occur," that he was "convinced there was a rape," and that the evidence of the victim's demeanor and trauma "was certainly consistent with a sexual assault."¹¹⁸ As the cases progressed, it turned out that a rape did not occur, the victim lied, and the young men accused of rape were innocent.¹¹⁹

¹¹⁵ 28 C.F.R. § 50.2(4), (6).

¹¹⁶ CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 8-1.1(a), (c)(1).

¹¹⁷ See *United States v. Silver*, No. 15-CR-93 (VEC), 2015 WL 1608412, at *3, *5 (S.D.N.Y. Apr. 10, 2015) (internal quotation marks omitted).

¹¹⁸ See *N.C. State Bar v. Nifong*, 06 DHC 35, (N.C. State Bar July 31, 2007) (internal quotation marks omitted).

¹¹⁹ See Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 *FORDHAM L. REV.* 1337, 1337-38 (2007).

B. Statements About Past Cases

A prosecutor's comments on past cases might be made in connection with each role that a prosecutor performs. For example, during an election campaign a prosecutor might try to tout as a measure of her effectiveness her record of previous convictions, including capital convictions.¹²⁰ Similarly, a prosecutor when discussing law enforcement policy, the need to strengthen laws with respect to certain types of investigations, or the need for additional resources might allude to previous investigations and prosecutions.¹²¹ Finally, a prosecutor in commenting on a current case might seek to highlight the case by describing a systemic problem, or a troubling pattern of similar cases that have been prosecuted.¹²²

To be sure, from an ethical standpoint, the correct way to approach statements about previous investigations, prosecutions, and convictions is to inquire what the prosecutor's purpose is in discussing these cases, whether that purpose is legitimate and necessary, and whether the statements are inconsistent with a prosecutor's role to serve justice.¹²³

C. Responsive Statements

A prosecutor is allowed to respond to public statements from any source in order "to protect the prosecution's legitimate official interests."¹²⁴ A prosecutor should not use this privilege to engage in overkill; responsive statements should be limited to such information that is necessary to mitigate the adverse publicity, not

¹²⁰ See, e.g., Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/killing-for-votes> (last visited Jan. 24, 2016); Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES, (July 15, 1995), <http://www.nytimes.com/1995/07/16/magazine/the-deadliest-da.html?pagewanted=all> (describing Philadelphia District Attorney Lynne Abraham's political campaign for death penalty, which she sought more than any other prosecutor in U.S.).

¹²¹ See, e.g., *United States v. Koubriti*, 305 F. Supp. 2d 723, 729, 735 (E.D. Mich. 2003) (describing public statements of United States Attorney General John Ashcroft in connection with government's efforts in the war on terror).

¹²² A recent example is the overheated public comments of U.S. Attorney Preet Bhahara on the systemic problem of official corruption. See *infra* text accompanying notes 202–10.

¹²³ See NAT'L PROSECUTION STANDARDS § 14 cmt. (NAT'L DISTRICT ATT'YS ASS'N 3d ed. 2012).

¹²⁴ CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(f) (AM. BAR ASS'N 4th ed. 2015); see MODEL RULES OF PROF'L CONDUCT r. 3.6(c) (AM. BAR ASS'N 2013); NAT'L PROSECUTION STANDARDS § 2-14.5.

exacerbate it.¹²⁵ Prosecutors may not respond when their statements have a substantial likelihood of materially prejudicing a criminal proceeding.¹²⁶

A prosecutor's ability to respond is permitted in order to equalize the positions of both sides, or correct misstatements about the prosecutor's conduct.¹²⁷ To the extent that this rule allows a prosecutor to "fight fire with fire," it may encourage a judicially-sanctioned "free-for-all" and, once provoked, may encourage excesses by prosecutor.¹²⁸ The Supreme Court in *United States v. Young*¹²⁹ considered the scope of a prosecutor's response during a trial, although admittedly in a different context.¹³⁰ The Court did not approve the prosecutor's response, albeit invited by defense counsel provocation, but did not find it to be plain error.¹³¹ The proper test should be whether the prosecutor's response was reasonably designed to repair the damage, rather than aggravate it.¹³²

D. Reference to Public Records

Although a prosecutor is prohibited from making materially prejudicial extrajudicial statements, the ethics rules create an exception that allows a prosecutor to make extrajudicial statements about information contained in a public record, apparently despite its content.¹³³ This "safe harbor" exception¹³⁴ obviously creates broad opportunities for prosecutors to make highly prejudicial

¹²⁵ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(f) ("A statement . . . shall be limited to such information as is necessary to mitigate the recent adverse publicity."); MODEL RULES OF PROF'L CONDUCT r. 3.6(c) ("A statement . . . shall be limited to such information as is necessary to mitigate the recent adverse publicity."); NAT'L PROSECUTION STANDARDS § 2-14.5 ("A public comment . . . shall be limited to statements reasonably necessary to mitigate the effect of undue prejudice created by the public statement of another.").

