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COMMENT

CLEANING THE DIRTY LAUNDRY: WASHING OUT LAW ENFORCEMENT'S PREJUDICIAL COMMENTS

TED HALLER*

*"I make my living off the Evening News / Just Giving me something-
something I can use / People love it when you lose,
They love dirty laundry."*¹

INTRODUCTION

"Chief: Suspect is 'cold-blooded murderer.'" ²

It happens so often that it has become cliché. A police chief, sheriff, or other law enforcement official holds a press conference or conducts an interview, during which he calls a suspect "cold-blooded,"³ a "monster,"⁴ or "cowardly."⁵ Or, if you are Sheriff Joe Arpaio, the sheriff of Maricopa County, Arizona, and self-described "America's Toughest Sheriff,"⁶ there is no need to wait for the media to ask about your judgments of a suspect when a press release will suffice.⁷

* Northwestern University, B.S. 2005; University of St. Thomas School of Law, J.D. 2014. The author sends an enormous thank you to Professor Neil Hamilton for all of his help, encouragement, and brilliance in helping me write this Comment. And thank you to every member of the University of St. Thomas Law Journal for the wise feedback.

1. Don Henley, *Dirty Laundry*, on DIRTY LAUNDRY (Asylum Records 1982).

2. Sara Murphy, *Chief: Suspect is 'cold-blooded murderer.'* WWAY NEWSCHANNEL 3 (Oct. 3, 2013, 11:53 PM), <http://www.wwaytv3.com/2013/10/03/chief-suspect-cold-blooded-murderer>.

3. *See, e.g., id.*

4. *See, e.g.,* Susanne M. Schafer, *Sheriff accuses suspect of being "monster" for taking part in search for missing teen*, THE AUGUSTA CHRONICLE (Aug. 12, 2012), <http://chronicle.augusta.com/news/2012-08-30/sheriff-accuses-suspect-being-monster-taking-part-search-missing-teen>.

5. *See, e.g.,* Douglass Dowty, *Sheriff identifies 'cowardly' man on the run who left passenger to die after Clay crash*, SYRACUSE.COM (Aug. 12, 2013, 12:51 PM), http://www.syracuse.com/news/index.ssf/2013/08/sheriffs_deputies_still_searching_for_cowardly_man_who_left_passenger_to_die_aft.html.

6. *About Sheriff Joe Arpaio*, MARICOPA COUNTY SHERIFF'S OFFICE, <http://www.mcso.org/About/Sheriff.aspx> (last visited Oct. 15, 2013).

7. For example, in press releases issued two days apart, Sheriff Arpaio called one suspect "an unfit mother" and another "sick." NEWSRelease, Maricopa County Sheriff's Office, Sheriff

Prosecutors are not supposed to make extrajudicial comments that have a “substantial likelihood” of prejudicing a criminal defendant; Rule 3.8(f) of the ABA Model Rules of Professional Conduct⁸ (hereinafter “Model Rules”) prohibits it.⁹ However, when making public comments, prosecutors do not always follow Rule 3.8(f).¹⁰ And prosecutors rarely face discipline for their extrajudicial comments.¹¹

But prosecutors are not the only people who speak to the press. In fact, prosecutors are not even the main source for journalists covering criminal matters—the police are.¹² Partially for this reason, the Model Rules impose an additional duty on prosecutors: to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial comment that the prosecutor would be prohibited from making under . . . this Rule.”¹³ Unfortunately, exercising reasonable care to prevent law enforcement personnel from making prejudicial, extrajudicial comments is challenging, and the Model Rules provide little guidance on how much supervision prosecutors should exercise over law enforcement.

This Comment will explore the relationship between prosecutors and law enforcement personnel in adhering to Rule 3.8(f), and it will argue that neither the rule nor current practice adequately protects criminal defendants.

Arpaio announces arrest of mother of two-year-old girl found wandering Anthem neighborhood (June 11, 2013), available at <http://www.mcso.org/MultiMedia/PressRelease/Nichole%20Hockett%20Booked.pdf>; NEWSRelease, Maricopa County Sheriff’s Office, Sheriff’s Office Tracks Down Woman Who Released Dogs into Desert (June 12, 2013), available at <http://www.mcso.org/MultiMedia/PressRelease/Dogs%20Abandoned%20Leads%20to%20Charges.pdf>.

8. The ABA Model Rules of Professional Conduct have been adopted, or adopted with minor changes, by forty-seven states and the District of Columbia. Abigail H. Lipman, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today’s Media Age*, 47 AM. CRIM. L. REV. 1513, 1516, n.18 (2010) (citing STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 3 (2009)).

9. “The prosecutor in a criminal case shall . . . refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2003).

10. Pat Fitzgerald, United States attorney for the Northern District of Illinois, arguably violated Model Rule 3.8(f) in a press conference announcing criminal charges against Rod Blagojevich, the governor of Illinois at the time. However, Illinois adopted a standard with a higher threshold for prejudice: “extrajudicial comments that would pose a *serious and imminent* threat of heightening public condemnation of the accused” (emphasis added) Kelly Selesnick, *Innocent Until Proven Guilty: Will Pat Fitzgerald’s Public Statements Prejudice Rod Blagojevich’s Trial?*, 23 GEO. J. LEGAL ETHICS 827, 828 n.15, 832–33 (2010). In the conference, Fitzgerald called Blagojevich’s conduct “appalling,” and enough to make “Lincoln roll over in his grave.” *Transcript: Justice Department Briefing on Blagojevich Investigation*, N.Y. TIMES (Dec. 9, 2008), http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html?pagewanted=all&_r=0.

11. Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 753 (2001).

12. See Steven Chermak & Alexander Weiss, *Maintaining Legitimacy Using External Communication Strategies: An Analysis of Police-Media Relations*, 33 J. CRIM. JUS. 501, 503 (2005).

13. MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2003).

Part I of this Comment will examine how the Model Rules, the courts, and other guidelines and policies dictate how the courts, prosecutors, and the police should balance a criminal defendant's Sixth Amendment¹⁴ right to a fair trial against the First Amendment's¹⁵ freedom of speech. Part II will argue that law enforcement's extrajudicial comments are increasingly prejudicial to a defendant's Sixth Amendment rights. Part III will argue that the current rules fail to adequately protect a defendant's right to a fair trial. Part IV will offer solutions that strengthen a defendant's Sixth Amendment rights by reducing the prejudicial, extrajudicial comments made by law enforcement personnel.

I. THE DIFFICULT BALANCE

"It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression."¹⁶

The steps of a press conference are as routine as those at a Catholic Mass. On a Louisiana summer day in 2006, a "riot of microphones was perched atop a podium emblazoned with the state seal and surrounded by flags."¹⁷ Staff handed out materials to the media—on this day, "arrest warrants in dark-blue folders."¹⁸ There was a sign-in sheet.¹⁹ A "gray-haired attorney general" entered and "walked stiffly" to the podium.²⁰ Cameras flashed and clattered.²¹ Showtime.

What happens next in the press conference is governed by Rule 3.8(f), which this Comment addresses; however, it is difficult to fully and fairly discuss the rule without first addressing the history of the Model Rules' treatment of trial publicity. This part of the Comment will discuss the text of Model Rule 3.8(f), and its relationship with Rule 3.6, the Supreme Court's constitutional analyses of the rules, prosecutors' additional rules and guidelines concerning extrajudicial comments, and police guidelines on trial publicity.

14. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." U.S. CONST. amend VI.

15. "Congress shall make no law . . . abridging the freedom of speech . . ." U.S. CONST. amend. I.

16. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 1 (2003).

17. SHERI FINK, FIVE DAYS AT MEMORIAL 342 (1st ed. 2013).

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

A. A Brief Background of the ABA's Trial Publicity Rules

The Model Rules contain two significant trial publicity rules: Rules 3.6²² and 3.8(f).²³ The exact language of each rule is vital to understanding the scope and flexibility of Rules 3.6 and 3.8(f).

