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OF PROSECUTORS AND PREJUDICE (OR "DO PROSECUTORS HAVE AN ETHICAL OBLIGATION NOT TO SAY RACIST STUFF ON SOCIAL MEDIA?")

Alex B. Long[*]

INTRODUCTION

> "Both the appearance and reality of impartial justice are necessary to the public legitimacy of judicial pronouncements and thus to the rule of law itself."
>
> - *Williams v. Pennsylvania*[1]

The past few years have seen numerous news stories about lawyers posting racially inflammatory content on their social media accounts.[2] While the phenomenon of lawyers posting online content manifesting racial and other forms of bias is certainly not limited to prosecutors,[3] most of the media coverage has focused on prosecutors who have engaged in this type of conduct. In 2016, a Florida prosecutor was fired after, among other things, referring to downtown Orlando as "a melting pot of 3rd world miscreants and ghetto thugs" on his Facebook page after a mass shooting.[4]

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[1] 136 S. Ct. 1899, 1909 (2016).

[2] *See* Kiley Thomas, *Courtroom audio: Bradley County Judge Advises Client to Drop Lawyer Over Racist Remarks*, NEWS CHANNEL 9 (Aug. 21, 2019) (detailing racist and homophobic tweets by private defense attorney), https://newschannel9.com/news/local/bradley-county-attorney-accused-of-making-racist-homophobic-comments-about-clients; *Meet Todd Gee, Racist Lawyer in Tennessee*, TORCH NETWORK (July 29, 2019) (detailing posts by same attorney), https://torchantifa.org/meet-todd-gee-racist-lawyer-in-tennessee/.

[3] *See* Joe Patrice, *Texas State Bar President Called Black Lives Matter A 'Terrorist Group' On Social Media*, ABOVE L. (July 13, 2020 10:48 AM) (detailing controversy surrounding unearthed social media post by president of State Bar of Texas), https://abovethelaw.com/2020/07/texas-state-bar-president-called-black-lives-matter-a-terrorist-group-on-social-media/.

[4] *See* Tobias Salinger, *Florida Prosecutor Fired over Facebook Post Following Pulse Massacre Calling Downtown Orlando 'a Melting Pot of 3rd World Miscreants and Ghetto Thugs,'* N.Y. DAILY NEWS (June 23, 2016, 6:41 PM), https://www.nydailynews.com/news/national/prosecutor-fired-facebook-post-orlando-massacre-article-1.2685858.

In 2018, the lead prosecutor in the San Bernardino County District Attorney's Office gang unit was fired after referring to Representative Maxine Water on social media as a "bitch" and a "loud mouthed c--- in the ghetto [who] you think would have been shot by now."[5]

The killing of George Floyd and subsequent protests during the summer of 2020 resulted in several prosecutors losing their jobs or otherwise facing public criticism for making inflammatory statements online.[6] In September 2020, a state assistant attorney in the criminal prosecution division in Texas was fired for social media posts that, among other things, referred to Black Lives Matter protesters as "terrorists," referred to Islam as a "virus," and stated that "'trans people' are an

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[5] *See* Alejandra Reyes-Velarde, *San Bernardino County Gang Prosecutor Resigns After Probe Into Social Media Rants,* L.A. TIMES (Jan. 9, 2019, 11:00 AM), https://www.latimes.com/local/lanow/la-me-ln-michael-selyem-resigns-20190109-story.html; Associated Press, *Prosecutor Disciplined Over Profane Post About Maxine Water, FLA. TIMES-UNION* (July 9, 2018, 10:19 PM), https://www.jacksonville.com/news/20180709/prosecutor-disciplined-over-profane-post-about-maxine-waters. There are other examples. In a recent case from Tennessee, a disciplinary prosecutor with the Tennessee Board of Professional Responsibility generated some attention for several anti- Muslim Tweets. *See* Adam Tamburin, *'Anti-Muslim Bias' of Tennessee Legal Ethics Watchdog Hurts Investigations, Court Filing Says*, TENNESSEAN (Dec. 11, 2020, 6:01 AM), https://www.tennessean.com/story/news/local/2020/12/11/anti-muslim-bias-tennessee-legal-ethics-watchdog-spurs-investigation/6508034002/. In 2019, an assistant prosecutor in Tennessee wrote on social media that white nationalists at the Unite the Right march in Charlottesville were "good God-fearing patriots". Daniel Connolly, *Collierville Assistant Prosecutor Mike Cross Praised White Nationalists, Court Documents Say*, MEMPHIS COMM APPEAL, (Mar. 18, 2019, 10:00 PM) https://www.commercialappeal.com/story/news/2019/03/19/collierville-prosecutor-mike-cross-white-nationalists/3103206002/. In yet another case from Tennessee, Craig Northcott, a district attorney in Tennessee, referred to Islam as "evil, violent, and against God's truth" in a Facebook post. *See* Adam Tamburin, *Tennessee DA Won't Give Gay Couples Domestic Assault Protections*, TENNESSEAN, (June 5, 2019, 10:00 PM) https://www.tennessean.com/story/news/2019/06/05/tennessee-district-attorney-craig-northcott-wont-give-gay-couples-domestic-assault-;protections/1351851001/; Associated Press, *Tennessee DA Faces Investigation After Islam, Gay Comments*, AP NEWS (June 10, 2019, https://apnews.com/article/d66b1405372b4daa9820c15a9a1d8996. .

[6] *See* Debra Cassens Weins, *Prosecuting Attorney Citicized for 'Racial Undertone' of Facebook Comment*, AM. BAR ASS'N J. (July 17, 2020, 11:05 AM) (detailing public criticism of prosecutor who posted that "We can only hope the deadly [Covid-19] strain spreads in riots"), https://www.abajournal.com/news/article/prosecuting-attorney-criticized-for-racial-undertone-of-facebook-comment; Gino Fanelli, *Monroe County Prosecutor Resigns After Post About George Floyd*, WXXI News, (June 30, 2020) (discussing resignation of prosecutor who posted on his Instagram account "7 funerals, a golden casket, and broadcast on every major network for a man who was a violent felon and career criminal? Soldiers die and the family gets a flag" on Instagram account), https://www.wxxinews.org/post/monroe-county-prosecutor-resigns-after-post-about-george-floyd.

abomination."[7] Another Texas prosecutor resigned after facing criticism for a Facebook post that seemed to analogize Black Lives Matter protesters to Nazis.[8]

There have also been several incidents in recent years in which prosecutors have commented on matters of public concern on social media in a way that is not overtly racist but nonetheless raises legitimate concerns over the prosecutors' integrity and appreciation of the special role that prosecutors play. For example, in 2015 an assistant prosecutor resigned after posting the message on Facebook following protests in Detroit concerning the Freddie Gray killing: "So I am watching the news in Baltimore and see large swarms of people throwing bricks etc at police who are fleeing from their assaults... 15 in hospital already. Solution. Simple. Shoot em. Period. End of discussion. I don't care what causes the protesters to turn violent."[9]

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[7] Eric Hananoki, *A Texas Assistant Attorney General is a QAnon Conspiracy Theorist who Tweets out Violent Threats and Bigoted Remarks*, MEDIA MATTERS, (Sep. 3, 2020, 10:59 AM), https://www.mediamatters.org/twitter/texas-assistant-attorney-general-nick-moutos-qanon-conspiracy-theorist-who-tweets-out; *see also* Rafael Olmeada, *Prosecutor Fired over Facebook Post Calling Demonstrators 'Animals*,' SOUTH FLA. SUN SENTINEL, (June 1, 2020, 1:59 PM) (detailing prosecutor's post following protests), https://www.sun-sentinel.com/local/broward/fl-ne-prosecutor-fired-20200601-v3qmqvb3kjciribqccsguyp4ee-story.html.

[8] Jacey Fortin, *Texas Prosecutor Resigns Over Facebook Post About Nazi Germany*, N.Y. TIMES, (June 29, 2020), https://www.nytimes.com/2020/06/29/us/kaylynn-williford-harris-county-prosecutor-resign.html.

[9] Elisha Anderson, *Asst. Prosecutor Resigns after 'Shoot Em' Facebook Post*, Detroit Free Press, May 1, 2015, https://www.freep.com/story/news/local/michigan/wayne/2015/05/01/assistant-prosecutor-resigns-facebook-post/26709361/. In another situation, a deputy prosecutor in Idaho generated controversy when he posted a response to a meme posted by a police officer. The meme showed a white police officer standing in front of a police cruiser with text reading, "[I]f we really wanted you dead all we'd have to do is stop patrolling your neighborhood... and wait." The prosecutor posted the following comment in response: ""Great point. Where the police are under attack from politicians, and the police become less aggressive, the murder rates go up. I say, let them have their neighborhoods. They will be like Rwanda in a matter of weeks." *Deputy Prosecutor Says Facebook Post Poorly Worded, Not Racist*, Spokesman-Review, July 13, 2016, https://www.spokesman.com/blogs/hbo/2016/jul/13/prosecutor-says-post-not-racist/ There are other examples. *See* Associated Press, *Florida Prosecutor Kenneth Lewis Sorry for 'Crack Hoes' Facebook Post*, NBCNEWS.com, May 23, 2014, https://www.nbcnews.com/news/us-news/florida-prosecutor-kenneth-lewis-sorry-crack-hoes-facebook-post-n113196 (discussing Florida prosecutor who posted on Facebook that "crack hoes" should "tie [their] tubes" and stated that Justice Sonia Sotomayor "hit the quota lottery" when she was appointed to the Supreme Court and would be serving french fries but for affirmative action); Debra Cassens Weins, *Assistant US Attorney's Derogatory Facebook Comments About 'Dalibama' and Trayvon Martin are Probed*, ABA Journal, Aug. 15, 2013,

These incidents are troubling in isolation. But they are also troubling insofar as they implicate broader concerns about how personal bias may impact, or be perceived as impacting, a prosecutor's professional conduct. Bias may influence a prosecutor's actions at multiple points in the criminal process, ranging from the decision to charge a suspect to begin with to the decision as to the crime charged to jury selection and ultimately to trial.[10] As an example, a Tennessee prosecutor generated headlines when he announced in a speech that he does not prosecute domestic violence claims involving same-sex couples because he does not recognize the validity of same-sex marriage.[11]

Concerns over the extent to which prosecutors bring their personal biases into the courtroom have only increased in recent years and have contributed to the doubts as to the overall fairness of the criminal justice system, particularly as applied to people of color.[12] One of the more shocking examples of how prosecutor bias may impact the criminal justice system occurred in September 2020 in the case of Francis Choy, an Asian-American woman previously convicted of murder. Choy's 17-year-old conviction was overturned, in part, due to the revelation that prosecutors had exchanged emails containing "jokes about Asian stereotypes and mocking caricatures of Asians using imperfect English."[13]

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https://www.abajournal.com/news/article/assistant_us_attorneys_derogatory_facebook_comments_about_dalibama_and_tray (discussing federal prosecutor's Facebook posts stating that "low-information voters" were responsible for the election of the "Dalibama," posting a graphic stating "Obama: Why Stupid People Shouldn't Vote," questioning Trayvon Martin's actions on the day of his shooting, and noting and defense counsel's decision to seek delay of sentencing in a case that prosecuted in order to search for evidence of bias in sentencing).