¹²⁶ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(f); MODEL RULES OF PROF'L CONDUCT r. 3.6(a); NAT'L PROSECUTION STANDARDS § 2-14.4.

¹²⁷ See *United States v. Young*, 470 U.S. 1, 12-13 (1985) (noting the prosecutor's ability to respond in order to right the scale); NAT'L PROSECUTION STANDARDS § 1-1.6.

¹²⁸ See NAT'L PROSECUTION STANDARDS § 1-2.1(e).

¹²⁹ *United States v. Young*, 470 U.S. 1 (1985).

¹³⁰ *Id.* at 2, 5-6, 9-10.

¹³¹ See *id.* at 5, 14, 20.

¹³² See *id.* at 12-13.

¹³³ See MODEL RULES OF PROF'L CONDUCT r. 3.6(a), (b)(2) (AM. BAR ASS'N 2013) ("[A] lawyer may state . . . information contained in a public record.").

¹³⁴ See *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1033 (1991) ("[P]rovides a safe harbor for the attorneys, listing a number of statements that can be made without fear of discipline . . .").

statements that are contained in public records, or to actually file court documents that contain information that a prosecutor is barred from expressing directly.¹³⁵ This “safe harbor” exception presents an attractive opportunity for prosecutors to create damaging public records and then disseminating these records to the media directly, or alert the media to their existence.¹³⁶ Moreover, the meaning of “public records” has generated considerable confusion. Some prosecutors have exploited this exception to disseminate publicly highly prejudicial information contained not only in “public records” of a court or other government agency, but also materials publicly available on the Internet and other news accounts previously reported in the media.¹³⁷ Adopting such an expansive concept of a public record that includes unfiltered and untested contents of all publicly accessible media “would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech.”¹³⁸

The public record exception does not give a prosecutor cart blanche to gratuitously place prejudicial information in a public record in order to have that information reported by the media.¹³⁹ An egregious example in a federal criminal fraud trial in which the defendant was accused of misappropriating funds from the federal housing administration can be found in *Henslee v. United States*.¹⁴⁰ During the trial the prosecutor filed a “motion” with the clerk of the federal district court, although as the appeals court observed, “the true character and purpose of which [was] not readily apparent.”¹⁴¹ The motion referred to a report of a civil settlement between the defendant and the housing agency having no connection with the criminal case, and which described the defendant’s “breaches,” “conversion[s],” “kick-backs,” “embezzle[ments],” and other violations of law.¹⁴² The motion garnered immediate and

¹³⁵ See *Attorney Grievance Comm’n of Maryland v. Gansler*, 835 A.2d 548, 557, 567 (Md. 2003).

¹³⁶ See *id.* at 554, 554–55, 555.

¹³⁷ See, e.g., *In re Brizzi*, 962 N.E.2d 1240, 1246 (Ind. 2012) (noting that news stories about the case could be accessed from the Internet); *Gansler*, 835 A.2d at 554, 554–55, 555 (describing information in the public domain, such as public court documents, media reports, and comments made by police officers).

¹³⁸ See *In re Brizzi*, 962 N.E.2d at 1247.

¹³⁹ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10 (AM. BAR ASS’N. 4th ed. 2014) (“A prosecutor should not place statements or evidence into the court record to circumvent this Standard.”).

¹⁴⁰ See *Henslee v. United States*, 246 F.2d 190, 191 (5th Cir. 1957).

¹⁴¹ *Id.* at 192.

¹⁴² *Id.*

widespread publicity.¹⁴³ Although the jury was polled by the trial judge and did not respond when asked if it had heard news reports connected with the case, the Court of Appeals nevertheless reversed the conviction, finding that the prosecutor's self-serving and irrelevant statements may have tainted the jury and "damage[ed] . . . the cause of justice."¹⁴⁴