Rule 3.6, entitled "Trial Publicity," states that attorneys "*shall not* make an extrajudicial statement that the lawyer knows or *reasonably* should know will be disseminated by public communication and will have a *substantial* likelihood of *materially prejudicing*" a case.²⁴ The rule is imperative, yet the various components of the sentence, italicized for emphasis, introduce subjectivity and imprecision to the interpretation; the objective test turns on whether a reasonable lawyer would believe a comment presented a "clear and weighty" likelihood of prejudice.²⁵

22. Model Rule 3.6 states:

- (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.
- (b) Notwithstanding paragraph (a), a lawyer may state:
 - (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;
 - (2) information contained in a public record;
 - (3) that an investigation of a matter in progress;
 - (4) the scheduling or result of any step in litigation;
 - (5) a request for assistance in obtaining evidence and information necessary thereto; [. . .]
 - (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (i) the identity, residence, occupation and family status of the accused;
 - (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (iii) the fact, time and place of arrest; and
 - (iv) the identity and arresting officers or agencies and the length of the investigation.
- (c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity *Id.*

23. MODEL RULES OF PROF'L CONDUCT R. 3.8 (2003).

24. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2003) (emphasis added).

25. Looking at the key words of the rule, the use of "shall not" denotes that the rule is imperative, defining "proper conduct for purposes of professional discipline." MODEL RULES OF PROF'L CONDUCT SCOPE (2003). Next, "reasonably" is defined in the Rules as when "the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES OF PROF'L CONDUCT R. 1.0 (2003). Thus, reasonability is an objective test. *See id.* "Substantial" is a "material matter of clear and weighty importance." *Id.*

Finally, a comment to the rule offers examples of subjects "that are more likely than not to have a material prejudicial effect," including: a person's "character, credibility, and criminal record," the existence of any confessions, the results of any test or nature of physical evidence, any opinion on the guilt of a suspect, prejudicial inadmissible evidence, and the "fact that a defendant has been charged with a crime." MODEL RULES OF PROF'L CONDUCT R. 3.6(a) cmt. 5 (2003).

Further complicating Rule 3.6, the drafters added some exceptions that allow for extrajudicial comments, including the opportunity to respond to the “substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer’s client,” to warn of a dangerous individual, and provide basic details of a suspect and the arrest.²⁶ However, prefacing the exceptions, the rule notes that the attorney “may” release the information, meaning the exceptions are “permissive”—in contrast to the imperative default rule.²⁷ While Rule 3.6 applies to civil and criminal matters, plaintiffs and prosecutors, and defense attorneys,²⁸ Rule 3.8, entitled “Special Responsibilities of the Prosecutor,” applies additional duties only to prosecutors in criminal matters.²⁹ Like with Rule 3.6, the exact language is important to understanding Rule 3.8. Rule 3.8(f), with the portion relevant to this Comment in bold, reads:

The prosecutor in a criminal case shall . . . except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.³⁰

Rule 3.8(f) is hardly a powerful mandate but the intent is clear: prosecutors should strive toward avoiding prejudicial, extrajudicial comments, and make sure there are measures in place to reasonably ensure that law enforcement officials also comply. The use of “refrain” renders the rule aspirational rather than imperative.³¹ In addition to prosecutors scrutinizing their own comments, the rule calls for prosecutors to “exercise reasonable care” to prevent law enforcement from making prejudicial, extrajudicial

26. *Id.* at 3.6(c).

27. MODEL RULES OF PROF’L CONDUCT R. 3.6(b)–(c) (2003).

28. *See id.*

29. MODEL RULES OF PROF’L CONDUCT R. 3.8 (2003).

30. MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2003) (emphasis added).

31. The use of “refrain” in Rule 3.8(f) leans the rule toward an aspiration rather than an imperative, especially given that the drafters were deliberate in their word choice as evidenced by subparts (c) and (e), which use the stronger language of “shall not” or “shall make”—in contrast to the weaker “refrain” in subpart (f). *See* MODEL RULES OF PROF’L CONDUCT R. 3.8 (2003). “Refrain,” while not defined in the Rule, means to “keep oneself from doing, feeling, or indulging in something and especially from following a passing impulse.” Merriam-Webster Dictionary, available at <http://www.merriam-webster.com/dictionary/refrain?show=0&t=1386349639>. A comment to Rule 3.8(f) also seems to suggest that the rule is aspirational, noting that a “prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing public opprobrium of the accused.” MODEL RULES OF PROF’L CONDUCT R. 3.8(f) cmt. 5 (2003).

comments, which—as suggested in a related rule—likely entails measures that assure police compliance, including educating and periodically reviewing law enforcement behavior.³²

Model Rules 3.6 and 3.8 were not the bar’s first attempt to address trial publicity.³³ Alabama issued the first code of legal ethics that contained a provision about attorneys’ extrajudicial statements in 1887, but there was no nationwide code until the ABA issued the “Canons of Professional Ethics” in 1908, which were soon adopted by many states.³⁴

However, it took the murder of a presidential assassin to get the bar to take trial publicity more seriously.³⁵ The Warren Commission, charged with investigating the assassination of President John F. Kennedy, found that media coverage might have indirectly contributed to the murder of the suspected assassin, Lee Harvey Oswald—and recommended that lawyers, police, and the media work together to ensure an individual’s right to a fair trial.³⁶ The ABA responded by creating the “Reardon Committee,”³⁷ which would go on to draft the precursor rule³⁸ to Rules 3.6 and 3.8.³⁹

The United States Supreme Court would also have its say in the crafting of the language.⁴⁰

B. *The Supreme Court Tries to Strike a Balance*

The current legal standards for pretrial and trial publicity are the result of a series of Supreme Court cases; this sub-section will briefly provide the facts, legal reasoning, and holdings of those key cases.

32. Rule 5.1 is comparable in that it governs the managerial responsibilities of partners or supervisory lawyers in law firms, a concept similar to the responsibility of prosecutors over law enforcement in Rule 3.8(f). *See* MODEL RULES OF PROF’L CONDUCT R. 5.1 (2003). Rule 5.1 states that a partner “shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct”; a comment to Rule 5.1 suggests “periodic review of compliance” in small firms, “more elaborate measures” in large firms, and “continuing legal education” in firms of all sizes. *Id.* at cmt. 3. Moreover, Rule 5.3 applies a similar supervisory standard to the supervision of nonlawyers by lawyers: “reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer” MODEL RULES OF PROF’L CONDUCT R. 5.3 (2003).

33. *See* Lipman, *supra* note 8, at 1515–16; *see also* Lonnie T. Brown, Jr., “*May It Please the Camera, . . . I Mean the Court*”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 95–96 (2004).

34. Lipman, *supra* note 8, at 1516. Section 17 of the Alabama Code provided that “[n]ewspaper publications by an attorney as to the merits of pending or anticipated litigation . . . tend to prevent a fair trial in the courts, and otherwise prejudice the due administration of justice. It requires a strong case to justify such publications” *Id.* (citing ALA. CODE OF ETHICS § 17 (1987)).

35. Brown, *supra* note 33, at 96.

36. *Id.*

37. The committee was named after its chair, Massachusetts Supreme Court Justice Paul Reardon. *Id.* at 97.

38. The rule was the Model Code of Professional Responsibility DR 7-107. *Id.* at 98, n.67.

39. *Id.* at 98.

40. *See id.* at 97.