[10] Am. Bar Ass'n Criminal Justice Standards for the Prosecution Function § 3-1.6 (4th ed. 2017) (prohibiting a prosecutor from using improper considerations in exercising prosecutorial discretion).

[11] *See* Tamburin, *supra* note 5.

[12] *See* Rachel Cicurel, *Don't Stop with the Police: Check Racism in the Prosecutor's Office*, WASH. POST (July 9, 2020, 4:33 PM) (referencing studies purporting demonstrate prosecutor bias on the basis of race), https://www.washingtonpost.com/opinions/2020/07/09/dont-stop-with-police-check-racism-prosecutors-office/.

[13] Deborah Becker, *After Discovery of Prosecutors' Racist Emails, Plymouth DA Will Not Seek New Trial for Woman over Parents Death*, WBUR, (Sep. 29, 2020), https://www.wbur.org/news/2020/09/29/prosecutors-racist-emails-plymouth-da-frances-choy; Michael Levenson, *Judge Overturns Murder Conviction, Citing 'Racial Animus' in Prosecutors' Emails*, N.Y. TIMES (Oct. 1, 2020) https://www.nytimes.com/2020/10/01/us/brockton-massachusetts-woman-freed-prison.html. The judge in the case overturned the conviction on several grounds, including the failure of prosecutors to turn over exculpatory evidence. Commonwealth v. Choy, No. 0383-CR-00300, at 16 (Mass. Super. Ct. Sep. 17, 2020) (Findings & Rulings), https://d279m997dpfwgl.cloudfront.net/wp/2020/09/Decision-to-Vacate-Convictions.pdf.

In most of the situations mentioned above, the prosecutors lost their jobs, thus providing at least some minor measure of reassurance that their superiors recognized the damage that such speech may have on the overall perception of the impartiality of prosecutors and the fairness of the criminal justice system.[14] But while the news accounts of these incidents described the statements at issue, the resulting public controversies, and the ensuing adverse employment actions, rarely is there any mention of any violation of the rules of professional conduct governing lawyers. Nor is there usually any suggestion that the prosecutors in question might be subject to professional discipline, up to and including disbarment.

That's because, as this Article discusses, there is probably nothing "unethical" about the conduct of the prosecutors in these cases as the law exists in most jurisdictions. In many states, a prosecutor (or any lawyer) who engages in harassment or discrimination on the basis of race, sex, or other characteristics while in the course of representing a client or while engaged in the practice of law may be subject to professional discipline.[15] But no rule of professional conduct speaks directly to the situation in which a prosecutor engages in such conduct in a private capacity. And, as discussed in this Article, in most jurisdictions, it is unlikely that any rule could be extended to reach this type of conduct.

Had the prosecutors mentioned above been judges rather than prosecutors, they would have been subject to professional discipline, including possible removal from the bench. The ABA Model Code of Judicial Conduct ("CJC") requires that a judge refrain from "activities that would appear to a reasonable person to undermine the judge's . . . integrity or impartiality."[16] State judges have faced professional discipline for violating this rule and similar rules for engaging in speech or conduct manifesting bias on the basis of race, sex, or other characteristics while off the bench and in their personal capacities.[17] But as this Article discusses, it

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With respect to newly-discovered emails, the judge concluded that the emails established that "justice may not have been done and the convictions must be vacated." *Id.* at 15-16.

[14] For a discussion of the employment law and free speech aspects of these types of cases, see Immanuel Kim, *A Voice for One, or a Voice for the People: Balancing Prosecutorial Speech Protections with Community Trust*, 86 FORDHAM L. REV. 1331 (2017).

[15] *See* People v. Sharpe, 781 P.2d 659, 660 (Colo. 1989) (en banc) (publicly censuring prosecutor who, during a conversation with defense counsel during a recess, said of the two Hispanic defendants in death penalty case, "I don't believe either one of those chili-eating bastards"); *infra* notes 51-54 and accompanying text.

[16] MODEL CODE OF JUDICIAL CONDUCT r. 1.2, 3.1(C) (AM. BAR ASS'N 2010) (emphasis added).

[17] *See In re* Ellender, 889 So.2d 225, 233 (La. 2004) (suspending judge who appeared at a Halloween party wearing wig, black face makeup, and prison jumpsuit); Miss. Comm'n on Judicial Performance v. Osborne, 11 So. 3d 107, 110, 118 (Miss. 2009) (suspending judge who made racially-charged public speech); In re Eakin, 150 A.3d 1042, 1060 Pa. Ct. Jud.

is unlikely that a prosecutor who posts racist, homophobic, or similar material online or who otherwise engages in conduct or speech in an extra-prosecutorial capacity that raises reasonable concerns about the prosecutors' integrity and capacity to perform the functions of a prosecutor would be subject to professional discipline.[18]

Simply stated, this Article argues that this is a mistake. More specifically, the Article argues that, given the special role that prosecutors occupy and the need to ensure the public that, to the extent possible, has faith that the criminal justice system operates free from bias, the same rule that requires judges to avoid extrajudicial activities that raise reasonable concerns regarding the judge's impartiality, integrity, and independence should apply in the case of prosecutors.[19] While the primary focus of this Article is on online speech, this proposed rule would apply to extra-prosecutorial speech and conduct more generally.

Part I of this Article discusses the special role that prosecutors play in the criminal justice system and how their conduct may shape public perception of the system. Part II surveys the rules of professional conduct that might conceivably apply in the case of a prosecutor who engages in extra-prosecutorial conduct that displays bias on the basis of race, sex, and related characteristics or that otherwise raises concerns about the prosecutor's fitness for office. Part III examines the disqualification standards that apply to prosecutors and notes the limited ability these standards have to address extra-prosecutorial speech manifesting bias and similar forms of speech. Part IV explores the rules outlined in the CJC that apply to a judge's extra-judicial activities that raise concerns over bias on the basis of race, sex, and other characteristics. Finally, Part V identifies the pros and cons of borrowing portions of the CJC for use in the regulation of prosecution and argues that the same standard that applies to a judge's extra-judicial activities that raise a question about a judge's impartiality and integrity should apply to prosecutors.

Disc. 2016) (disciplining judge who exchanged e-mails with friends and professional acquaintances that contained offensive material involving gender, race, sexual orientation, and ethnicity); In re Lowery, 999 S.W.2d 639, 661 (Tex. Rev. Trib. 1998) (disciplining judge for, *inter alia*, racial slurs directed at parking attendant).

[18] For a discussion of some of the other ethical issues associated with a prosecutor's use of social media, 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 (2015).

[19] As used in this Article, the term "prosecutor" would cover not only attorneys who prosecute criminal cases but bar disciplinary counsel who perform prosecutorial functions. *See* MODEL RULES FOR DISCIPLINARY ENFORCEMENT Rule 4(B)(2) (Am. Bar Ass'n 2002) (noting that bar counsel performs prosecutorial functions).

I. THE SPECIAL ROLE OF PROSECUTORS AND PUBLIC PERCEPTION OF THE CRIMINAL JUSTICE SYSTEM

Prosecutors are partisans. Like all lawyers, prosecutors have a duty to diligently represent their client's interests, which frequently means zealously advocating for a conviction.[20] Some prosecutors focus heavily on the partisan aspect of their jobs, viewing themselves as preparing to do battle with defense counsel when they enter the courtroom.[21]

But of course, prosecutors are more than partisans. As representatives of the sovereign, which has a compelling interest in achieving justice, prosecutors have a duty to seek justice.[22] As stated often in the law governing lawyers, a prosecutor is a minister of justice.[23] While prosecutors are expected to act with zeal when they pursue a conviction, they also must seek impartial justice, as free as possible from other

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[20] *See* Berger v. United States, 295 U.S. 78, 88 (1935) (stating that a prosecutor should prosecute "with earnest and vigor").

[21] *See* Jeffrey Bellin, *Theories of Prosecution*, 108 CALIF. L. REV. 1203, 1232-33 (2020) (noting the image of a prosecutor as a combatant and stating that "[u]nlike American prosecutors, German prosecutors do not see themselves as white knights or avenging angels"); Bruce Green, *Why Should Prosecutors "Seek Justice?*", 26 FORDHAM URBAN L.J. 607, 642 (1992) (noting the prosecutor's "instinct to do battle"); Daniel S. McConkie, *Structuring Pre-Plea Deal Discovery*, 107 J. CRIM. L. & CRIMINOLOGY 1, 14 (2017) ("[P]rosecutors work in an adversary system; they do battle against the defense to obtain convictions."); Ronald F. Wright & Kay L. Levine, *The Cure for Young Prosecutors' Syndrome*, 56 ARIZ. L. REV. 1065, 1126 (2014) (stating that "young prosecutors begin their careers thinking of themselves as superheroes, ready to try any case on the docket and to do battle with any defense attorney who stands in the way of a conviction . . . ."); *see also* State v. Medina, 604 A.2d 197, 204 (N.J. Super. Ct. App. Div. 1992) ("[P]rosecutors cannot be expected to do battle in the adversarial ring with two hands tied behind their backs."); James R. Acker, *Reliable Justice: Advancing the Twofold Aim of Establishing Guilt and Protecting the Innocent*, 82 ALB. L. REV. 719, 720 (2019) (stating that "[c]riminal justice is rife with the vocabulary and imagery of institutionalized battle . . . .").