The public record exception assuredly was not intended to allow prosecutors to smear a defendant indirectly by creating purposeless and illegitimate records.¹⁴⁵ Prosecutors, however, are able to file documents in a case lawfully that may inflict substantial prejudice on a defendant. For example, the federal prosecution of Sheldon Silver, New York State Assembly Speaker, was initiated by "a 35-page, single-spaced, sealed Complaint" which described in vivid and inflammatory detail the defendant's scheme to bribe, secure kickbacks, and extort millions of dollars from private lawyers and others.¹⁴⁶ The complaint disingenuously referred to witnesses by anonymous identifiers but which were easy for the media to identify by name, described the defendant's "corrupt arrangement with the real estate law firm" which, according to the complaint, "ha[d] no connection to his official position," and asserted that several government witnesses were "reliable."¹⁴⁷ The prosecutor then quickly leaked the complaint to the media to set the stage for the defendant's arrest the next day, followed by the press conference extravaganza.¹⁴⁸

It would seem that if a prosecutor sought to take advantage of the protection of the public record safe harbor, the prosecutor ought not be allowed to provide information beyond quoting from and making reference to the public record, and making clear that what is being disclosed is the contents of the public record and not the prosecutor's own opinion about the evidence and the defendant's

¹⁴³ See *id.* at 192, 193.

¹⁴⁴ See *id.* at 193–94.

¹⁴⁵ See *supra* note 111 and accompanying text.

¹⁴⁶ *United States v. Silver*, No. 15-CR-93 (VEC), 2015 WL 1608412, at *1 (S.D.N.Y. Apr. 10, 2015); see also Complaint at 1, 5, 35, *United States v. Silver*, 2015 WL 1608412 (S.D.N.Y. 2015) (No. 15-CR-93 (VEC)) (providing specific details of the defendant's alleged misconduct).

¹⁴⁷ *Id.* at 13, 17, 22 n.7, 24 n.8.

¹⁴⁸ See *Silver*, 2015 WL 1608412, at *5, *5 n.6 ("This is not to say that the Court approves of leaks of sealed information or credits the idea that these particular leaks did not originate in the Government's camp."). It should be fairly obvious that the government was responsible for improperly leaking news of Silver's arrest to the press hours before the Complaint was unsealed or the arrest was made. Nevertheless, as the District Court observed, "the speculative news stories published between 1:55 a.m. and 8:00 a.m. on the day of Silver's arrest could hardly have had any prejudicial impact inasmuch as Silver was arrested, the Complaint was unsealed and he appeared in court later that day." *Id.* at *5.

guilt.

The prosecutorial tactic of inserting prejudicial information into a public record and then alerting the media may be a trap for the unwary litigant. For example, during a secret grand jury investigation a prosecutor subpoenas witnesses and documents. Assuming a witness moves to quash the subpoena, it would not be surprising if the prosecutor's response contained highly prejudicial and even inflammatory information to support the subpoena. Obviously if such motion practice occurs during a grand jury proceeding, all of these undisputedly public records should be filed under seal, and not accessible to the media.¹⁴⁹ Whether the media learns about these filings, of course, depends on whether the information is leaked to the media.

Although there is no settled definition of "public record," several courts have refused to extend the concept to include all information that is publicly accessible on the Internet and in media reports.¹⁵⁰ These courts have limited the concept of public record to "refer only to public government records, i.e., the records and papers on file with a government entity to which an ordinary citizen would have lawful access."¹⁵¹

E. Statements Prejudicial to the Administration of Justice

A prosecutor's extrajudicial statements may be so irresponsible as to constitute conduct prejudicial to the administration of justice.¹⁵² This broad standard of professional misconduct covers advocacy statements that materially prejudice a specific adjudicative proceeding, which was one of the bases for disbaring Michael Nifong, the Duke lacrosse prosecutor.¹⁵³ Also subject to sanctions are improper comments by prosecutors aimed not at a specific legal proceeding but more generally at matters the prosecutor believes

¹⁴⁹ See, e.g., FED. R. CRIM. P. 6(e)(6) ("Records . . . must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.").

¹⁵⁰ See *In re Brizzi*, 962 N.E.2d 1240, 1247 (Ind. 2012) (agreeing with the *Gansler* definition of public record); Attorney Grievance Comm'n of Maryland v. Gansler, 835 A.2d 548, 569 (Md. 2003) ("[Public record information] should refer only to public government records—the records and papers on file with a government entity to which an ordinary citizen would have lawful access.").

¹⁵¹ *In re Brizzi*, 962 N.E.2d at 1247 (citing *Gansler*, 835 A.2d at 569).

¹⁵² See MODEL RULES OF PROF'L CONDUCT r. 8.4(d) (AM. BAR ASS'N 2013) ("It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.").