1. *The Dr. Sheppard “Carnival” Leads to the “Reasonable Likelihood” Standard*

On Independence Day, 1954, a pregnant woman went to bed.⁴¹ She was found the next day “bludgeoned to death,” and a media firestorm erupted.⁴² Television shows, radio broadcasts, and newspaper articles—including a front-page editorial—pushed for the woman’s husband, Dr. Sam Sheppard, to face murder charges.⁴³ Weeks after “the ‘editorial artillery’ opened fire,” Dr. Sheppard was indicted. But the media firestorm only grew stronger at trial.⁴⁴

Inside the courtroom, a special table was set up for the media, with the first three rows in the gallery reserved for the press, and all rooms on that floor of the courtroom were used by reporters.⁴⁵ Sometimes the movement of people in and out of the courtroom made it difficult for participants in the trial to hear each other speak.⁴⁶ While Dr. Sheppard testified on the witness stand, a police officer issued a press release calling Dr. Sheppard a “[b]arefaced [l]iar.”⁴⁷ Outside the courthouse, cameras followed the jury—pictures of them appeared more than “40 times in the Cleveland papers alone.” The jurors had no instructions to “not read or listen to anything concerning the case.”⁴⁸ As for the judge, he participated in a “staged interview” while walking into the courthouse; he also happened to be up for a “hotly contested election”—as was the chief prosecutor.⁴⁹ The jury convicted Dr. Sheppard of second-degree murder.⁵⁰

Dr. Sheppard appealed his conviction to the Supreme Court, which reversed his denial of a habeas petition, and ordered the doctor released from prison.⁵¹ In a second trial in 1966, Dr. Sheppard was acquitted.⁵²

In *Sheppard*, the Supreme Court walked the tightrope between the Sixth and First Amendments, noting that “justice cannot survive behind walls of silence,” but that the “carnival atmosphere at trial could easily have been avoided”⁵³ Most relevant to the future of the Model Rules, the Court held:

41. *Sheppard v. Maxwell*, 384 U.S. 333, 335 (1966).

42. *Id.* at 339.

43. *See id.* at 339–41.

44. *See id.* at 341–49.

45. *Id.* at 342–43.

46. *Id.* at 344.

47. *Sheppard*, 384 U.S. at 349.

48. *Id.* at 343–45, 353. The jury was “sequestered” for its deliberations, but jurors had been allowed to call home every day of their five days of deliberations. *Id.* at 349.

49. *Id.* at 343–45, 354.

50. *Id.* at 335.

51. *Id.* at 363.

52. *Dr. Sam Sheppard, 46, Dies; Imprisoned for Wife’s Murder*, N.Y. TIMES (Apr. 7, 1970), <http://query.nytimes.com/mem/archive/pdf?res=F30A1FFC3E5A157493C5A9178FD85F448785F9>.

53. *Sheppard*, 384 U.S. at 349, 358.

But where there is a *reasonable likelihood* that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.⁵⁴

Hence, the first ABA standard required attorneys to avoid making extrajudicial statements that had a *reasonable likelihood* of preventing a fair trial.⁵⁵

2. A Problem “As Old as the Republic”⁵⁶ Leads to the “Substantial Likelihood” Standard

One fall evening in 1975, in a small town in Nebraska, a family of six was found dead in their house.⁵⁷ “[W]idespread news coverage” followed—locally, regionally, and nationally.⁵⁸ Soon after the arrest of Erwin Simants, the prosecutor and the defense attorney successfully asked the court to enter an order “prohibiting those in attendance [at the trial] from ‘releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced’”⁵⁹

The press was not pleased, and they attempted to get the order vacated.⁶⁰ Instead, another judge⁶¹ found that the nature of the crimes created a “*clear and present danger* that pre-trial publicity could impinge upon the defendant’s right to a fair trial,” applying the order until a jury was impaneled and restricted journalists from reporting on five topics.⁶² The Nebraska Supreme Court upheld the order but reduced its scope to prohibiting the reporting of three subjects.⁶³

The U.S. Supreme Court was next, and the majority pointed out early in the opinion that the “problems presented by this case are almost as old as the Republic.”⁶⁴ After vacillating between discussions of the First and Sixth Amendments, observing that the “authors of the Bill of Rights did not undertake to assign priorities” to either amendment, and concluding that “prior restraints on speech . . . are the least tolerable infringement on First Amendment rights,” the Court reversed the Nebraska Supreme Court.⁶⁵ However,

54. *Id.* at 363. (emphasis added).

55. *See* Brown, *supra* note 33, at 97.

56. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 547 (1976).

57. *Id.* at 542.

58. *Id.*

59. *Id.*

60. *Id.* at 543.

61. *Neb. Press Ass’n*, 427 U.S. at 543. The petitioners intervened in state district court; the case had since been transferred over from county court where a different judge issued the initial order on public dissemination. *Id.*

62. *Id.* (emphasis added).

63. *Id.* at 545. The three protected subjects were confessions to officers, confessions to third parties other than the press, and other facts “strongly implicative” of the defendant. *Id.*

64. *Id.* at 547.

65. *Id.* at 559–61, 570.

the Court upheld the “clear and present danger” test for determining whether pre-trial publicity would interfere with a defendant’s right to a fair trial.⁶⁶ The Court had moved to a more “stringent” test, tipping the see-saw of Constitutional balance toward the First Amendment.⁶⁷

In light of the Supreme Court’s holding, the Model Rules were updated.⁶⁸ Instead of adopting the “clear and present danger”⁶⁹ test verbatim, the Rules struck a compromise between “reasonable likelihood” and “clear and present danger,” adopting a “substantial likelihood” standard.⁷⁰ A comment to Rule 3.6 listed subjects likely to prejudice a jury, such as the “character, credibility, reputation, or criminal record of a party.”⁷¹ Additionally, Rule 3.8(e)—the precursor to Rule 3.8(f)—emerged, requiring prosecutors to “exercise reasonable care to prevent” law enforcement officials from making any extrajudicial statement that a “prosecutor would be prohibited from making under Rule 3.6.”⁷² But what would the Supreme Court say about the new standard?

3. *The “Substantial Likelihood” Standard (Seemingly) Passes its Constitutional Test*

It was the night before an attorney planned to hold a press conference about his client, and the attorney was curious: did Nevada’s version of Rule 3.6 allow him speak publicly in the hours after his client was indicted?⁷³ After researching the issue for several hours, the attorney decided he could.⁷⁴ The attorney made his statement.⁷⁵ Fortunately for his client, a jury later acquitted the defendant on all counts.⁷⁶ Unfortunately for the attorney, he was disciplined by the Southern Nevada Disciplinary Board of the State Bar for violating Nevada’s version of Rule 3.6.⁷⁷ The attorney’s case made its way to the Supreme Court.⁷⁸

The Supreme Court, in two 5-4 majority opinions, upheld the “substantial likelihood” standard but also held that it was incorrectly applied to

66. *Neb. Press Ass’n*, 427 U.S. at 562–63.

67. See Lipman, *supra* note 8, at 1520; see also Brown, *supra* note 33, at 100.

68. See Brown, *supra* note 33, at 100.

69. The ABA Standards for Criminal Justice did adopt the “clear and present danger” test. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1067–68 (1991).

70. Lipman, *supra* note 8, at 1520.

71. MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. 5 (1983); Lipman, *supra* note 8, at 1520–21.

72. MODEL RULES OF PROF’L CONDUCT R. 3.8(e).

73. See *Gentile*, 501 U.S. at 1033, 1044.

74. *Id.* at 1044.

75. *Id.* at 1042–43. Among his remarks, the attorney said that the evidence showed his client was innocent, that the real thief was a police detective, and that other witnesses were not credible. *Id.* at 1045.

76. *Id.* at 1033.

77. *Gentile*, 501 U.S. at 1033.

78. Before appealing to the U.S. Supreme Court, the attorney had appealed to the Nevada Supreme Court, which affirmed the decision of the disciplinary board. *Id.*

the Nevada attorney, thereby reversing the Nevada Supreme Court.⁷⁹ Chief Justice William Rehnquist wrote in the first majority opinion that “we agree with the majority of the [s]tates that the ‘substantial likelihood of material prejudice’ standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State’s interest in fair trials.”⁸⁰

In the other majority opinion, Justice Anthony Kennedy noted that the case was a “poor vehicle” to assess a court’s ability to regulate an attorney’s speech, but that the attorney’s comments did not demonstrate any “threat to the legal process”⁸¹ Notably, Justice Kennedy suggested in his dicta that defense attorneys have greater freedom to speak than the “police, the prosecution, and other government officials” who hold “innumerable avenues for the dissemination of information adverse to the criminal defendant,” whereas a defendant “cannot speak without fear of incriminating himself”⁸² Nonetheless, the “substantial likelihood” test passed the Supreme Court, although its boundaries remained undefined.⁸³

Today’s Model Rules 3.6 and 3.8 include the “stringent” and “subjective” “substantial likelihood” standard, printed *infra*. Additionally, comments to Rule 3.8 note that a prosecutor “has the responsibility of a minister of justice and not that simply of an advocate,” and “should[] avoid comments which have no legitimate law enforcement purpose”⁸⁴

C. *The Prosecutor’s Duties in Striking a Balance*

The Model Rules are not the only rules related to trial publicity that prosecutors are required to follow. There are a variety of federal and local rules that supplement or reiterate the Model Rules.⁸⁵

U.S. attorneys must adhere to federal regulations outlined in Title 28 of the Code of Federal Regulations.⁸⁶ The regulations forbid “personnel of the Department of Justice” from releasing “information for the purpose of influencing a trial”⁸⁷ The regulations list the types of objective information⁸⁸ that personnel can release for criminal matters, while also stating that “[d]isclosures should . . . not include subjective observations.”⁸⁹ Addi-

79. *Id.* at 1058, 1076.