[22] *See Berger*, 295 U.S. at 88 (stating that "[i]t is as much [a prosecutor's] 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"); People v. Herring, 20 Cal.App.4th 1066, 1076 (1993) ("A prosecutor is held to a higher standard than that imposed on other attorneys because he or she exercises the sovereign powers of the state."); Green, *supra* note 21, at 642 (stating that prosecutors' duty to seek justice "derives from their role on behalf of a sovereign whose own interest is in achieving justice").

[23] *See, e.g.,* Attorney Grievance Comm'n v. McDonald, 85 A.3d 117, 144 (Md. 2014) (stating that a prosecutor is "held to even higher standards of conduct than other attorneys due to [the] unique role as both advocate and minister of justice"); MODEL RULES OF PROF'L CONDUCT r. 3.8 cmt. [1] ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.") (Am. Bar. Ass'n 2020) [hereinafter MODEL RULES].

influences that may cloud their judgment.[24] The ABA's aspirational Criminal Justice Standards for the Prosecution Function identify various ways in which a prosecutor's judgment might be clouded.[25] The Standards also specifically advise that a prosecutor should avoid bias or prejudice on the basis of race and other characteristics in carrying out the prosecution function and "should be proactive in efforts to detect, investigate, and eliminate improper biases, with particular attention to historically persistent biases like race, in all of its work."[26]

Prosecutors play an important role in preserving public trust in the criminal justice system. The public's perception that the criminal justice system operates in an unbiased manner is crucial to the operation of the system.[27] Where the process is tainted by real or reasonably perceived prejudices, the public's trust in the process is damaged. [28] As often noted, the appearance of justice is as important as actual justice.[29] Therefore, prosecutors must strive not only for justice but the for the appearance of justice.[30]

In this respect, prosecutors and judges occupy similar positions within the criminal justice system. Both are representatives of the sovereign. As

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[24] State v. Medrano, 65 A.3d 503, 510 (Conn. 2013) (stating that a prosecutor is a representative of the people, "who seek impartial justice for the guilty as much as for the innocent"); AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7(f) (4th ed. 2017) ("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."); Rebecca Roiphe, *A Typology of Justice Department Lawyers' Roles and Responsibilities*, 98 N.C. L. REV. 1077, 1103 (2020) (stating that "prosecutors are asked to exercise substantial discretion and are required to operate in a disinterested way"); Paul B. Spielman, *Public Prosecutors and the Appearance of Justice: How the Court of Appeals Erred in Gatewood by Treating a State's Attorney as an Ordinary Advocate*, 65 MD. L. REV. 1222, 1222 (2006) (arguing that there is a "greater need for impartiality and disinterest by public prosecutors due to their unique role as state advocates for justice").

[25] AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7 (4th ed. 2017).

[26] AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6.

[27] *See* Roberta K. Flowers, *What You See is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 700 (1998) ("The appearance of justice has been deemed as important as justice itself.").

[28] *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614, 628 (1991) ("Racial bias [within the courtroom] mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality.").

[29] *See* J.E.B. v. Ala. *ex rel.* T.B., 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) ("Wise observers have long understood that the appearance of justice is as important as its reality."); Richmond Newspapers, v. Va., 448 U.S. 555, 573–74 (1980) (plurality opinion) (citing the common law notion that "justice must satisfy the appearance of justice'").

[30] *See* Flowers, supra note 27, at 703.

such, they have the power to shape the public's perception of the sovereign and the system of justice the sovereign provides.[31] Maintaining impartiality and the appearance of impartiality are crucial components of a judge's job.[32] Obviously, a prosecutor's conception of impartiality is different than that of a judge, and laypeople certainly recognize that prosecutors play a partisan role in judicial proceedings. But it is essential to the public's trust in the criminal justice system that members of the public believe that judges and prosecutors make professional decisions free from improper influences.[33]

Unfortunately, there is considerable public distrust concerning the criminal justice system. A 2019 survey by the National Center for State Courts found that slightly less than half of respondents agreed with the statement that courts are unbiased.[34] The most alarming area of distrust is that of race. A 2019 Pew Research Center survey found that a majority of Americans believe that blacks are generally treated less fairly than whites by the criminal justice system.[35] Nearly 9 out of 10 black adults expressed this view.[36] Part of this mistrust may have to do with the shockingly low number of elected black prosecutors.[37] But recent history also suggests strongly that some of this distrust is attributable to the perception that prosecutors sometimes fail to prosecute police misconduct with sufficient zeal.[38] As the ABA Task Force on Building Public Trust in the American

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[31] *See* Flowers, *supra* note 27 *at* 732 (recognizing the symbolic role played by prosecutors and their ability to undermine confidence in the justice system).

[32] *See* MODEL CODE OF JUDICIAL CONDUCT R. 2.11(A) (stating that "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned"); Debra Lyn Bassett, *Recusal and the Supreme Court*, 56 HASTINGS L.J. 657, 661 (2005) (noting that federal judges take an oath of impartiality).

[33] *See* Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447, 1459 (2016) ("In order to maintain confidence in the court system, however, lawyers must appear to be unconflicted in their zealous representation of a client.").

[34] GBAO STATE OF THE STATE COURTS—SURVEY ANALYSIS 3 (2020): https://www.ncsc.org/__data/assets/pdf_file/0018/16731/sosc_2019_survey_analysis_2019.pdf.

[35] John Gramlich, *From Police to Parole, Black and White Americans Differ Widely in their Views of Criminal Justice System*, PEW RES CTR, (May 19, 2019), https://www.pewresearch.org/fact-tank/2019/05/21/from-police-to-parole-black-and-white-americans-differ-widely-in-their-views-of-criminal-justice-system/.

[36] Gramlich, *supra* note 35; *see also* Joseph J. Avery & Joel Cooper, *Racial Bias in Post-Arrest and Pretrial Decision Making: The Problem and a Solution*, 29 CORNELL J.L. & PUB. POL'Y 257, 274 (2019) ("Many African-Americans distrust the criminal justice system.").

[37] *See* I. Bennett Capers, *Against Prosecutors*, 105 CORNELL L. REV. 1561, 1600 & n. 214 (noting that prosecutors are "overwhelmingly white" and citing study showing that ninety-five percent of all elected prosecutors are white).

[38] *See* Jasmine B. Gonzales Rose, *Racial Character Evidence in Police Killing Cases*, 2018 WIS. L. REV. 369, 386 (2018) ("Prosecutors' failure to pursue charges, grand juries' failure to indict, trial juries' failure to convict, and judges' light sentencing in police deadly force

Justice System notes, "[t]hose concerns are heightened by the appearance that the police officers and prosecutors handling misconduct allegations have an institutional bias to exonerate accused officers."[39] One of the more alarming recent incidents giving credence to these sorts of concerns is the case of two St. Louis prosecutors who covered up the beating of a Black suspect by a police officer and whose actions came to light shortly after the Michael Brown shooting.[40]

A prosecutor's social media activity or other forms of speech manifesting bias on the basis of race or other characteristics only contributes to public distrust of the criminal justice system. For example, in the St. Louis case, not only did the prosecutors cover up police misconduct, one of them made a racist and homophobic comment to a police detective and another attorney when discussing the matter.[41] As one of the lawyers handling the ensuing disciplinary case against the prosecutor observed at the time, the prosecutor's statements called into question her ability to act objectively in the performance of her official duties.[42]

Likewise, statements that are not overtly racist but that call into question a prosecutor's understanding of the special role of prosecutor and the ability to carry out the obligations of the office also contribute to public distrust of the system. When some of the prosecutors who engaged in this type of activity in recent years have lost their jobs, their offices have released statements announcing that the prosecutors' actions were inconsistent with their duties.[43] But the social media posts undoubtedly did

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cases have a significant impact on the American people and on the actual and perceived legitimacy of our criminal justice legal system."); AM. BAR ASS'N, TASK FORCE ON BUILDING PUBLIC TRUST IN THE AMERICAN JUSTICE SYSTEM 19 (2017) (observing "that many Americans perceive that the criminal justice system routinely permits police officers to use excessive force against minorities with impunity" "), https://www.americanbar.org/content/dam/aba/administrative/office_president/2_8_task_force_on_building_trust_in_american_justice_system.authcheckdam.pdf.

[39] AM. BAR ASS'N, *supra* note 34.

[40] In re Schuessler, 578 S.W.3d 762 (Mo. 2019) (en banc).

[41] *Id.* at 766.

[42] *See* Jason Taylor, *Missouri Supreme Court Considers Penalties for Cover Op of Police Assault by St. Louis Circuit Attorneys*, MISSOURINET, Jan. 24 2019 (quoting disciplinary counsel as asking, ""How can we be sure that she's going to objectively consider race and sexual orientation in making her official charging duties?"), https://www.missourinet.com/2019/01/24/missouri-supreme-court-considers-penalties-for-cover-up-of-police-assault-by-st-louis-circuit-attorneys/.

[43] *See* Olmeada, *supra* note 7 (quoting prosecutors' office as saying "[t]he views expressed in that posting are entirely inconsistent with the ideals and principles of the Broward State Attorney's Office and the duties and responsibilities of an assistant state attorney."); Salinger, *supra* note 4 (quoting supervisor as telling prosecutor that he could no longer defend prosecutor "as a prosecutor free of bias").

damage to the credibility of the offices in question and contributed to the continuing distrust of the criminal justice system in some quarters.

II. THE RULES OF PROFESSIONAL CONDUCT AND EXTRA-PROSECUTORIAL SPEECH MANIFESTING BIAS

The most obvious way the legal profession could address extra-prosecutorial speech manifesting bias would be through the rules of professional conduct governing lawyers. While most of the rules of professional conduct regulate conduct occurring in a lawyer's professional capacity, there are already some rules that reach conduct occurring in a lawyer's private life.[44] This Part of the Article discusses the rules that might conceivably apply when a prosecutor engages in extra-prosecutorial conduct that displays bias on the basis of race, sex, and related characteristics or that otherwise calls into question a prosecutor's fitness for office.