¹⁵³ See Mosteller, *supra* note 119, at 1338, 1348–49; *supra* notes 33–36, 118–19 and accompanying text.

are of public concern in the criminal justice system.¹⁵⁴ Although, as noted above, a prosecutor has much greater leeway in speaking out on matters of public concern, his public statements may be so irresponsible as to constitute conduct prejudicial to the administration of justice.¹⁵⁵

Prosecutors occasionally make public statements critical of judges and the justice system. Ethics rules address such statements indirectly. Prosecutors are cautioned that any statements about the judiciary and the justice system, especially statements expressing disagreement, should be "respectful."¹⁵⁶ However, some public statements about judges and the justice system cross the line, and prosecutors have been cited by professional disciplinary bodies for engaging in conduct prejudicial to the administration of justice.¹⁵⁷ Prosecutors know that they occupy a special status with the public as the embodiment of law and order.¹⁵⁸ They know that in contrast to criticism by defense lawyers, a prosecutor's criticism of judges and the justice system is likely to carry far more weight with the public, and affect adversely the public's confidence in the judiciary, and the administration of justice generally.¹⁵⁹

A prosecutor's extrajudicial statements about the conduct of judges and the operation of the justice system may be so irresponsible and prejudicial to the administration of justice as to warrant disciplinary sanctions.¹⁶⁰ Needless to say, a prosecutor's attack on judges makes for good press and may enhance a prosecutor's image as an aggressive crusader against lawless judges. Thus, an Arizona prosecutor's relentless attack on judges and other public officials for obstructing his efforts at fighting corruption led to his disbarment.¹⁶¹ Andrew Thomas, the Maricopa County prosecutor, publicly accused judges of lawless, biased, and corrupt conduct.¹⁶² A flow of press releases repeatedly charged that

¹⁵⁴ See, e.g., *In re Soares*, 947 N.Y.S.2d 233, 235 (N.Y. App. Div. 2012) (ruling that an attorney was subject to sanctions when he made a comment alleging that a judge was practicing bad criminal justice policy).

¹⁵⁵ See *id.*; *supra* note 17 and accompanying text.

¹⁵⁶ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.10(b) (AM. BAR ASS'N 4th ed. 2015).

¹⁵⁷ See, e.g., *In re Holtzman*, 577 N.E.2d 30, 31 (N.Y. 1991); *Zimmerman v. Bd. of Prof'l Responsibility*, 764 S.W.2d 757, 758, 762, 763 (Tenn. 1989); *In re Soares*, 947 N.Y.S.2d at 234, 235.

¹⁵⁸ See Vance, *supra* note 73, at 373.

¹⁵⁹ See *id.* at 373, 406.

¹⁶⁰ See, e.g., *In re Soares*, 947 N.Y.S.2d at 235.

¹⁶¹ See *In re Thomas*, PDJ-2011-9002, slip op. at 25-26, 171, 232 (Ariz. 2011).

¹⁶² See *id.* at 3, 60, 66-67.

a judicial faction was dodging the law and demonstrating a disregard for the will of the people and engaged in a conspiracy to thwart his investigations into judges and other public officials.¹⁶³ Without any supporting evidence, Thomas brought a civil RICO complaint against 14 persons, including four judges.¹⁶⁴ Employing an amalgam of invective, insinuation, and diatribe, he charged the defendants with a massive conspiracy to engage in judicial and official misconduct, including extortion, bribery, hindering prosecution, and obstructing government administration.¹⁶⁵ Thomas had the complaint dismissed a few weeks after he filed it, claiming, falsely, that the United States Department of Justice would be investigating the matter.¹⁶⁶

Other public attacks by prosecutors against judges may be so reckless as to constitute conduct prejudicial to the administration of justice. Thus, a New York prosecutor issued a “news alert” that publicly attacked a judge who, according to the prosecutor, during a trial on charges of sexual misconduct, in his robing room, ordered the victim to get down on the floor and show the position she was in when she was attacked.¹⁶⁷ As it turned out, the allegation against the judge was false, and the prosecutor’s public release of the allegation was unwarranted and unprofessional, and properly subject to discipline.¹⁶⁸ Similarly, a prosecutor’s public attack on judges for not being aggressive enough may constitute misconduct, as in one case where the prosecutor publicly, and falsely, branded a judge’s decision as a “get-out-of-jail-free card for every criminal defendant in New York State.”¹⁶⁹

F. Speech Critical of a Verdict

A verdict that disappoints a prosecutor may be an occasion for the prosecutor to criticize the jury or the judge, or comment on deficiencies in the justice system, and suggest that the defendant improperly beat the system. The prosecutor in this way saves face.