80. *Id.* at 1075.

81. *Id.* at 1057–58.

82. *Id.* at 1056.

83. *See Gentile*, 501 U.S. at 1057.

84. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1, 5.

85. *See, e.g.*, 28 C.F.R. § 50.2 (2014).

86. *Id.* *See also* Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross The Line?* 44 GA. L. REV. 1021, 1035 (2010).

87. 28 C.F.R. § 50.2(a).

88. The regulations allow personnel to release a defendant’s name, age, residence, employment, marital status, the charge(s), investigating agency, and “circumstances immediately surrounding an arrest” *Id.* § 50.2(b).

89. *Id.*

tionally, the regulations state that personnel “should refrain” from disclosing information that could create a danger of prejudice, such as observations about a defendant’s character.⁹⁰

The United States Attorneys’ Manual (hereinafter “USAM”) also has policies related to trial publicity that “parallel” the federal regulations, but offer more specificity.⁹¹ The USAM begins by noting that its guidelines balance the “right of the public to know,” “an individual’s right to a fair trial,” and “the government’s ability to effectively enforce the administration of justice.”⁹² The USAM lays out specific guidelines on press conferences, which it says “should be held only for the most significant and newsworthy actions, or if a particularly important deterrent or law enforcement purpose would be served.”⁹³ In addition, the USAM lists “exceptional circumstances” when it “may be appropriate” to have a press conference, including crimes with a “heinous or extraordinary nature,” an “imminent threat to the community,” or when “a request for public assistance is vital.”⁹⁴ Generally, the USAM follows much of the intent of the Model Rules in that it prohibits personnel from disclosing information that would have a “substantial likelihood of materially prejudicing an adjudicative proceeding.”⁹⁵

In addition to the rules and guidelines followed by federal prosecutors, there are a variety of other federal, state, county, municipal, and court rules that offer varying degrees of specificity.⁹⁶ For example, the U.S. District Court for the District of Minnesota states that it is “the duty of a lawyer” to not release information “if there is a reasonable likelihood that such dissemination will interfere with a fair trial or otherwise prejudice the due administration of justice.”⁹⁷

D. *The Police’s Role in Striking a Balance*

Law enforcement agencies also have their own rules concerning trial publicity.⁹⁸ At the federal level, the same Department of Justice regulations

90. *Id.* § 50.2(b)(6). The regulations forbid dissemination of information “concerning a defendant’s prior criminal record.” *Id.* § 50.2(b)(4).

91. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, 1-7.000 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/; Levenson, *supra* note 86, at 1037–38.

92. UNITED STATE ATTORNEYS’ MANUAL 1-7.110.

93. *Id.* at 1-7.401(A).

94. *Id.* at 1-7.401(C).

95. *See id.* at 1-7.500.

96. *See, e.g.*, MINN. LR 83.2 (Oct. 13, 2014), available at http://www.mnd.uscourts.gov/local_rules/Local-Rules-Master.pdf.

97. *Id.*

98. *See e.g.*, MINNEAPOLIS POLICE DEP’T POLICY AND PROCEDURE MANUAL, 6-200 available at http://www.ci.minneapolis.mn.us/police/policy/mpdpolicy_6-200_6-200 (last visited Nov. 14, 2014); CHI. POLICE DEP’T, NEWS MEDIA GUIDELINES GEN. ORDER G09-02 (Dec. 28, 2012), available at <http://directives.chicagopolice.org/directives/data/a7a57be2-12937790-40c12-9382-0d6eaf>

that apply to U.S. attorneys also apply to Justice Department law enforcement personnel, such as Federal Bureau of Investigation (hereinafter “FBI”) agents and U.S. Marshals.⁹⁹

Some local departments have rules on trial publicity as well.¹⁰⁰ For example, the Los Angeles Police Department has a short guideline that mentions free press as an “essential element of the First Amendment,” encourages media to be told “all that can be told that will not impinge on a person’s right to a fair trial, seriously impede a criminal investigation, imperil a human life, or seriously endanger the security of the people.”¹⁰¹ The King County (Washington) Sheriff’s Office has a policy stating that “department members should release all reasonable information about an event to the news media upon request,”¹⁰² and when discussing a suspect, “[g]eneral details of the alleged offense.” However, an introduction to the manual notes that what follows “are not hard, fast rules, but policies and procedures for delivering police services to you.”¹⁰³

II. IF IT BLEEDS, IT LEADS—AND TWEETS, POSTS, BLOGS, AND E-MAILS

*“Who controls the present controls the past.”*¹⁰⁴

The press conference that opened Part I of this Comment took place about a year after Hurricane Katrina, and the attorney general used the occasion to announce the arrests of two nurses and a doctor at a New Orleans hospital.¹⁰⁵ Investigators believed the medical professionals had engaged in mercy killing—second-degree murder in the prosecutor’s opinion.¹⁰⁶ The attorney general told the reporters that this was “not euthanasia. This is plain-and-simple homicide,” and then provided the caveat that homicide had to be proven in court.¹⁰⁷ Most reporters did not include the caveat in their stories, instead opting for the “inflammatory quote.”¹⁰⁸

This part of the Comment will explain: why extrajudicial comments receive oversized coverage in the media; why the police-and-reporter relationship often works against the accused; why police (and prosecutors) have little control over how their comments are passed on to the public; why

e597221637.html; L.A. POLICE DEP’T, 2014 1ST QUARTER MANUAL, sec. 115, available at http://www.lapdonline.org/lapd_manual/ (last visited Nov. 14, 2014).

99. 28 C.F.R. § 0.1 (2014).

100. See e.g., MINNEAPOLIS POLICE DEP’T, *supra* note 98; CHI. POLICE DEP’T, *supra* note 98; L.A. POLICE DEP’T, *supra* note 98.

101. L.A. POLICE DEP’T, *supra* note 98.

102. KING CNTY. SHERIFF, GEN. ORDERS MANUAL, 1.06.025 (July 10, 2009), available at <http://www.kingcounty.gov/safety/sheriff/About/~media/safety/sheriff/documents/g/GOM.ashx>.

103. *Id.* at 2 (introductory letter from Sheriff Susan L. Rahr).

104. GEORGE ORWELL, 1984 533 (Houghton Mifflin Harcourt, 1987).

105. FINK, *supra* note 17, at 342–43.

106. *Id.* at 343.

107. *Id.* at 344.

108. *Id.*

social media inflames the spread of information; and how the information goes on to affect the public—including jurors.

A. *The Police-Media Criminal Industrial Complex*

Crime stories are popular; according to a study in 1995, crime comprised 25 percent of the coverage in newspapers and 20 percent in television.¹⁰⁹ Crime is often the most popular type of news story in a newspaper or television broadcast.¹¹⁰ And while traditional media audiences have become more fragmented, a 2013 study by the Pew Research Center found that during a month, 75 percent of U.S. adults watch local television news and 65 percent view network newscasts.¹¹¹ Another 2013 Pew study found that, despite the increasing popularity of social media as a news source, 42 percent of people who seek news on Facebook also watch local television news.¹¹²

Moreover, ownership of local television stations is consolidating: a 2013 study found that thirteen owners control 85 percent of the major affiliated stations in the country's twenty-five largest media markets.¹¹³ Declining diversity of ownership will likely lead to a decline in diversity of story selections as fewer voices contribute to editorial decisions.