A. Rule 3.8: Special Responsibilities of a Prosecutor

The ABA Model Rules of Professional Conduct (the "Model Rules") recognize the special role that prosecutors play in the legal system by devoting a rule entirely to the ethical responsibilities of prosecutors.[45] Titled "Special Responsibilities of a Prosecutor," Model Rule 3.8 recognizes that a prosecutor is a "minister of justice whose duty is to seek justice rather than merely to advocate for the State's victory at any given cost."[46] Given this special role, the rule imposes special obligations on prosecutors, such as the duty to disclose exculpatory evidence to the defense and the duty to take steps to remedy a wrongful conviction.[47] The rule also imposes more stringent restrictions on public speech in the case of prosecutors.[48] But the rule only addresses prosecutor speech that is likely to heighten public condemnation of "the accused."[49] Therefore, the rule does

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[44] *See* MODEL RULES OF PROF'L CONDUCT r. 8.4(b) (Am. Bar. Ass'n 2020) [hereinafter MODEL RULES] (prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); *id.* R. 8.4(c) (prohibiting a lawyer from engaging in dishonesty, fraud, deceit, or misrepresentation).

[45] MODEL RULES OF PROF'L CONDUCT r. 3.8 (Am. Bar. Ass'n 2020) [hereinafter MODEL RULES].

[46] *Id.* r. 3.8 cmt. 1.

[47] *Id.* r. 3.8(d), (f).

[48] *Id.* r. 3.8(f).

[49] *Id.*

not directly address extra-prosecutorial discriminatory statements that are unrelated to any pending criminal matter. Indeed, the rule as a whole is limited to prosecutor conduct "in a criminal case" and, therefore, does not reach extra-prosecutorial conduct.[50]

B. Rule 8.4(g): Discrimination

Model Rule 8.4(g) prohibits a lawyer from engaging in conduct "that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law."[51] In enacting the rule, the ABA recognized that "[d]iscriminatory and harassing conduct, when engaged in by lawyers in connection with the practice of law, engenders skepticism and distrust of those charged with ensuring justice and fairness."[52] But by its terms, the rule is limited to discriminatory conduct that is related to the practice of law. Many states have similar versions of this rule, but they too are typically limited to situations in which a lawyer is acting in the lawyer's capacity as a lawyer or is acting in the course of representing a client.[53] Therefore, discriminatory conduct or speech that occurs while a prosecutor is not wearing his or her metaphorical prosecutor's hat or that occurs away from the practice of law is not covered by the rule.[54]

C. Rule 8.4(d): Conduct Prejudicial to the Administration of Justice

One potential basis for professional discipline for engaging in discriminatory speech or conduct in one's private capacity is Model Rule 8.4(d). The rule prohibits a lawyer from engaging in conduct prejudicial to the administration of justice.[55] The phrase "conduct prejudicial to the administration of justice" is somewhat vague, and neither the rule nor the

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[50] *Id.*
[51] *Id.* r. 8.4(d).
[52] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 (2020).
[53] *Compare* NEB. RULES OF PROF'L CONDUCT § 3-508.4(d) (2020) (addressing conduct that occurs when a lawyer is "employed in a professional capacity") *with* COLO. RULES OF PROF'L CONDUCT r. 8.4(g) (2020) (addressing conduct "in the representation of a client").
[54] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 493, 5 (2020) ("Rule 8.4(g) does not regulate conduct unconnected to the practice of law, as do some other rules of professional conduct.").
[55] MODEL RULE 8.4(d).

comments provide further guidance as to what type of conduct the rule prohibits. There are two competing judicial interpretations of the rule.[56]

1. *The Majority Approach*

Under the clear majority approach, the rule is only applicable where the misconduct has some bearing on the judicial process "in connection with an identifiable case or tribunal."[57] Conduct is only actionable where it "impedes or subverts the process of resolving disputes."[58] So, for example, mishandling client funds might violate other rules, but because it ordinarily does not interfere with the operation of the judicial process in an ongoing matter, there is no violation of Rule 8.4(d).[59] In contrast, filing a criminal complaint against a judge in order to force the judge's disqualification from a matter would amount to a violation because it impedes the orderly administration of the judicial process in a particular matter.[60]

The misconduct does not necessarily have to incur in the course of representing a client under the majority approach. For example, the rule has been applied when a lawyer lied under oath as part of an agency investigation into the lawyer's own conduct.[61] But the misconduct must still have occurred "in the course of some judicial proceeding or a matter directly related thereto."[62]

Prosecutors have faced professional discipline under this rule for a variety of misconduct, including routinely issuing fake subpoenas in order to interview witnesses,[63] presenting false testimony in a capital case,[64] and allowing a victim to dictate as a condition of plea offer an amount of restitution that would have exceeded what was allowed by statute.[65] But it

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[56] *See* ABA ANNOTATED MODEL RULES OF PROF'L CONDUCT (9th ed.2019) r. 8.4.
[57] *In re* Mason, 736 A.2d 1019, 1023 (D.C.1999); *see* In re Discipline of Haderlie, 885 N.W.2d 78, 82 (N.D. 2016) (Crothers, J., specially concurring) (stating "the term has a near-universal application to conduct connected with judicial proceedings").
[58] *In re* Friedman, 23 P.3d 620, 628 (Alaska 2001).
[59] *See id.* at 629 (discussing this scenario).
[60] *See In re* Aubuchon, 309 P.3d 886, 896 (Ariz. 2013) (involving this scenario).
[61] *In re* Mason, 736 A.2d 1019, 1022-23 (D.C. 1999).
[62] *In re* Smith, 848 P.2d 612, 613 (Or. 1993).
[63] State *ex rel.* Okla. Bar Ass'n v. Miller, 309 P.3d 108, 115 (Okla. 2013).
[64] *In re* Peasley, 90 P.3d 764, 772 (Ariz. 2004) (en banc).
[65] *In re* Flatt-Moore, 959 N.E.2d 241, 245 (Ind. 2012); *see also In re* Aubuchon, 309 P.3d 886, 896 (Ariz. 2013) (filing criminal complaint without probable cause); Matter of Miller, 677 N.E.2d 505, 508 (Ind. 1997) (prosecuting criminal charges against individual while also assisting individual in civil claims); *In re* Bell, 72 So.3d 825, 827 (La. 2011) (involving bribery); Disciplinary Counsel v. Spinazze, 149 N.E.3d 503, 506 (Ohio 2020) (involving false statements to a court and attempt to cover up the misrepresentations with a false notation in a case file and false excuses to supervisor); Disciplinary Counsel v.

would be the rare case in which any lawyer's discriminatory speech or conduct would be actionable under this rule where the speech is not closely connected to an ongoing matter. For example, in a Delaware case, a lawyer sent a series of sexually crude and otherwise offensive emails to opposing counsel.[66] The Delaware Supreme Court held that while the conduct violated the rule of conduct prohibiting a lawyer from using means that serve no substantial purpose other than to embarrass, delay or burden a person, the lawyer's conduct was not prejudicial to the administration of justice since there was no "showing that the conduct affected the performance of opposing counsel or had some other distinct impact on the judicial process."[67]

2. *The Minority Approach*

Some courts take a broader view of the language of Rule 8.4(d).[68] Under this approach, an attorney's conduct amounts to conduct prejudicial to the administration of justice where the attorney's conduct "reflects negatively on the legal profession and sets a bad example for the public at large."[69] The concern for these courts is that the lawyer's conduct undermines the public's trust in the legal profession or "engenders disrespect for the courts and for the legal profession."[70]

Given this more expansive reading of Rule 8.4(d), a lawyer's conduct may amount to a violation of the rule even where the conduct does not have

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Phillabaum, 44 N.E.3d 271, 273 (Ohio 2015) (involving prosecutor who insisted that a legal assistant add to an indictment gun specifications that had not been presented to the grand jury and then signed the indictment); Disciplinary Counsel v. Phillabaum, 44 N.E.3d 271, 273 (Ohio 2015) (involving prosecutor who insisted that a legal assistant add to an indictment gun specifications that had not been presented to the grand jury and then signed the indictment); Disciplinary Counsel v. Wrenn, 790 N.E.2d 1195, 1197 (Ohio 2003) (involving failure to disclose discoverable information).

[66] Matter of Member of Bar Hurley, No. 383, 2017, 2018 WL 1319010, *3 (Del. Mar. 14, 2018).

[67] *Id.*

[68] *See* Florida Bar v. Frederick, 756 So.2d 79, 87 (Fla. 2000) (rejecting the idea that the rule is limited to conduct in a judicial proceeding and holding that the rule covers "conduct that prejudices our system of justice as a whole"); In re Waite, 782 N.W.2d 820, 824 (Minn. 2010) (stating that the court has never "limited the scope of conduct sanctionable under Rule 8.4(d)" to conduct occurring before courts and other tribunals and upholding discipline where lawyer failed to file tax returns); *In re* Bruner, 469 S.E.2d 55, 56 (S.C. 1996) (imposing discipline where attorney who misrepresented to client's title insurer that requirement for insurance had been satisfied).

[69] Attorney Grievance Comm'n of Md. v. Brady, 30 A.3d 902, 913 (Md. Ct. App. 2011).