¹⁶³ See Bennett L. Gershman, *Threats and Bullying by Prosecutors*, 46 LOY. U. CHI. L.J. 327, 336 (2014).

¹⁶⁴ See *In re Thomas*, PDJ-2011-9002, slip op. at 106.

¹⁶⁵ See *id.* at 114, 115, 130.

¹⁶⁶ See Sarah Fenske, *Andrew Thomas, Joe Arpaio Dismiss RICO Claim Against County Officials—Ask Justice Department to Investigate Instead*, PHOENIX NEW TIMES, (Mar. 11, 2010, 12:48 PM), <http://www.phoenixnewtimes.com/news/andrew-thomas-joe-arpaio-dismiss-rico-claim-against-county-officials-ask-justice-department-to-investigate-instead-6630608>.

¹⁶⁷ *In re Holtzman*, 577 N.E.2d 30, 31 (N.Y. 1991).

¹⁶⁸ See *id.*

¹⁶⁹ *In re Soares*, 947 N.Y.S.2d 233, 234–35 (N.Y. App. Div. 2012).

However, a prosecutor should not make statements critical of a verdict, whether by a judge or jury.¹⁷⁰ Given the prosecutor's authority and prestige, such remarks risk improperly influencing jurors in other cases to which they may sit.¹⁷¹ It may also be seen as intimidating a judge when a case is tried without a jury.

G. Statements Referring to Severity of Sentence

It is unethical for prosecutors to promote themselves and their office, either in campaigning for office or in other public statements, by claiming that the sentences that have been imposed in prosecuted cases demonstrate that the prosecutor has been an effective and aggressive official.¹⁷² Such statements are inconsistent with a prosecutor's role as a minister of justice, whereby a prosecutor has a duty to maintain an attitude of fairness and objectivity, rather than suggest an attitude motivated by vengeance and retribution.¹⁷³ Rather, the prosecutor should seek to ensure that the sentencing process is done in a fair and equitable manner.

H. Statements About Conviction Rates

Prosecutors like to promote their conviction rates as a measure of their effectiveness.¹⁷⁴ Those prosecutors who campaign for office often make their record of convictions the most significant factor that the public should consider in determining the prosecutor's fitness for the position.¹⁷⁵ Flaunting conviction rates is not only

¹⁷⁰ CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION 3-5.10 (AM. BAR ASS'N 2014) ("The prosecutor should not make public comments critical of a verdict, whether rendered by judge or jury.").

¹⁷¹ See Joseph R. Daughen, *Jury Duty: Low Pay, Lots of Hassle, and Now Fear Experts say Some are Afraid to Serve*, PHILLY.COM (May 4, 1992), http://articles.philly.com/1992-05-04/news/26011813_1_jurors-prospective-panelists-jury-duty.

¹⁷² See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-7.2(a) ("The severity of sentences imposed should not be used as a measure of a prosecutor's effectiveness."); Kenneth Bresler, *Seeking Justice, Seeking Election, and Seeking the Death Penalty: The Ethics of Prosecutorial Candidates' Campaigning on Capital Convictions*, 7 GEO. J. LEGAL ETHICS 941, 943 (1994).

¹⁷³ See Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 135 n.43, 153-54 (2004).

¹⁷⁴ See Kenneth Bresler, *"I Never Lost a Trial": When Prosecutors Keep Score of Criminal Convictions*, 9 GEO. J. LEGAL ETHICS 537, 541, 542 (1996); Catherine Ferguson-Gilbert, *It is not Whether you Win or Lose, it is How you Play the Game: Is the Win-Loss Scorekeeping Mentality Doing Justice for Prosecutors?*, 38 CAL. W. L. REV. 283, 290 (2001).

¹⁷⁵ See Bresler, *supra* note 174, at 541.

misleading, it is unethical.¹⁷⁶

IV. THE PROSECUTOR'S DUTY OF SILENCE

Given the several roles that a prosecutor performs, and the broad opportunities for a prosecutor to speak outside the courtroom, the idea that a prosecutor has a "Duty of Silence" seems far-fetched. Indeed, a prosecutor's public statements are often not only permissible but sometimes indispensable. A prosecutor's campaign speech describing his work and fitness for office is critical to the proper functioning of democracy, and enjoys the greatest constitutional protection for speech.¹⁷⁷ A prosecutor's speech that informs the public about the prosecutor's activities, educates the public about law enforcement plans and priorities, and informs the public about matters of public concern and threats to the public welfare and safety, also enjoys considerable constitutional protection.¹⁷⁸ However, the broad protection given to campaign speech and speech on matters of public concern is based on the assumption that such speech promotes necessary and legitimate objectives.¹⁷⁹ That is not the case with extrajudicial speech that does not serve legitimate prosecutorial interests, such as statements concerning pending or impending cases, and individuals suspected or accused of wrongdoing.¹⁸⁰ Any interest a prosecutor might have in speaking about these cases, or the public might have in learning from the prosecutor about these cases, is overridden by the constitutional right of persons accused of crime to receive a fair trial by an impartial jury.¹⁸¹ Thus, press conferences, press releases, interviews, postings and leaks that occur after a defendant has been accused of a crime are most likely to prejudice the potential jury pool, i.e., the public.¹⁸² With respect to speaking about pending cases, a prosecutor has a duty to remain silent.