From whom, then, do journalists receive their crime information? The most popular source is the police officer.¹¹⁴ The police “are easily accessible, constantly available, and willing to participate to control crime images.”¹¹⁵ In fact, according to one study, law enforcement “represented between 25 and 45 percent of the sources cited in crime stories.”¹¹⁶ The police have become such a popular and default source for reporters that stories will often use the “generic ‘police said’ without specific attribution.”¹¹⁷ Therefore, “[p]olice are by far the most visible of all criminal justice institutions”¹¹⁸

109. Chermak & Weiss, *supra* note 12, at 503; Steven Chermak, *Image Control: How Police Affect the Presentation of Crime Stories*, 14 AM. J. POLICE 2, 22 (1995).

110. See Steven Chermak, *Crime in the News Media: A Refined Understanding of How Crime Becomes News*, in 10 MEDIA, PROCESS, AND THE SOCIAL CONSTRUCTION OF CRIME 95, 97 (Gregg Barak ed., 1995).

111. AMY MITCHELL, ET AL., HOW AMERICANS GET TV NEWS AT HOME 1 (Pew Research Center 2013), available at http://www.journalism.org/files/2013/10/Nielsen_Latest_10-11.pdf.

112. AMY MITCHELL, ET AL., THE ROLE OF NEWS ON FACEBOOK 2 (Pew Research Center 2013), available at http://www.journalism.org/files/2013/10/facebook_news_10-24-2013.pdf.

113. S. DEREK TURNER, CEASE TO RESIST: HOW THE FCC'S FAILURE TO ENFORCE ITS RULES CREATED A NEW WAVE OF MEDIA CONSOLIDATION 2 (Free Press 2013), available at http://www.freepress.net/sites/default/files/resources/Cease_to_Resist_Oct._2013_0.pdf.

114. See Chermak & Weiss, *supra* note 12, at 503.

115. Chermak, *supra* note 110, at 29.

116. Chermak, *supra* note 12, at 503.

117. Chermak, *supra* note 110, at 31. As a reporter, the author of this Comment can attest to frequently beginning his television reports with “police say.”

118. Chermak, *supra* note 12, at 502.

Given law enforcement's vital role in shaping news coverage, reporters and police have developed a mutually beneficial relationship.¹¹⁹ The police need the media "in order to manufacture a legitimate reputation."¹²⁰ The media need the police as a convenient, easily accessible source "in order to produce stories about crime efficiently."¹²¹ Therefore, reporters are careful to avoid burning bridges with the police, and lose them as a source¹²²—incentivizing coverage that glorifies police (and indirectly, the prosecution) and shames the criminal.¹²³

Once the media's incentive to attract readers and viewers is factored in, the pro-police/anti-defense bias¹²⁴ is magnified by sensationalism, speculation, and a need to feed the public's curiosity for often lurid details.¹²⁵ Furthermore, once a criminal case enters the public sphere and grabs the attention of the media, both the police and prosecution lose control of the narrative as unsubstantiated reports and opinions replace any official record of the case.¹²⁶ For example, when members of Duke University's lacrosse team were accused of rape in 2006, the media falsely reported that one of the suspects had been arrested for "gay bashing," and commentators "labeled the players racist" with little substantiation.¹²⁷

The mass shooting at Columbine High School in 1999 demonstrated that, once a news event becomes public—via police reportage or live television feeds—it belongs to the public, and investigators' grip on the narrative erodes.¹²⁸ In the days and months after the shooting, the media falsely reported that the spooky "Trench Coat Mafia" was behind the attack, that

119. *Id.* at 504; see also Andrew E. Taslitz, *The Duke Lacrosse Players and the Media: Why the Fair Trial-Free Press Paradigm Doesn't Cut It Anymore*, in RACE TO INJUSTICE: LESSONS LEARNED FROM THE DUKE LACROSSE RAPE CASE 175, 183 (Michael L. Seigel, ed., 2009).

120. Chermak & Weiss, *supra* note 12, at 501.

121. See Chermak, *supra* note 110, at 26; see also Chermak, *Crime in the News*, *supra* note 111, at 97; Mark A. Beebe, *Prosecutors, Politics, Press and Prejudice*, 39 IDAHO L. REV. 377, 394–95 (2002–2003). Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1, 23 (1989).

122. Chermak & Weiss, *supra* note 12, at 503.

123. See Drechsel, *supra* note 121, at 23.

124. See Taslitz, *supra* note 119, at 183–84 (writing that "reporters repeatedly deal in different cases with the same police officers . . . [y]et a reporter might cross a particular *defense attorney's* path but once, creating less incentive to curry favor with the defense").

125. See generally, RONALD L. GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* 15–16 (New York University Press 1998) (describing the attention "sensational" crimes receive); see also RICHARD L. FOX ET AL., *TABLOID JUSTICE: CRIMINAL JUSTICE IN AN AGE OF MEDIA FRENZY* 62 (Lynne Reinner Publishers, 2nd ed. 2007); MARK GERAGOS & PAT HARRIS, *MIS-TRIAL: AN INSIDE LOOK AT HOW THE CRIMINAL JUSTICE SYSTEM WORKS . . . AND SOMETIMES DOESN'T* 221 (Gotham Books, 2013) (writing that defense attorneys "realize that most articles about our clients are going to be negative").

126. See generally, Taslitz, *supra* note 119, at 192–94.

127. *Id.* at 195. The now-disbarred district attorney, Mike Nifong, sometimes fueled the false media reports.

128. See generally, DAVE CULLEN, *COLUMBINE* 67 (2009) (providing a detailed analysis of the tragedy at Columbine and the public response).

both shooters were loners and outcasts, and that one victim had martyred herself by answering affirmatively to one of the killer's questions about whether she believed in God.¹²⁹ Moreover, imprecise language by the sheriff—who “winged” a press conference—magnified false information, such as the death count, number of shooters, and role of other students.¹³⁰

In sum, the police have a strong influence on crime coverage, and sloppiness by either the police or reporters, or both, can lead to sensational coverage that is anti-defendant or simply wrong.

B. *The Social Media Parade*

The influence of traditional media outlets has declined while the use of social media has surged.¹³¹ Newspaper newsrooms are 30 percent smaller than in 2000, network-news audiences are down 55.5 percent compared to 1980, and investigative reporting is declining at local television stations.¹³² Blogs, Facebook, Twitter, Instagram, Message Boards, Pinterest, LinkedIn, and other forms of social networking can all influence journalists, attorneys, courts, and trials.¹³³

The influence of social media would prove too irresistible for prosecutors in New Orleans, where a “bizarre and appalling turn of events” would involve—not the tossing of beads on Bourbon Street—but the tossing of anonymous barbs on a newspaper's online message board.¹³⁴ As a result of this prosecutorial misconduct, former police officers who had been sentenced to prison for gunning down civilians in the aftermath of Hurricane Katrina would be ordered released pending a new trial.¹³⁵ The federal judge determined that the assistant U.S. attorneys who prosecuted the officers had been posting comments on the Nola.com website.¹³⁶ The prosecutors posted the comments under articles about the New Orleans Police Department, making assertions that the department was “corrupt,” “ineffectual,” “a joke for a long time,” and writing phrases like “[t]here is an old Italian proverb: the fish rots from the head down.”¹³⁷ In a blistering and lengthy opinion, Judge Kurt D. Engelhart evaluated the prosecutors' conduct using the Model Rules, federal regulations, and local court rules and found that they

129. *Id.* at 72, 225–33.

130. *Id.* at 85–86.

131. See generally, Lili Levi, *Social Networks and the Law: Social Media and the Press*, 90 N.C.L. REV. 1531, 1554, 1572 (2012) (describing the effect social media has had on news consumption); see also J. Paul Zimmerman, *A Practical Guide to the Development of Jury Charges Regarding Social Media*, 36 AM. J. TRIAL ADVOC. 641, 641 (2013).