[70] Attorney Grievance Comm'n of Md. v. Dore, 73 A.3d 161, 175-76 (Md. Ct. App. 2013); Attorney Grievance Comm'n of Md. v. Marcalus, 996 A.2d 350, 362 (Md. Ct. App. 2010).

an adverse impact on the legal process in a particular matter.[71] For example, in a case from New York, a lawyer was found to have engaged in conduct prejudicial to the administration of justice when he made threatening and racist phone calls to an African-American neighbor.[72] In a Maryland case, government attorneys at the Board of Veterans' Appeals had a longstanding practice of exchanging racist, homophobic, and misogynistic emails during work hours, many of which concerned co-workers and work policies.[73] The court found that the conduct amounted to conduct prejudicial to the administration of justice despite the fact that the emails had no impact on any ongoing legal matter.[74]

For these courts, the fact that the lawyer in question is a prosecutor may also be relevant in the determination of whether the prosecutor's conduct undermines public trust or engenders disrespect for the courts and the legal profession. For example, in an Indiana case, a prosecutor faced professional discipline after being arrested for driving under the influence.[75] The Indiana Supreme Court found that the prosecutor had engaged in conduct prejudicial to the administration of justice and publicly censured the prosecutor.[76] Central to the court's decision concerning the violation of the rule was the fact that the lawyer was a prosecutor:

> The duty of prosecutors to conform their behavior to the law does not arise solely out of their status as attorneys. As officers charged with administration of the law, their own behavior has the capacity to bolster or damage public esteem for the system. Where those whose job it is to enforce the law break it instead, the public rightfully questions whether the system itself is worthy of respect. The harm done is to the public esteem for those charged with enforcing the law.[77]

In an earlier decision, the Indiana Supreme Court had reached a similar conclusion on a similar set of facts, analogizing the position held by a prosecutor to that of a judge.[78] Both are charged with administration of the

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[71] *See* In re Sitton, No. M2020-00401-SC-BAR-BP (Tenn. Jan. 22, 2001) (concluding attorney violated rule when he gave advice on Facebook as a lawyer about planning in advance how to claim a defense to killing someone).
[72] In re Hennessey, 155 A.D.3d 1425, 1426 (N.Y. App. Div. 2017).
[73] Attorney Grievance Comm' v. Markey, 230 A.3d 942, 952-54 (Md. 2020).
[74] *Id.*; *see also In re* Disciplinary Action against Gherity, 673 N.W.2d 474, 476 (Minn.2004) (disciplining lawyer who was convicted of battery and disorderly conduct).
[75] Matter of Seat, 588 N.E.2d 1262, 1262-63 (Ind. 1992).
[76] *Id.* at 1264. Interestingly, the court concluded that the prosecutor had not violated the rule of professional conduct prohibiting a lawyer from committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects. *Id.*
[77] *Id.*
[78] *In re* Oliver, 493 N.E.2d 1237, 1242 (Ind. 1986).

law, so both have the ability to bolster or damage the public perception of the justice system.[79] Accordingly, in Indiana, "criminal conduct committed by prosecutors or their deputies is conduct inherently prejudicial to the administration of justice."[80]

D. Disciplinary Rule DR 1–102(A(6): Conduct that Reflects Adversely on One's Fitness to Practice Law

A handful of states retain a provision from the older Model Code of Professional Responsibility (the "Model Code") that might conceivably apply in situations in which a prosecutor exhibits bias in the prosecutor's private capacity. Under Disciplinary Rule (DR) 1–102(A)(6), a lawyer who engages in conduct that adversely reflects on the lawyer's fitness to practice law is subject to professional discipline.[81] Today, nearly every jurisdiction has abandoned use of the older Model Code and instead base their rules of professional conduct on the ABA's Model Rules of Professional Conduct. Under the Model Rules, a lawyer who commits a *criminal* act that reflects adversely on the lawyer's fitness to practice law is subject to discipline.[82] Thus, the Model Rule is narrower than the older Model Code rule. However, a few states have retained the language of DR 1-102(A)(6) in their rules.[83]

This rule prohibiting conduct that adversely reflects on the lawyer's fitness to practice law is a catch-all rule that, in theory, applies when no other rule addresses the conduct in question.[84] Despite this, disciplinary authorities sometimes charge lawyers with violations of the rule and courts uphold discipline under the rule when the conduct clearly violates other rules.[85] Like the rule prohibiting conduct that is prejudicial to the

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[79] *Id.*

[80] Matter of Hill, 144 N.E.3d 184, 193 (Ind. 2020).

[81] MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(6)(AM BAR ASS'N 1969).

[82] MODEL RULES r. 8.4(b).

[83] *See* ALABAMA RULES OF PROF'L CONDUCT r. 8.4(g) (2020); KANSAS RULES OF PROF'L CONDUCT r. 8.4(g) (2020); MASSACHUSETTS RULES OF PROF'L CONDUCT r. 8.4(h) (2020); NEW YORK RULES OF PROF'L CONDUCT r. 8.4(h) (2020); OHIO RULES OF PROF'L CONDUCT Rule 8.4(h) (2020); WASH. RULES OF PROF'L CONDUCT r. 8.4(n) (2020); *see also* COLO. RULES OF PROF'L CONDUCT r. 8.4(h) (prohibiting a lawyer from engaging "in any conduct that directly, intentionally, and wrongfully harms others and that adversely reflects on a lawyer's fitness to practice law").

[84] *See In re* West, 805 P.2d 351, 354 (Alaska 1991) (stating rule only addresses conduct not already listed under other provisions).

[85] For example, in *Alabama State Bar v. Giardini*, No. 1180248, 2020 WL 2298363, *8 (Ala. May 8, 2020) a prosecutor who was responsible for prosecuting child sex abuse cases was charged with a violation of the rule for engaging in sexually explicit online conversations with teenagers. This conduct clearly violated Rule 8.4(b), which prohibits an

administration of justice, the language of the rule raises its own set of vagueness concerns.[86] However, the rule has withstood various challenges on the grounds that it is unconstitutionally vague.[87]

The rule has been applied in a host of scenarios, including conduct unrelated to the practice of law.[88] Notably, disciplinary authorities have charged lawyers with violations of this rule for making racist statements, both while acting as lawyer and in situations completely unrelated to the practice of law.[89] The fact that the lawyer in question is a prosecutor has also been a factor in the decision to impose professional discipline in some instances.[90] Therefore, it is not out of the question that the rule could apply in the case of a prosecutor or other lawyer who engages in racist or other forms of discriminatory speech in a private capacity. But, again, few states have such a rule in place.

III. PROSECUTOR DISQUALIFICATION STANDARDS

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attorney from committing a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

[86] *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §5, cmt. c (AM. Las INST. 2000) (stating that "the breadth of [catch-all] provisions creates the risk that a charge using only such language would fail to give fair warning of the nature of the charges to a lawyer respondent and that subjective and idiosyncratic considerations could influence a hearing panel or reviewing court in resolving a charge based only on it").

[87] *See, e.g.,* Norris v. Alabama State Bar, 582 So.2d 1034, 1037 (Ala. 1991); *In re* Holtzman, 78 N.Y.2d 184 (1991).

[88] *See, e.g*., People v. Zeilinger, 814 P.2d 808 (Colo. 1991) (en banc) (involving sexual relations with a client); People v. Robinson, 839 P.2d 4 (Colo. 1992) (en banc) (involving prosecutor's use of cocaine); Butler County Bar Association v. Blauvelt, 156 N.E.3d 891, 893 (Ohio 2020) (involving lawyer charged with public indecency); Matter of Bernstein, 237 A.D.2d 89 90-92 (N.Y. Sup. Ct. A.D. 1997) (involving lawyer with a history of making sexually suggestive statements to clients). For an empirical study on how states that retain this provision actually apply it in practice and the types of misconduct for which attorneys have been disciplined under the rule, see Jon J. Lee, *Catching Unfitness*, __ GEO. J.L. ETHICS ___, *49-59 (forthcoming 2021).

[89] *See* People v. Sharpe, 781 P.2d 659, 660-61 (Colo.1989) (disciplining prosecutor under the rule who used racial slurs during a court recess); Matter of Schlossberg, Case No. 2020-03248, 2020 WL 7550464, *3 (N.Y. Sup. Ct. A.D. Dec. 22, 2020) (censuring lawyer who made racist statements while berating a store employee).

[90] *See Robinson,* 839 P.2d at 6 ("The respondent, however, undertook an even higher responsibility to the public with respect to this obligation by virtue of his public office as an attorney engaged in law enforcement."); People v. Sharpe, 781 P.2d 659, 660-61 (Colo.1989) (stating "a sanction is necessary in order to emphasize that lawyers, especially those acting as public officials, must scrupulously avoid statements as well as deeds that could be perceived as indicating that their actions are motivated to any extent by racial prejudice.").

The Francis Choy case mentioned in the Introduction, in which a murder conviction was overturned, in part, due to the discovery of racist emails exchanged between the prosecutors in the case, illustrates the point that sometimes the existence of prosecutorial bias renders it impossible for a neutral observer to have faith in the possibility of an impartial trial.[91] One way the legal system may address prosecutor bias is through disqualification motions. As the following Part discusses, courts apply different disqualification standards when it comes to prosecutorial bias. But regardless of which standard a court uses, disqualification of prosecutors is uncommon.

A. Prosecutor Bias as a Conflict of Interest

The classic conflict of interest scenario arises when a lawyer's exercise of independent professional judgment is compromised by some external consideration.[92] Most lawyers think of professional conflicts of interest in terms of a lawyer's conflicting loyalties between clients.[93] But the rules of professional conduct also make clear that a conflict may arise from a lawyer's own personal interests.[94] Where, for example, a client has called into question a lawyer's professional conduct during the course of representation, it may be that the lawyer's own self-interest or animosity toward the client may limit the ability of the lawyer to dispassionately consider or recommend an appropriate course of action on behalf of the client.[95] In such cases, a lawyer would have a conflict of interest under

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[91] *See supra* note 13 and accompanying text.

[92] *See* MODEL RULES OF PROF'L CONDUCT r.1.7 cmt. [8] ("[A] conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests.").

[93] *See generally id.* r. 1.7(a)(2) (explaining that conflicts may arise as a result of a lawyer' responsibilities to another client); *id.* R 1.8(a) (restricting a lawyer's ability to enter into business transactions with a client).

[94] *See id.* r. 1.7(a)(2) (explaining that conflicts may arise where the representation of a client is materially limited by a lawyer's own interests).

[95] *See* In re Toney, No. 09–61830, 2012 WL 1854259, *1 (Bankr. N.D. Ohio May 21, 2012) (noting that animosity between the client and attorney may lead to representation being materially limited by the attorney's personal interests); Or State Bar Ass'n, Formal Op. 2009-182 (explaining that a conflict may exist because it is "possible that Client's filing of a Bar complaint could create such personal resentment that it would compromise Lawyer's ability to effectively represent Client"); *see also* Mannhalt v. Reed, 847 F.2d 576, 581 (9th Cir. 1988) (stating that when "an attorney is accused of crimes similar or related to those of his client, an actual conflict exists because the potential for diminished effectiveness in representation is so great").

ABA Model Rule 1.7(a)(2) because the lawyer's representation of the client would be materially limited by the lawyer's personal interests.[96]

A lawyer's strongly-held views, biases, or personal animosity may result in a disqualifying conflict of interest.[97] This principle applies to prosecutors as it does all lawyers.[98] For example, the ABA's Criminal Justice Standards for the Prosecution Function observe that a prosecutor "should not permit the prosecutor's professional judgment or obligations to be affected by the prosecutor's personal" interests.[99] While professional disciplinary action against a prosecutor is rare,[100] the idea that a prosecutor's personal biases or animosity may result in a conflict of interest that improperly influences a prosecutor's charging decision to the point that the conflict amounts to a violation of the rules of professional conduct has occasionally found its way into disciplinary decisions.[101]

Potentially disqualifying conflicts involving a prosecutor's personal biases may take a variety of forms. Several authors have argued that a disqualifying conflict of interest exists when prosecutors are called upon to prosecute police officers, prosecutors' "closest professional allies.[102] Close

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[96] MODEL RULES OF PROF'L CONDUCT r.1.7(a)(2).