¹⁷⁶ See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.4 (b)(i) (AM. BAR ASS'N 2014) ("In exercising discretion to file and maintain charges, the prosecutor should not consider . . . partisan or other improper political or personal considerations."); *id.* § 3-3.9 (d) ("In making the decision to prosecute, the prosecutor should give no weight to . . . a desire to enhance his or her record of convictions.").

¹⁷⁷ See *supra* notes 25–36 and accompanying text.

¹⁷⁸ See *supra* notes 39–40 and accompanying text.

¹⁷⁹ See *supra* notes 25–29 and accompanying text.

¹⁸⁰ See *In re* Amendments to Rules of Prof'l Conduct, Rule 407, SCACR, 2005 S.C. LEXIS 199, *205, *216–17 (S.C. June 20, 2005); Attorney Grievance Comm'n of Maryland v. Gansler, 835 A.2d 548, 559, 560 (Md. 2003).

¹⁸¹ See *id.* at 559–60.

¹⁸² See *United States v. King*, 192 F.R.D. 527, 533 (E.D. Va. 2000); *Gansler*, 835 A.2d at 559.

The prosecutor's duty of silence flows from several sources. First, as the most powerful figure in the American criminal justice system, the prosecutor has the power to employ, lawfully, "the most terrible instruments of government" to deprive persons of their liberty, destroy their reputations, and even bring about their death.¹⁸³ It is the prosecutor alone who decides whether or not to bring criminal charges, who to charge, what charges to bring, whether a defendant will stand trial or plead guilty, and whether to confer immunity from prosecution.¹⁸⁴ A prosecutor literally holds the power to invoke or deny punishment.¹⁸⁵ And a prosecutor's discretion to exercise these powers is virtually unlimited, and rarely second-guessed by the courts.¹⁸⁶ Indeed, the ability of courts, disciplinary bodies, and other investigative agencies to impose significant restraints on a prosecutor's use of his powers is so negligible that it makes the prosecutor accountable to himself alone.¹⁸⁷ As the Supreme Court darkly observed: "[b]etween the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual."¹⁸⁸

Moreover, a prosecutor has the legal and ethical duty to serve not a private client, or his own personal or political interests, but rather the interest of justice.¹⁸⁹ Unlike a defense attorney, a prosecutor is considered a quasi-judicial official, indeed a "Minister of Justice,"¹⁹⁰ who has the dual responsibility to convict the guilty and protect the innocent.¹⁹¹ Long ago, the Supreme Court gave the classic description of the prosecutor's role to serve justice, to play by the rules, and not hit below the belt:

[He] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern

¹⁸³ See FREEDMAN & SMITH, *supra* note 37, at 286.

¹⁸⁴ See *id.*

¹⁸⁵ See *id.*

¹⁸⁶ See *id.* at 288–89.

¹⁸⁷ See *Wayte v. United States*, 470 U.S. 598, 607 (1985); Bennett L. Gershman, *A Moral Standard for the Prosecutor's Exercise of the Charging Discretion*, 20 FORDHAM URB. L.J. 513, 513 (1993).

¹⁸⁸ *Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 814 (1987).

¹⁸⁹ See FREEDMAN & SMITH, *supra* note 37, at 287.

¹⁹⁰ See MODEL RULES OF PROF'L CONDUCT § 3.8 cmt. 1 (AM. BAR ASS'N 2013) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS'N 2014) ("The prosecutor is an administrator of justice, a zealous advocate, and an officer of the court.")