132. Levi, *supra* note 131, at 1538–46.

133. See Zimmerman, *supra* note 121, at 641; see also Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring An Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 7 (2012).

134. *United States v. Bower*, 969 F. Supp. 2d 546, 550 (E.D. La. 2013).

135. *Id.* at 549–50, 627.

136. *Id.* at 545–58.

137. *Id.* at 578.

violated all of them.¹³⁸ The judge held that the conduct was so “egregious” that “prejudice need not be shown.”¹³⁹ Near the end of the opinion, Judge Engelhart offered a timely warning:

The Court cannot fathom why at least three . . . highly intelligent . . . officials thought posting comments publicly was a good idea, other than to have their corrosive opinions on public display for all to see, read, and accept as correct . . . [T]he fact that the government’s actions were conducted in anonymity makes it all the *more* egregious . . . Re-trying this case is a very small price to pay in order to protect the validity of the verdict in this case, the institutional integrity of this Court, and the criminal justice system as a whole.¹⁴⁰

C. *Media: The Sound and the Fury*

Both traditional and social media can be, as Judge Engelhart recognized, a potent communications-weapon, pushing the “social pressures of group interactions” and raising the possibility of “groupthink.”¹⁴¹ Social sciences teach us that what people see, read, and hear in the media can matter.¹⁴²

Media coverage can magnify an individual’s preexisting beliefs because “people are more likely to remember ambiguous information that is consistent with their schemata than inconsistent information”¹⁴³ Moreover, possibly because of the media’s often pro-police bias, “individuals exposed to actual media reports of crime also develop a pro-prosecution orientation.”¹⁴⁴ If exposed to inadmissible information about a defendant, “the majority of extant empirical research indicates that jurors do not adhere to limiting instructions.”¹⁴⁵

One empirical study found that “juries exposed to factual publicity were significantly more likely to convict the defendant than those not exposed.”¹⁴⁶ The authors of the study concluded that “it is not disturbing that voir dire accomplishes so little. What is disturbing is that we expect voir

138. *See id.* at 568–78.

139. *Id.* at 620.

140. *Id.* at 625–27.

141. Levi, *supra* note 132, at 1565.

142. *See generally* Edith Greene, *Media Effects on Jurors*, 14 LAW & HUMAN BEHAVIOR 439, 448 (1990) (concluding that “media can have an impact on jury decision making”); *see also* Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCH., PUB. POL., & LAW 677, 679 (2000).

143. Greene, *supra* note 142, at 445.

144. Lieberman & Arndt, *supra* note 142, at 679.

145. *Id.* at 703.

146. Norbert L. Kerr, et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. 665, 675 (1990–1991).

dire to accomplish so much.”¹⁴⁷ A review of six empirical studies found that “juries are unwilling (or unable) to set aside information that appears relevant to determining what happened—regardless of what the law (and thus the judge) have to say about it.”¹⁴⁸ The same review examined a meta-analysis of 44 studies and found a “modest positive relationship . . . between exposure to negative pretrial publicity and judgments of guilt.”¹⁴⁹

III. MODEL RULE 3.8(F) IS OUT OF TOUCH

*“He must be brought to the bar without irons, or any manner of shackle or bonds; unless there be evident danger of escape.”*¹⁵⁰

In the days following the press conference that began Parts I and II of this Comment, information slowly trickled to the press, culminating in a CNN anchor reporting, “from an act of God, to playing God, accusations of intentional killings in the wake of Katrina, as one doctor is worried a colleague may have done the unthinkable.”¹⁵¹ The doctor under investigation then heard her name in the news report, and was “overcome by anger, grief, and outrage.”¹⁵² The prosecutor had not officially released her name.¹⁵³ The police had not officially released her name.¹⁵⁴ It did not matter that she was not charged; the media pressure was too intense.¹⁵⁵ She was forced to stop practicing medicine.¹⁵⁶

This part of the Comment will argue: that Rule 3.8(f) is not adequately followed by prosecutors due to the lack of enforcement; that it is difficult for prosecutors to supervise law enforcement’s extrajudicial comments; that political incentives discourage stringent adherence; and that the reality of the media environment damages those cast as criminals—whether charged or not.

147. *Id.* at 699.

148. Dennis J. Devine, et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 *PSY., PUB. POL., & LAW* 622, 666 (2000).

149. *Id.* at 687; see also Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 *LAW & HUM. BEHAV.* 219, 228 (1999) (finding that the “data support the hypothesis that negative pretrial publicity significantly affects jurors’ decisions about the culpability of the defendant”).

150. 4 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 317 (1769), available at http://avalon.law.yale.edu/18th_century/blackstone_bk4ch25.asp.

151. FINK, *supra* note 17, at 306.

152. *Id.* at 307.

153. See *id.* at 323–85 (noting the many unofficial leaks of information).

154. See *id.*

155. See *id.* at 307.

156. *Id.*

A. *Prosecutors are Rarely Disciplined in Criminal Cases for Extrajudicial Comments*

Prosecutors are either ethical angels or very fortunate because they rarely face discipline.¹⁵⁷ One study found zero, possibly one, reported discipline cases for violations of Rule 3.6,¹⁵⁸ which prohibits prejudicial extrajudicial comments.¹⁵⁹ The study did not examine reported discipline cases for state rules equivalent to Rule 3.8(f), but if prosecutors avoid discipline for their own extrajudicial comments under Rule 3.6, then it is unlikely that they are facing discipline for law enforcement's comments under Rule 3.8(f).¹⁶⁰

The absence of reported discipline cases does not necessarily suggest that there is any widespread cover-up or moral lapses, but is likely explained by limited resources, absence of individual clients to bring complaints, a desire for disciplinary authorities to avoid interfering in a case until it has gone through the entire appellate process, and a high standard of proof.¹⁶¹ The Model Rules for Lawyer Discipline require proof of misconduct "by clear and convincing evidence," with the burden of proof on the disciplinary counsel¹⁶²—a tough standard given that prosecutors are only to "refrain" from making prejudicial extrajudicial comments.

If deterrence is one of the purposes for disciplining an individual, then the author of this Comment is concerned that the lack of discipline for trial publicity rules may fail to discourage rule-breaking—damaging a citizen's right to a fair trial.¹⁶³

Of course, there are other means, such as criminal contempt, for a prosecutor to face punishment other than discipline by a disciplinary board. However, judges rarely use the contempt sanction in "highly publicized cases when a prosecutor participates in publicity . . ." ¹⁶⁴ One prominent

157. See generally Kenneth Rosenthal, *Prosecutor Misconduct, Convictions, and Double Jeopardy: Case Studies in Emerging Jurisprudence*, 71 TEMP. L. REV. 887, 889 (1998) ("The prosecutor . . . is not required to explain or justify his actions, let alone have such explanation subject to appellate review."); see also BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 14.12 (2d ed. 2002).

158. Because the Model Rules do not govern in every state, the study "attempted to identify violations of state versions of rules that corresponded to" the rule. Zacharias, *supra* note 12, at 752, n.107.

159. *Id.* at 751.

160. The author of this Comment did not find any cases of Rule 3.8(f) violations.

161. See Zacharias, *supra* note 11, at 756, 758, 762.

162. MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT R. 18(3).

163. See generally Zacharias, *supra* note 11, at 768 (noting "the most obvious example" of violating publicity rules is "speaking to the press during litigation").