[97] *See Restatement (Third) of the Law Governing Lawyers* § 125 cmt. c (AM. LAW INST. 2000) ("[A] conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs."); *see also* People v. Doyle, 406 N.W.2d 893, 897-98 (Mich. Ct. App. 1987) (stating that one category of prosecutor conflict cases "includes situations where the prosecuting attorney has a personal interest (financial or emotional) in the litigation, or has some personal relationship (kinship, friendship or animosity) with the accused"). *See generally* State v. Hatfield, 356 N.W.2d. 872, 875-76 (1984) ("Personal animosity on the part of the prosecuting attorney toward the defendant of such a degree that it was likely to color the prosecutor's judgment as to whether to prosecute, or would cause such attorney to make highly inflammatory and prejudicial statements to the court during trial, may be sufficient to cause a conviction to be set aside."); Sheri Lynn Johnson, *Racial Antagonism, Sexual Betrayal, Graft, and More: Rethinking and Remedying the Universe of Defense Counsel Failings*, 97 WASH. U. L. REV. 57, 94 (2019) (noting racial animosity on the part of defense counsel as grounds for new trial).

[98] *See* Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 463, 466-67 (2017) (explaining that a prosecutor's conflict may arise "out of any personal belief" and discussing how implicit bias may impact prosecutor discretion).

[99] AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, § 3-1.7. (f) (4th ed. 2017).

[100] *See* Green & Roiphe, *supra* note 98, at 485 ("Prosecutors are rarely disciplined for anything, much less conflicts of interest.").

[101] *See In re* State Bar of Ariz. v. Thomas, PDJ-2011-9002, 233–46 (Ariz. Apr. 10, 2012), http://archive.azcentral.com/ic/news/0410Thomas-Aubuchon.PDF; Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 160 (2016) (discussing case).

[102] Levine, *supra* note 30, at 1450; *see* John V. Jacobi, *Prosecuting Police Misconduct*, 2000 WIS. L. REV. 789, 804 (arguing that prosecutors have "an impossible conflict of

working relationships between prosecutors and the police play a critically important role in enabling prosecutors to obtain convictions.[103] Given this reality, some scholars have argued that prosecutors face a disqualifying conflict when they are called upon to prosecute police officers.[104]

Ordinarily, the concern in a conflict of interest situation is that the lawyer in question will be less zealous in the representation of a client.[105] But sometimes the opposite may true; bias may potentially cause a prosecutor to be overly zealous. For example, various studies suggest racial bias impacts prosecutors' charging and plea bargain decisions.[106] The ABA's Criminal Justice Standards for the Prosecution Function specifically caution prosecutors against allowing impermissible considerations, such as race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status, to influence a prosecutor's discretion.[107] A prosecutor's racial or other bias may present a significant risk that that the prosecutor's independent professional judgment will be compromised, thus resulting in a violation of the rules of professional conduct if the prosecutor remains involved in the matter.[108]

If the lawyer in question were not a prosecutor, there would be no real concern about overzealousness on the part of a lawyer. But, of course, prosecutors are different. Ultimately, a prosecutor's job is to see that justice

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interest" in such cases); Caleb J. Robertson, Comment, *Restoring Public Confidence in the Criminal Justice System: Policing Prosecutions When Prosecutors Prosecute Police*, 67 EMORY L.J. 853, 856–57 (2017) (arguing that prosecutors face "an unavoidable apparent conflict of interest in such circumstances").

[103] *See* Jacobi, *supra* note 96, at 803–04 (noting the essential role that police officers play in the work of prosecutors and stating that "prosecutors face 'an impossible conflict of interest between their desire to maintain working relationships and their duty to investigate and prosecute police brutality'") (quoting Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 719 (1996)); Levine, *supra* note 102 at 1469-70 ("Maintaining a good relationship with individual officers and the good will of a police department is essential to a prosecutor's success in obtaining convictions, and thus to her professional life.").

[104] *See* Levine, *supra* note 102 at 1484-85.

[105] *See, e.g.*, Commonwealth v. Cousin, 88 N.E.3d 822, 837 (Mass. 2018) (noting that defense counsel had a conflict of interest where his ability to zealously represent client could have been hampered by conflicting loyalties); Veronica J. Finkelstein, *Better Not Call Saul: The Impact of Attorneys on their Clients' Sixth Amendment Right to Effective Assistance of Counsel*, 83 U. CIN. L. REV. 1215, 1245 (2015) (noting that conflicts pose a challenge to an attorney's ability to zealously advocate for a client's interests).

[106] *See* Cicurel, *supra* note 12 (citing studies).

[107] AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, Standard 3-1.6 (4th ed. 2017).

[108] *See generally* Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 853 (2004) ("A prosecutor who is unable to exclude impermissible racial, gender, or religious considerations from her discretionary decision-making, or who is predisposed to give weight to these considerations, lacks neutrality.").

is done.[109] A prosecutor who is strongly prejudiced against a criminal defendant may allow that prejudice to cloud the prosecutor's judgment as a minister of justice. The prosecutor's representation of the client–-the public[110]–-may therefore be materially limited by the prosecutor's bias, to the detriment of the accused and the public.[111]

B. Conflicting Prosecutorial Disqualification Standards, Infrequent Disqualification

There are several reasons why a prosecutor's demonstrated bias may not lead to disqualification in a given matter. First is the fact that the rules of professional conduct and disqualification standards are not always the same in some jurisdictions.[112] While a violation of a rule of professional conduct involving conflicts of interest may subject a lawyer to professional discipline, it does not always automatically lead to the disqualification of that lawyer in a matter.[113] Courts must ultimately decide if the concerns over a lawyer's conflict of interest are substantial enough to disqualify a lawyer, thereby depriving the lawyer's client of chosen counsel.[114] Another reason to not rely heavily on disqualification motions as a means of addressing prosecutor bias is simply that judges are often hesitant to grant such motions.[115] This reluctance may be explained out of a judicial concern over removing a duly appointed or elected public official or out of a concern of imputing the conflict to the prosecutor's entire office.[116]

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[109] *See* Connick v. Thompson, 563 U.S. 51, 71 (2011) ("The role of a prosecutor is to see that justice is done.").
[110] *See* AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION, § 3-1.13 (4th ed. 2017) (stating that a prosecutor "generally serves the public and not any particular government agency").
[111] *See* Commonwealth v. Robinson, 204 A.3d 326, 351 (Pa. 2018) (Donohue, J., opinion in support of reversal) (stating in the case of a judge who sent racist emails to prosecutors that the defendant was entitled to a prosecutor "whose judgment is neither 'clouded' nor 'blurred by subjective reasons'").
[112] *See* Woods v. Covington Cty. Bank, 537 F.2d 804, 810 (5th Cir. 1976) (stating that consideration of whether disqualification is required encompasses more than the rules of professional conduct).
[113] *See* Fed. Deposit Ins. Corp. v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995) (noting that while the rules of professional conduct concerning conflicts "provide a useful guide for adjudicating motions to disqualify, they are not controlling").
[114] *See Woods*, 537 F-2d at 810 (noting the needs to strike a balance between the need to ensure ethical conduct and other interests, such as protecting a litigant's "right to freely chosen counsel").
[115] *See* Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 241 n.173 (2000) (noting the reluctance of courts to disqualify prosecutors).
[116] *See* Zacharias & Green, *supra* note 109. ("It is one thing to exhort government lawyers to avoid appearances of impropriety; it is another thing, through the exercise of supervisory

In addition, even where a court uses the standard articulated in the rules of professional conduct as the disqualification standard, it may be difficult to establish that the standard is met. For example, it may be difficult to establish that a lawyer's biases are so pronounced that they actually create a significant risk that the representation of a client will be materially limited.[117] But in the case of prosecutor bias, the public's perception that impartial justice cannot be done is deeply troubling by itself.[118]

In the case of prosecutors in particular, courts have developed their own standards for disqualification. Some courts state that the appearance of impropriety sometimes justifies disqualification of a prosecutor.[119] But courts that recognize this possibility also often note that they decide such matters on a case-by-case basis and emphasize that that it is the "rare" situation in which the mere appearance of impropriety is sufficient to justify disqualification of a prosecutor.[120] Under this approach, the appearance of

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authority over the conduct of licensed attorneys, to remove duly appointed (or elected) government officials from office."). Where the general rule is that one lawyer's conflict is imputed to the other lawyer's in the office, there is a real concern about disqualifying an entire prosecutor's office based on the conflict of one prosecutor. *See* State v. Camacho, 406 S.E.2d 868, 875 (N.C. 1991) (noting the government's interest in fulfilling its prosecution function and the interest in convenience in using the local prosecutor's office); Green & Roiphe, *supra* note 98, at 488 (noting the difficulty of applying the imputed disqualification rule to an entire office).

[117] *See* Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 883 (2009) (noting the difficulties of inquiring into actual bias); State v. Detroit Motors, 163 A.2d 227, 231 (N.J. Super Ct. Law Div.1960 (noting that "in any given case, except a very unusual one, it would not be possible for the defendant to prove" improper intent or motive on the part of a prosecutor).

[118] *See* People v. Greer, 561 P.2d 1164, 1172 (Cal. 1977) (stating that "both the accused and the public have a legitimate expectation that his zeal, as reflected in his tactics at trial, will be borne of objective and impartial consideration of each individual case"); People v. Doyle, 406 N.W.2d 893, 898-99 (Mich. Ct. App. 1987) (recognizing that the two policy considerations in prosecutor disqualification matters are fairness to the accused and "the preservation of public confidence in the impartiality and integrity of the criminal justice system").