¹⁹¹ See FREEDMAN & SMITH, *supra*, note 37, at 288.

impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.¹⁹²

As this essay shows, a prosecutor can commit “foul blows” by speech as well as conduct. But in contrast to other principal actors in the criminal justice system, such as judges and defense lawyers, a prosecutor’s “foul speech” has a much greater potential to prejudice the public. A prosecutor’s speech needs to be considered within a culture that glorifies prosecutors, views the prosecutor as protecting the community and rule of law against lawbreakers, sees the prosecutor as a special guardian and protector of the truth, and thus trusts the prosecutor’s assertions, judgments, and opinions about a case and individuals accused of crimes. Famous New York District Attorneys like William Travers Jerome, Thomas E. Dewey, and Frank S. Hogan have been lionized for their aggressive pursuit and prosecution of murderers, gangsters, and corrupt officials.¹⁹³ Dewey was the inspiration for the character in the popular radio show “Mr. District Attorney,” with its memorable preamble: “Mr. District Attorney[!] Champion of the People[!] . . . guardian of our fundamental rights—life, liberty, and the pursuit of happiness.”¹⁹⁴ The media celebrates prosecutors. TV shows such as “Law and Order,” “CSI,” and “Brooklyn D.A.” portray the prosecutor as tough, honorable, and courageous.¹⁹⁵ Rather than refraining from reinforcing that image, some prosecution speech stokes the flames.

¹⁹² *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹⁹³ See David Ray Papke, *Mr. District Attorney: The Prosecutor During the Golden Age of Radio*, 34 U. TOL. L. REV. 781, 781, 787 (2003); *History of the Office*, N.Y. COUNTY DISTRICT ATTORNEY’S OFFICE, <http://manhattanda.org/history-office#1119> (last visited Nov. 21, 2015); *Jerome Reviews his Official Years*, TWAINQUOTES.COM, <http://www.twainquotes.com/19090508.html> (last visited June 29, 2016).

¹⁹⁴ Papke, *supra* note 193, at 781, 787.

¹⁹⁵ See, e.g., Ronald M. Sandgrund, *Does Popular Culture Influence Lawyers, Judges, and Juries?—Part III*, 44 COLO. L. 51, 54 (2015).

Moreover, as demonstrated above,¹⁹⁶ prosecutors are able to use the public forum effectively because they have always enjoyed an extremely close relationship with the media. Reporters typically try to cultivate an acquaintance with prosecutors. Reporters know that it's the prosecutor who effectively dominates the criminal justice system, knows about current investigations, about the prominent targets and cooperating witnesses, and possesses and controls the evidence of guilt. Reporters would be foolish to alienate these fruitful sources. The press also cultivates a close relationship with prosecutors. They have frequent contacts,¹⁹⁷ they dine with prosecutors,¹⁹⁸ they flatter them by writing and broadcasting favorable news accounts,¹⁹⁹ and they strenuously avoid behavior that might discourage prosecutors from providing future scoops. Prosecutors have stated publicly that "the press . . . ha[s] to be nice to me."²⁰⁰ With such a favorable outlet for their public commentary, prosecutors know that they can control the information they wish to disseminate, shape the way the media and ultimately the public views the disclosures. And if a prosecutor chooses to divulge secret, confidential, or privileged information to a friendly reporter, the prosecutor is confident that given their close relationship, as well as the privilege protecting news sources, the prosecutor's identity will never be revealed.

A recent example is the manner in which Preet Bharara, United States Attorney for the Southern District of New York, conceived and carried out his media "brinksmanship" relative to the defendant's right to a fair trial.²⁰¹ Bharara launched his extrajudicial "blitz" by leaking to the media a "35-page, single-spaced sealed Complaint charging . . . [Sheldon] Silver, the then-Speaker of the New York Assembly, with . . . fraud, conspiracy, and extortion."²⁰² After the complaint was unsealed, and Silver was arrested and processed, Bharara held a press conference in which he castigated the widespread corruption in Albany ("show-me-the-money culture of Albany") and offered gratuitously his subjective

¹⁹⁶ See *supra* Part II.B.

¹⁹⁷ See, e.g., Paul R. Wallace, *Prosecuting in the Limelight*, 22 DEL. L. 20, 21 (2005).

¹⁹⁸ See Matheson, *supra* note 17, 889–90. Many journalists and reporters asked me to lunch, often, and I usually acquiesced.

¹⁹⁹ KENDALL COFFEY, *SPINNING THE LAW: TRYING CASES IN THE COURT OF PUBLIC OPINION* 242 (2010).

²⁰⁰ *Id.* at 242.

²⁰¹ See *United States v. Silver*, No. 15-CR-93 (VEC), 2015 WL 1608412, at *1 (S.D.N.Y. Apr. 10, 2015).