164. Richard W. Holmes, *Prosecutorial Dealing with the Media: Duties, Remedies, and Liability*, 28 J. LEGAL PROF. 177, 183 (2003–2004) (citing GERSHMAN, PROSECUTORIAL MISCONDUCT §§ 6:3–6:7).

defense attorney argues that “judges don’t like to do things that are controversial—especially when there’s no precedent.”¹⁶⁵

For example, in 2008, Pat Fitzgerald, a U.S. attorney, held a press conference to announce criminal charges against Rod Blagojevich, the governor of Illinois at the time.¹⁶⁶ In the conference, Fitzgerald called Blagojevich’s conduct “appalling,” and enough to make “Lincoln roll over in his grave.”¹⁶⁷ Fitzgerald was not disciplined.¹⁶⁸

B. *Copping Out On the Cops*

While Rule 3.8(f) calls for prosecutors to “exercise reasonable care” to prevent law enforcement from making prejudicial extrajudicial statements, actually exercising the “reasonable care” can be difficult.¹⁶⁹ Exercising reasonable care is especially difficult in cross-jurisdictional investigations, when law enforcement and the prosecution work out of different departments or agencies. For example, one former federal prosecutor said, “when you have state prosecutors who don’t control the police or when you have federal prosecutors working with state officers, or even sometimes agencies outside the DOJ” then supervision can be a “problem.”¹⁷⁰ Another former federal prosecutor agreed, adding that “it helps to have all members of the team to be in the same department. Control is much easier to exercise.”¹⁷¹

Additionally, control becomes even more difficult when dealing with law enforcement offices headed by individuals who see themselves as “completely independent” of the prosecutor, and who are prone to “speaking their minds to the press, on a confidential basis. These ‘leaks’ typically are reported as unattributed, making it difficult to determine who made them.”¹⁷² On the other hand, control is easier when both law enforcement

165. Telephone interview with Joe Friedberg, in Minneapolis, Minn. (Nov. 1, 2013) (on file with author).

166. *Transcript: Justice Department Briefing on Blagojevich Investigation*, N.Y. TIMES (Dec. 9, 2008), http://www.nytimes.com/2008/12/09/us/politics/09text-illinois.html?pagewanted=all&_r=0.

167. *Id.*

168. Kelly Selesnick, *Innocent Until Proven Guilty: Will Pat Fitzgerald’s Public Statements Prejudice Rod Blagojevich’s Trial?*, 23 GEO. J. LEGAL ETHICS 827, 832–33 (2010). The lack of disciplinary action can possibly be explained by Illinois adopting a rule with a higher threshold for prejudice: “extrajudicial comments that pose a *serious and imminent* threat of heightening public condemnation of the accused” (emphasis added). *Id.* at n.15.

169. See generally E-mail from Hank Shea, Senior Distinguished Fellow, UST School of Law, to Ted Haller (Sept. 19, 2013 8:17 CST) (on file with author) (noting that prosecutors shall lead by example and inform the Court when someone on their team violates Rule 3.8(f)); Interview with Mark Osler, Professor of Law at UST School of Law, in Minneapolis, Minn. (Oct. 3, 2013) (training prosecutors to know what information they can share is crucial).

170. Osler Interview, *supra* note 169.

171. Shea E-mail, *supra* note 169.

172. *Id.*

and prosecution are run out of the same department, such as the U.S. Department of Justice, and are required to follow the same regulations.¹⁷³

Departments' varying policies create an additional hurdle to effective control of law enforcement by prosecutors. For example, one controversial act is the so-called perp walk, when an accused person (perpetrator) is walked in front of news cameras—the video is then frequently looped, often in guilt-implying slow motion, in newscasts and on the Internet.¹⁷⁴ Perp walks are highly prejudicial, heightening “public condemnation of the accused.”¹⁷⁵ Perp walks serve no law enforcement purpose except, perhaps, deterrence.¹⁷⁶ For this reason, federal regulations prohibit employees of the Justice Department from taking action “to encourage or assist news media in photographing or televising a defendant or accused person being held or transported”¹⁷⁷ Similarly the U.S. Attorney’s Manual states “no advance information will be provided to the news media” when a search warrant or arrest warrant is to be executed”¹⁷⁸ Many local departments, including the Chicago Police Department, prohibit “[s]taging the movement of an arrestee for the sole purpose of allowing the arrestee to be photographed or videotaped by the news media”¹⁷⁹ However, perp walks still occur regularly, and many law enforcement agencies have no policies prohibiting the practice.¹⁸⁰ If truly following the spirit of Rule 3.8(f), it is difficult to see any situation where a perp walk is proper given that prosecutors must “exercise reasonable care to prevent investigators . . . associated with the prosecutor . . . from making an extrajudicial statement” that has a “substantial likelihood of heightening public condemnation of the accused”¹⁸¹

Finally, as demonstrated by the case of prosecutors posting anonymous comments online, *infra* Part II(B), social media creates an additional hurdle in controlling the statements of law enforcement. It is nearly impossible for a prosecutor to have the knowledge that a police officer is posting prejudicial comments online, and even if the comments are not anonymous, monitoring social media would be unduly time-consuming.

173. *See supra*, Part I(C).

174. *See* Ernest F. Lidge, *Perp Walks and Prosecutorial Ethics*, 7 NEV. L.J. 55 (2006).

175. *Id.* at 56.

176. *See id.* at 66.

177. Judicial Administration Statements of Policy, 28 C.F.R. § 50.2(b)(7) (1975).

178. DEP’T OF JUSTICE, UNITED STATES ATTORNEYS’ MANUAL, 1-7.600 (1997), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/.

179. CHI. POLICE DEP’T, *supra* note 98.

180. When I was a television news reporter, I regularly participated in the videotaping of suspects, and was often assisted by elected county sheriffs in notifying me of the proper time and place to access the movement of the accused. Occasionally, I had the opportunity to stick a microphone in the individual’s face while asking suggestive questions.

181. MODEL RULES OF PROF’L CONDUCT R. 3.8(f). *See* Lidge, *supra* note 174, at 68–71. Lidge makes a compelling argument that a perp walk is a “statement” as intended by Rules 3.6 and 3.8. *See id.* at 57–58.

C. *When Police Get Political*

Unfortunately, politics offers an incentive for both prosecutors and police to make prejudicial, extrajudicial comments.¹⁸² According to a government study in 1998, more than 95 percent of “chief, state, and local felony prosecuting attorneys” were elected.¹⁸³ County sheriffs are elected positions.¹⁸⁴ And of course, non-elected law enforcement officials are influenced by politicians seeking desired outcomes in high-profile cases.

Therefore, both the police and prosecutors have an incentive to appear “tough on crime,” which can lead to prejudicial, extrajudicial comments.¹⁸⁵ Examples of these kinds of comments abound, including those discussed *infra* in the introduction: a North Carolina police chief called a suspect a “cold-blooded murderer;” a South Carolina sheriff called a suspect a “monster;” a New York sheriff called a man “cowardly.”¹⁸⁶ Maricopa County’s Sheriff Joe Arpaio called someone an “unfit mother” in one press release, and another person “sick” in his office’s very next release.¹⁸⁷

IV. REDUCING PREJUDICIAL COMMENTS BY POLICE

*“We must both abide by the Bill of Rights, yet recognize when a First Amendment freedom conflicts with a Fifth Amendment protection.”*¹⁸⁸

It took a year for the Louisiana doctor, discussed in Parts I–III, to get back to practicing medicine; she was arrested, but never tried, for killing patients at a hospital during Hurricane Katrina.¹⁸⁹ The doctor’s defense attorney blasted the attorney general’s decision to arrest his client as “improper” and “unethical” conduct.¹⁹⁰ Meanwhile, the attorney general’s public information director “lamented” that the doctor’s “people were free to say anything they wanted about the events,” while “the prosecutors were bound to say nothing about all the evidence they possessed.”¹⁹¹

182. See Scott M. Matheson, *The Prosecutor, the Press, and Free Speech*, 58 *FORDHAM L. REV.* 865, 888 (1990); Stanford C. Gordon & Gregory A. Huber, *Citizen Oversight and the Electoral Incentives of Criminal Prosecutors*, 46 *AM. J. POL. SCI.* 334, 335 (2002).

183. Gordon & Huber, *supra* note 182, at 335.

184. David N. Falcone & L. Edward Wells, *The County Sheriff as a Distinct Policing Modality*, 14 *AM. J. POL. SCI.* 123, 127 (1995).

185. See generally Gordon & Huber, *supra* note 182, at 335 (“[p]opular wisdom suggests that prosecutors, when seeking reelection, must cultivate the image that, as guardians of public safety, they are ‘tough on crime’”).

186. Murphy, *supra* note 2; Dowty, *supra* note 5; Schafer, *supra* note 4.

187. NEWSRelease, *supra* note 7.

188. Dick Thornburgh, Attorney General of the United States, Remarks at the Associated Press Managing Editors Ass’n, Dallas, Tex. (Oct. 31, 1990).