[119] *See* Battle v. State, 804 S.E.2d 46, 51 (Ga. 2017) ("Certainly, a conflict of interest or the appearance of impropriety from a close personal relationship with the victim may be grounds for disqualification of a prosecutor."); State v. Lemasters, 456 S.W.3d 416, 423 (Mo. 2015) (stating that disqualification is required "if a reasonable person with knowledge of the facts would find an appearance of impropriety and doubt the fairness of the trial"); *Doyle*, 406 N.W.2d at 899 ("American courts have consistently held that the appearance of impropriety is sufficient to justify disqualification of a prosecuting attorney."). *But see* People v. Paulitch, No. 337949, 2018 WL 3594456, *8 (Mich. Ct. App. July 26, 2018) (holding that the appearance of impropriety standard is no longer applicable in prosecutor disqualification situations). Numerous authors have called for a disqualification standard for prosecutors that employs an "appearance of justice" or "appearance of impropriety" standard. *See* Levine, *supra* note 33 at 1462; Robertson, *supra* note 102, at 861;

[120] Bogle v. State, 655 So.2d 1103, 1106 (Fla. 1995); People v. Adams, 987 N.E.2d 272, 274 (N.Y. 2013).

impropriety justifies disqualification only in those situations in which "the appearance is such as to discourage public confidence in our government and the system of law to which it is dedicated."[121] Numerous courts take the position that a party must show the existence of an *actual* conflict or *actual* impropriety before disqualification of a prosecutor is appropriate.[122] Others have adopted something of a middle ground, finding that disqualification is appropriate where the presence of an actual or apparent conflict "renders it unlikely that defendant will receive a fair trial."[123]

Regardless of the disqualification standard employed, the disqualification of a prosecutor is rare.[124] One study of all federal disqualification decisions in criminal cases over a ten-year period found exactly zero cases in which a court disqualified a prosecutor.[125] Thus, the reality is that reliance on the threat of disqualification to curb prosecutorial bias is unlikely to yield meaningful results.[126]

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[121] *Adams*, 987 N.E.2d at 274; *see also* Liapis v. Dist. Ct., 282 P.3d 733, 737 (Nev. 2012) (stating that the appearance of impropriety is only sufficient to justify disqualification in the case of a public attorney and then only "if the appearance of impropriety is so extreme as to undermine public trust and confidence in the judicial system").

[122] *See* People in Interest of N.R., 139 P.3d 671, 675 (Colo. 2006) (noting that the legislature had done away with the "appearance of impropriety" standard as a basis for disqualifying a district attorney"); Commonwealth v. Breakiron, 29 A.2d 1088, 1092 (Pa. 1999) (applying an actual impropriety standard); Commonwealth v. Eskridge, 604 A.2d 700, 702 (Pa. 1992) (stating that disqualification is appropriate where "an actual conflict of interest affecting the prosecutor exists in the case"); State v. McManus, 941 A.2d 222, 231–32 (R.I. 2008) ("Courts that have considered this issue typically hold that a prosecutor should be disqualified if there is an actual conflict of interest."); Levine, *supra* note 102, at 1454 (stating that courts usually hold that an appearance of impropriety is insufficient to justify disqualification of a prosecutor). Courts also regularly apply an actual conflict standard on post-conviction motions based on a prosecutor's alleged conflict. *See* State v. Medina, 713 N.W.2d 172, 182 (Wis. Ct. App. 2006) (concluding that "actual conflict of interest" standard applied to post-trial claim based on failure to disqualify prosecutor); Monu Bedi, *Unraveling Unlawful Command Influence*, 93 WASH. U. L. REV. 1401, 1433 (2016) (stating that the appearance of impropriety is insufficient to warrant relief).

[123] People v. Conner, 666 P.2d 5, 8 (Cal. 1983) (en banc). This standard replaced the previous standard in California under which disqualification is appropriate when a prosecutor has a conflict that "might prejudice him against the accused and thereby affect, *or appear to affect*, his ability to impartially perform the discretionary function of his office. People v. Greer, 561 P.2d 1164, 1173 (Cal. 1977) (emphasis added).

[124] *See* Zacharias & Green, at 241 n.173 (2000) (noting the reluctance of judges to disqualify prosecutors); Keith Swisher, *Disqualifying Defense Counsel: The Curse of the Sixth Amendment*, 4 ST. MARY'S J. LEGAL MALPRACTICE. & ETHICS 374, 397 (2014) (noting the difficulty criminal defendants face in seeking disqualification of prosecutors).

[125] Swisher, *supra* note 124, at 397.

[126] *See* Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 774-75 (2018) (stating questioning the ability of recusal motions to address judicial bias).

IV. THE CODE OF JUDICIAL CONDUCT AND JUDICIAL BIAS

The judiciary has had its own issues in recent years concerning extrajudicial speech manifesting bias on the basis of race and other characteristics.[127] The most disturbing example is undoubtedly the case of Judge Richard Cebull, a federal judge in Montana, who sent hundreds of offensive emails displaying bias on the basis of race, sex, religion, and sexual orientation to friends and professional contacts over the course of a several year period.[128] The Code of Judicial Conduct's treatment of a

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[127] *See* Devlin Barrett, *Judge Forced Off Bench After Online Posting of Noose, 'Make America Great Again' Message*, WASH. POST (Sep. 17, 2019 10:48 AM) (detailing judicial misconduct proceedings and resignation of judge who posted an image of a noose on his Facebook page), https://www.washingtonpost.com/national-security/judge-forced-off-bench-after-online-posting-of-noose-make-america-great-again-message/2019/09/17/29baa094-d954-11e9-ac63-3016711543fe_story.html; Lateshia Beachum, *A Judge Resigns After Using the N-Word in Texts that She Says the Public was Never Meant to See*, SEATTLE TIMES (Feb. 27, 2020, 1:46 PM) (detailing account of judge who sent racist texts to a romantic partner), https://www.washingtonpost.com/nation/2020/02/27/jessie-leblanc-resigns-racial-slur/. In 2019, the Tennessee Board of Judicial Conduct found that Judge James Lammey had not made anti-Semitic statements on Facebook when he reposted an article by a Holocaust denier that called Muslim immigrants "foreign mud" and suggested that Jews should "get the F--- over the Holocaust." Daniel Connolly, *Memphis Judge Posts Facebook Link to Holocaust Denier's Essay Calling Immigrants 'Foreign Mud*,' MEMPHIS COMM APPEAL (Apr. 30, 2019, 5:00 AM), https://www.commercialappeal.com/story/news/2019/04/30/memphis-judge-facebook-jim-lammey-posts-holocaust-denier-article-tennessee/3335613002/; Tennessee Board of Judicial Conduct, Letter of Reprimand, (Nov. 15, 2019), http://www.tsc.state.tn.us/sites/default/files/docs/lammey_reprimand_letter_only_2019_11_18.pdf. The Board did, however, reprimand the judge for violating the Code of Judicial Conduct by sharing items on Facebook that reflected, among other things,

> a concern for the credibility of certain federal agencies, a strong position on professional athletes kneeling during the national anthem, the effect of illegal aliens on the economy, opposition to certain Democrat platform principles, opposing support for then-presidential candidate Hillary Clinton, a position on Black Lives Matter and the double standard of the news media, a position on the controversial issue of shooting deaths by police officers and the media bias, anti-Jihadist sentiment, a position on the controversial issue of transgender bathrooms and boys in girls' locker rooms, concern for illegal aliens voting in Virginia, and an expression of bias in favor of then-presidential candidate Donald Trump.

Letter of Reprimand, *supra*; Debra Cassens Weiss, *Judge Who Shared 'Foreign Mud' Article on Facebook is Reprimanded for Partisan Posts*, ABA J. (Nov. 20, 2019, 4:39 PM), https://www.abajournal.com/news/article/judge-who-shared-foreign-mud-article-on-facebook-is-reprimanded-for-partisan-posts.

[128] *See* Matt Volz, *Federal Judge Sent Hundreds of Bigoted Emails*, ASSOCIATED PRESS, (Jan. 27, 2014), https://apnews.com/article/0a3b4ee6fc3340b8aac612202ee264aa. The Ninth Circuit Judicial Conference originally found Cebull's conduct violated the Code of Judicial Conduct and ordered a public reprimand, but later vacated the order as moot before

judge's extrajudicial activities giving rise to a perception of bias is fairly extensive, at least when compared to the treatment of prosecutorial bias in the rules of professional conduct.[129] In addition, the Code of Conduct for United States Judges, a separate ethics code applying to federal judges, also addresses the same issues. The following Part examines the CJC's handling of judicial bias, including its handling of extrajudicial conduct giving rise to the perception of racial and other forms of bias, as well as the treatment of the issue by the Code of Conduct for United States Judges and the federal statute authorizing discipline in the case of misconduct on the part of federal judges.

A. The CJC's Treatment of Judicial Bias in General

The CJC recognizes that judges owe numerous duties to the public.[130] Judges owe duties of "independence" and "integrity."[131] They also owe a duty of "propriety," not just in the sense of conduct that complies with the law and other external regulations but in the sense of competent, diligent, and unbiased performance of a judge's judicial duties.[132] Rule 2.1 of the CJC announces that a judge's performance of judicial duties take precedence over all of the judge's personal or extrajudicial activities.[133] Thus, the CJC prohibits a judge from engaging in extrajudicial activities, like serving as a partner or employee of a business entity, that may take a judge's time and attention away from the performance the judge's performance of judicial duties.[134]

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it became public due to Cebull's subsequent retirement. Eventually, the Committee on Judicial Conduct and Disability of the Judicial Conference of the United States ordered the publication of the report. In re Judicial Misconduct, 751 F.3d 611 (Judicial Conference of the United States Committee on Judicial Conduct and Disability 2014).

[129] Canon 3 of the CJC is devoted entirely to personal and extrajudicial activities that may conflict with the obligations of the judicial office.

[130] *See* MODEL CODE OF JUDICIAL CONDUCT Terminology (AM. BAR. ASS'N 2010) (stating that the judicial office is a public trust).

[131] *Id.* Canon 1 ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.").

[132] *Id.* Terminology (defining "impropriety" in terms of "that violates the law, court rules, or provisions of this Code, and conduct that undermines a judge's … impartiality"); *id.* Canon 2 (stating that a judge "hall perform the duties of judicial office impartially, competently, and diligently").

[133] MODEL CODE OF JUDICIAL CONDUCT r. 2.1.

[134] *See id.* r. 3.11(B) (prohibiting a judge, with certain exceptions, from serving as an officer, director, manager, general partner, advisor, or employee of any business entity).