²⁰² *Id.*

opinion of Silver's character (dishonest, "greedy," and engaged in "secret self-reward" cleverly and cynically).²⁰³ In case anyone missed the press conference, Bharara issued an inflammatory press release highlighting these same themes (charges against Silver part of the "culture of corruption" in Albany; charges against Silver "go to the very core of what ails Albany";²⁰⁴ "Politicians are supposed to be on the people's payroll, not on secret retainer to wealthy special interests they do favors for[.]")²⁰⁵ Silver represents a "lack of transparency, lack of accountability, and lack of principle joined with an overabundance of greed, cronyism, and self-dealing").²⁰⁶ Bharara followed the release with similar comments via Twitter.²⁰⁷ The following day—the timing was deliberate—Bharara gave a speech at a local law school covered massively by the media, in which he lampooned Silver, ridiculed his conduct as "business as usual."²⁰⁸ Finally, a few weeks later, Bharara gave an interview with a journalist in which after noting the importance of public corruption prosecutions he added:

[W]hen you see somebody who's been charged with (and we've convicted many, many people before this case)—and you see somebody who has basically sold his office to line his pockets and compromised his integrity and ethics with respect to how to make decisions on all those issues I mentioned that affect people's lives, that's a big problem. . . . And it's a big problem for democracy.²⁰⁹

A prosecutor also needs to be silent because the consequences of his speech are so grave. As Holmes reminded, a criminal trial must be carried out in a courtroom, not in the media.²¹⁰ A criminal defendant is guaranteed a fair trial by an impartial jury.²¹¹ Indeed, the right to a fair trial is "the most fundamental [right] of all freedoms."²¹² Moreover, the components of a fair trial—public trial by an impartial jury—do not necessarily insure a fair trial when a prosecutor may have previously tainted the proceeding by irresponsible public statements about evidence that may never get

²⁰³ *Id.*

²⁰⁴ *Id.* at *2.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at *3.

²¹⁰ *See Patterson v. Colorado*, 205 U.S. 454, 458, 462 (1907).

²¹¹ *Estes v. Texas*, 381 U.S. 532, 559 (1965).

²¹² *See id.* at 540 ("[A] fair trial [is] the most fundamental of all freedoms.").

admitted, confessions that are inadmissible, comments about the defendant's character, and opinions about the defendant's guilt.²¹³ The Supreme Court articulated this overriding concern in *Gentile v. State Bar of Nevada*,²¹⁴ a case involving public statements by a defense lawyer:

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on materials admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which might never be admitted at trial and *ex parte* statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.²¹⁵

V. CONCLUSION

The protections afforded prosecution speech vary with the role of the prosecutor and the forum in which the speech is communicated. Campaign speech, and speech on matters of public concern, enjoy the greatest protection because such speech is typically seen as legitimate and necessary to the democratic process and to core functions of the prosecutor's work. This type of speech most often appears in press conferences or press briefings. But when a prosecutor speaks in the role of an advocate, and makes statements about current prosecutions, as an expert on TV, or on the internet, such statements have the capacity to prejudice future criminal proceedings. It is with respect to advocacy speech that a prosecutor has to be most careful, and except for limited facts about a case, a prosecutor as a general rule has a duty to refrain from speaking.

In our system, politics, power, and ego may well drive much prosecutor speech. Further, a prosecutor's potential relationship with a media that is eager and able to obtain and disseminate the

²¹³ See *supra* notes 5–6, 44–45 and accompanying text.

²¹⁴ *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

²¹⁵ *Id.* at 1070. It is noteworthy that the Court was referring to extrajudicial statements not by a prosecutor but by defense counsel. See *id.* at 1034. It is not unreasonable to suggest, as noted above, that while extrajudicial statements by all lawyers can be prohibited, extrajudicial statements by a prosecutor have a far greater potential to prejudice a jury than statements by the defendant's lawyer, and extrajudicial statements by a prosecutor can be more readily restricted. See *supra* note 24 and accompanying text (describing the standard of scrutiny used for extrajudicial statements by prosecutors); see *supra* Part III. And lest we forget, a prosecutor's statements that refer to evidence that may never be admitted at trial, or contain opinions on a defendant's character and guilt, have the potential to contribute to the conviction of an innocent person. See *supra* notes 42, 44–45 and accompanying text. Indeed, as several cases discussed above show, the danger of a prosecutor's irresponsible statements contributing to a wrongful conviction is real. See *supra* notes 5–6.

prosecutor's statements highlights a danger to the system and to those accused of crimes. Regulation of prosecutor speech is piecemeal and inconsistent. It may be that the only meaningful control is the prosecutor's own sense of fair play, integrity, desire to do justice, and self-restraint.