189. FINK, *supra* note 17, at 428–29.

190. *Id.* at 428.

191. *Id.* at 429.

The public information officer was understandably frustrated, but the Model Rules have it right: the prosecutor is a “minister of justice”¹⁹²—one who has the discretion of *whether* to charge, *what* to charge, *who* to charge, and *when* to charge—possessing the ability to destroy someone’s life. The outcome of a trial is often immaterial to the reputational, psychological, familial, and economic toll of being named in the media as a suspect. Therefore, in order to preserve the right to a fair trial, defense attorneys should have greater freedom to fight back. Their clients have no choice in their charges, but the prosecutors do.

Moreover, as this Comment has explained, there is still a loophole: law enforcement. Police can make public and private comments, leak information, and comment anonymously via social media. Prosecutors can help minimize this loophole by exercising their required “reasonable care” to ensure law enforcement’s comments are not “heightening public condemnation of the accused.”¹⁹³ This final part of the Comment will argue: that a cultural paradigm shift is needed, beginning with leadership; that better training can reduce harmful extrajudicial comments; that social media jury instructions are needed; and that journalists need education on prosecutor’s responsibilities.

A. *An Opportunity for Leadership*

Leadership is needed. A rule will not change the Supreme Court’s hesitance to constrain freedom of speech. A rule change will not alter the symbiotic relationship between police and journalists. A rule change will not shine a light on anonymous posts in social media. A rule change will not reduce the coverage of crime in the news. A rule change will not open a prosecutor’s schedule, allowing intensive supervision of law enforcement. A rule change will not minimize political incentives to make harmful public comments.

As one former federal prosecutor wrote, “[a]bove all else, prosecutors must lead by example. Comply with Rule 3.6 and 3.8 at all times . . . The vast majority of law enforcement personnel will follow the directions of an authentic, rule-abiding prosecutor.”¹⁹⁴ A law professor who studies professionalism and ethics suggests “prosecutors build social capital around the issue of compliance, so a prosecutor who is out of line would be subject to peer pressure and adverse peer comment.”¹⁹⁵ Chief prosecutors—whether at the municipal, county, state, or federal level—have an opportunity to change a culture that has too often led to poor oversight of law enforce-

192. MODEL RULES OF PROF’L CONDUCT R. 3.8(f) cmt. 1.

193. MODEL RULES OF PROF’L CONDUCT R. 3.8(f).

194. Shea E-mail, *supra* note 169.

195. E-mail from Neil Hamilton, Professor of Law, UST School of Law, to Ted Haller (Nov. 28, 2013 1:20 CST) (on file with author). Professor Hamilton’s biography can be viewed at <http://www.stthomas.edu/law/facultystaff/faculty/hamiltonneil/>.

ment. Effective leadership will require informing “the Court when someone under his or her direction intentionally has violated Rule 3.6 or 3.8.”¹⁹⁶ And “[r]egardless of whether the Court is informed, the prosecutor should remove the violator from further involvement in the case at the earliest possible opportunity.”¹⁹⁷ A criminal defense attorney agreed, arguing that “the best thing [prosecutors] can do is establish a good relationship with law enforcement.”¹⁹⁸ As explained *infra* in Part III, asserting control in multi-jurisdictional investigations is difficult, but the prosecutor can still exert control by “virtue of his or her ability to refuse to work with rule violators.”¹⁹⁹

B. Train Anyone Who Will Listen—Including Reporters

This Comment has hopefully made clear that there is no conspiracy to deprive accused persons of their constitutional rights. Instead, a merger of ignorance, apathy, the media, and technological development has created an atmosphere rife with harmful extrajudicial comments. Combating these factors requires knowledge, care, the media, and technology.

Prosecutors need to regularly train the police. Perhaps Rule 3.8(f) would benefit from an additional comment requiring prosecutors to regularly train law enforcement personnel on Rules 3.6 and 3.8, and fair-trial concerns—just like the comment to Rule 5.1 encourages “periodic review of compliance” in law firms. More realistically, chief prosecutors should create department policies that require the regular training of law enforcement; warn the police that prosecutors will not work with violators; establish that prosecutors may publicly admonish violators; clarify that the prohibition applies to both traditional media relations and social media; and explain that a body of empirical studies shows the adverse impact of pretrial publicity. This kind of training will lead to increased knowledge, more concern, cautious media relations, and restraint in social media.

Training should not end with the police. While not beholden to the rules, journalists should still have a rudimentary understanding that the prosecutors and police do not have unlimited leeway to make comments on cases. Of course, journalists will still push for maximum information. However, the training could reduce any temptation to frame undisclosed information as a cover-up, a concern brought to the attention of the Associated Press by Attorney General Dick Thornburgh in 1990:

This appetite has given rise to a considerable temptation for a prosecutor to exceed the proper role he must play in our criminal justice system, a temptation heightened by a small but vocal cho-

196. *Id.*

197. *Id.*

198. Friedberg Interview, *supra* note 165.

199. *Id.*

rus which shouts ‘Cover-up!’ or ‘Whitewash!’ every time a prosecutor refuses comment on a pending investigation²⁰⁰

And reporters should gently be reminded of the Society of Professional Journalists Code of Ethics, which calls on journalists to “minimize harm.”²⁰¹

C. More Social Media Policies Needed

Prosecutors and police need social media guidelines. Thoughtful use of social media by law enforcement can engage the community, resulting in better communication and enhanced trust. However, personnel need to understand that posting comments, even off-the-clock or in a civilian capacity, can dramatically affect the outcome of a case—as it did for the New Orleans police officers released from prison, discussed *infra* in Part II. Additionally, judges should more specifically address social media use in their jury instructions and courtroom policies; instructions should include familiar language in the use of social media terms and warn of consequences for not following instructions.²⁰²

CONCLUSION

*“There’s a pale horse coming/ And I’m going to ride it/ I’ll rise in the morning/ My fate decided/ I’m a dead man walking.”*²⁰³

The complexity of life can be exhausting. Perhaps one reason why trials capture our attention is their *perceived* simplicity. The lines are drawn. Two sides to a story. A fate in the hands of a judge or jury. Truth only a verdict away. While most trials are actually much more complex than how they are portrayed or covered, perception can become reality, and reality can become a self-fulfilling prophecy. There is a gravitational force that pulls us into joining the narrative, no matter how false it is. We want to be a part of the grand story that is the criminal justice system.

We must fight that force. Instead of joining the story, we need to rewrite the story. And what a beautiful story there is to write: ministers of justice ensuring that the game is fair even if it is to their disadvantage; a two-sided story becomes as complicated as humanity; the rules remain a cushion rather than a spring.

In Bruce Springsteen’s “Dead Man Walking,” a song about a man awaiting his execution, the condemned removes himself from the world

200. Thornburgh speech, *supra* note 188.

201. *Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, available at <http://www.spj.org/pdf/ethicscode.pdf> (last visited Oct. 27, 2013).

202. See St. Eve & Zuckerman, *supra* note 133, at 19.

203. Bruce Springsteen, *Dead Man Walking*, on DEAD MAN WALKING (Columbia Records 1996).

even before his execution does so.²⁰⁴ “Now I’ve got my story/ Mister, ain’t no need for you to listen/ It’s just a dead man talking.”²⁰⁵ The condemned feels no need to tell his story. No one will listen, and even if someone did, his story would not matter.

The Sixth Amendment exists to avoid that premature removal of an accused’s voice. Neither the prosecutor nor the police get to choose the moment when the accused becomes silenced—preempted by the other voices. Yet this is precisely what harmful extrajudicial comments do: they drown out the voice of the accused.

The condemned man in “Dead Man Walking” observes that “[b]etween our dreams and actions lies this world.”²⁰⁶ Let’s close the gap. We can do a better job of ensuring fair trials in this world by using Rule 3.8(f) to minimize the harmful effects of extrajudicial prejudicial comments made by law enforcement.

204. *See id.*

205. *Id.*

206. *Id.*