But the Code also recognizes that a judge's own biases may also interfere with the proper performance of the judge's judicial duties. "Proper performance" of judicial duties, by definition, includes the impartial performance of those duties.[135] The CJC defines "impartiality" in terms of the ability to maintain an open mind and the lack of bias or prejudice in favor of, or against, a particular class of persons.[136] The concept of impartiality appears repeatedly through the CJC, from the rules regarding judicial disqualification to the rules regarding making pledges, promises, or commitments that are inconsistent with the impartial performance of judicial duties.[137] Of the four judicial duties that Canon 1 articulates a judge as owing to the public–-independence, integrity, propriety, and impartiality–-impartiality (or the absence of bias or prejudice) is the duty the rules and canons reference most frequently.[138]

In addition to the lack of *actual* bias or prejudice, judges must avoid conduct that creates the *appearance* of bias or prejudice. In order for the public to have confidence in the independence, integrity, and propriety of the judiciary as a whole, the public must have faith that judges are performing their duties free from bias or prejudice.[139] Thus, when the CJC speaks of the need for judges to perform their duties in a manner free from bias or prejudice, the rules also frequently reference the need for the public to be able to reasonably believe that bias or prejudice concerning an

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[135] *See id.* r. 2.2 ("A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.").

[136] *Id.* Terminology.

[137] *Id.* r. 2.11; *id.* r. 2.10.

[138] Relying on the mention of a word in a rule or canon is perhaps not the best way to measure the frequency with which the CJC addresses a concept. For example, Rule 2.15 references a judge's "honesty, trustworthiness, or fitness as a judge." *Id.* r. 2.15. These are all terms that might arguably fall under either the category of "integrity" or "proper" behavior (or perhaps both). The word "independence" does not appear in Rule 3.4, prohibiting a judge from accepting appointments to governmental committees. But a comment explains that the rule furthers the goals of independence and impartiality. Therefore, reliance on the canons and black-letter rules may not yield a complete picture. But, by my count at least, the concept of "impartiality," including reference to the absence of "bias" or "prejudice," appears 13 times in the CJC, almost twice as much as any of the other terms.

[139] *See generally id.* Preamble ¶ [2] (stating that judges "should aspire at all times to conduct that ensures the greatest possible public confidence in their independence, impartiality, integrity, and competence"); *id.* r. 2.3 cmt. 1 ("A judge who manifests bias or prejudice in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute.")

individual or an entire class of people were not factors in the judge's actions.[140]

For example, Rule 2.3(A) of the CJC requires a judge to perform the duties of the judicial office without bias or prejudice. [141] Judicial conduct organizations typically apply the rule to the situation where a judge's conduct displays a preference for one side or the other, irrespective of race or similar considerations.[142]

B. The CJC's Treatment of Extrajudicial Speech or Conduct Manifesting Bias

The CJC contains three rules that might potentially speak to the situation in which a judge's extrajudicial conduct manifests bias on the basis of race or other characteristics.

1. The Appearance of Impropriety Standard

The first is Rule 1.2, the "appearance of impropriety" rule. Canon 1 of the CJC articulates the principle that a judge "shall avoid impropriety and the appearance of impropriety."[143] Rule 1.2 then announces the enforceable rule: "A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[144] A comment emphasizes that "[p]ublic confidence in the judiciary is eroded by improper conduct and conduct that creates the appearance of impropriety" and that "[t]his principle applies to both the professional and personal conduct of a judge."[145]

The "appearance of impropriety" language has a long history in the Code of Judicial Conduct and has survived several revisions to the code.[146] An earlier version of the rule, which is still in place in some jurisdictions,

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[140] *See id.* r. 2.11(A) ("A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances . . . .").
[141] *Id.*
[142] *See* In re Cresap, 940 So.2d 624, 635 (La. 2006) (concluding judge violated rule where he failed to remain neutral and "essentially aligned himself with the plaintiffs").
[143] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM. BAR ASS'N 2010).
[144] *Id.* r. 1.2.
[145] *Id.* Canon 1 cmt. [1].
[146] See Nancy J. Moore, *Is the Appearance of Impropriety an Appropriate Standard for Disciplining Judges in the Twenty-First Century*, 41 LOY U. CHI. L.J. 285, 285-88 (2010) (discussing history of the standard).

existed in the form of a broad, hortatory Canon 2(A), requiring that judges avoid impropriety and the appearance of impropriety at all times.[147] A comment explained that the focus should be on "whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."[148] The current CJC definition of "impropriety" likewise focuses, in part, on "conduct that undermines a judge's independence, integrity, or impartiality."[149] Each of these terms, in turn, has its own definition.[150]

Depending on the jurisdiction, judges who engage in conduct reflecting racial and other forms of bias or prejudice potentially face discipline under either version of the CJC for having engaged in conduct that creates the appearance of impropriety. For example, Judge Richard Cebull, the federal judge from Montana mentioned earlier who used his court email account to send hundreds of offensive emails was found to have engaged in conduct that created the appearance of impropriety.[151] Similarly, in a 2016 case from Pennsylvania, a Supreme Court justice used his government-supplied computer and email server to send and receive e-mails that contained nudity and inappropriate references involving gender, race, sexual orientation, and ethnicity, including several sexually suggestive emails about court personnel.[152] The Pennsylvania Court of Judicial Discipline considered whether this conduct violated the "appearance of impropriety" canon.[153] In considering whether the justice's conduct violated the canon, the court observed that the canon applied not only to a judge's "decision-making duties' but a judge's "off-bench" conduct as well.[154] In this particular instance, the court classified the judge's conduct as "on-bench" misconduct insofar as the judge used government-supplied equipment to send the material.[155] The court concluded that the judge's conduct "could cause citizens to wonder whether their cases received unbiased consideration by" the judge and that "a reasonable inference was that the judge lacked the impartiality required of judges."[156] Such conduct "fundamentally lessens

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[147] MODEL CODE OF JUDICIAL CONDUCT Canon 2(A) cmt. 2 (AM. BAR ASS'N 1990).
[148] *Id.*
[149] MODEL CODE OF JUDICIAL CONDUCT Terminology (Am. BAR ASS'N 2010).
[150] *Id.*
[151] *See supra* note 128 and accompanying text; In re Judicial Misconduct, 751 F.3d 611, 62 (Judicial Conference of the United States Committee on Judicial Conduct and Disability 2014).
[152] *In re* Eakin, 150 A.3d 1042, 1060 (Pa. Ct. Jud. Disc. 2016).
[153] *Id.* at 1055.
[154] *Id.* at 1056-57.
[155] *Id.* at 1057.
[156] *Id.* at 1058.

public confidence in the judiciary" and, therefore, violated Pennsylvania's Code of Judicial Conduct.[157]

Judicial conduct commissions have also applied the "appearance of impropriety" standard in situations in which a judge's conduct has nothing to do with the judge's official duties.[158] *In re Ellender* involved a judge who attended a Halloween part wearing a prisoner jump suit, handcuffs, an "afro wig," and blackface.[159] The Judiciary Commission of Louisiana charged the judge with a violation of the same version of the "appearance of impropriety" canon as in the Pennsylvania case.[160] In finding that the judge had violated the rule, the court referenced the importance that "justice is dispensed to every citizen, without fear of bias or prejudice."

2. Rule 2.3(B)

The second rule that might apply in the case of a judge's out-of-court conduct suggesting bias on the basis of race or other characteristics is CJC Rule 2.3(B). Rule 2.3 generally requires that judges perform their judicial duties without bias or prejudice.[161] In particular, Rule 2.3(B) provides that

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation . . . .[162]

On its face, the rule applies to conduct occurring in the performance of the judge's official duties, and this is the situation in which courts and judicial conduct commissions have applied the rule.[163] But some courts have applied the rule in a situation in which a judge makes statements or engages in conduct about the judge's duties but not while performing those

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[157] *Id.*
[158] *See In re* Lowery, 999 S.W.2d 639, 661 (Tex. Rev. Trib. 1998) (disciplining judge for, *inter alia*, racial slurs directed at parking attendant).
[159] *In re* Ellender, 889 So.2d 225, 227 (La. 2004).
[160] *See id.* at 228
[161] MODEL CODE OF JUDICIAL CONDUCT r. 2.3(A) (AM. BAR ASS'N 2010).
[162] *Id.* r. 2.3(B).
[163] *See, e.g.,* State v. Bowser, 474 P.3d 744 (Kan. 2020) (involving judge who allegedly abandoned his neutral role and referenced defendant's race while encouraging defendant to accept plea deal); *In re* Day, 413 P.3d 907 (Or. 2018) (involving judge who set up screening process in order to avoid having to perform same-sex marriages).

duties.[164] *In re Neely* is a judicial discipline case from Wyoming involving a municipal court judge who told a reporter that she would not perform same-sex marriages due to her religious beliefs.[165] The Wyoming Commission on Judicial Conduct and Ethics subsequently brought disciplinary charges against the judge for violation of several rules of judicial conduct, including a violation of Wyoming's version of Rule 2.3(B) and eventually recommended the judge's removal from the bench.[166]

In reviewing the Commission's decision, the Wyoming Supreme Court noted that a comment to Rule 2.3 explained that a judge must avoid conduct that may reasonably be *perceived* as prejudiced or biased.[167] While the judge denied that her statement manifested any actual bias toward homosexuals, in the court's view, her statement could reasonably be perceived as doing so.[168]

3. Rule 3.1(C)

While the "appearance of impropriety" standard and Rule 2.3(B) have been applied to extrajudicial speech and conduct manifesting racial bias, Rule 3.1(C) speaks most directly to such conduct. Rule 3.1(C) provides that a judge shall not participate in extrajudicial activities "that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality."[169] A comment explains that "[d[iscriminatory actions and expressions of bias or prejudice by a judge, even outside the judge's official or judicial actions, are likely to appear to a reasonable person to call into question the judge's integrity and impartiality."[170] The comment mentions "jokes or other remarks that demean individuals" on the basis of race and these other characteristics as the sort of speech that might reasonably call into question a judge's integrity or impartiality.[171] Rule 3.1(C) is a new addition to the CJC, but shares some similarities with the "appearance of impropriety" standard from the older version of the CJC.[172]

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[164] *See* Tennessee Board of Judicial Conduct, Letter of Reprimand, Nov. 15, 2019, http://www.tsc.state.tn.us/sites/default/files/docs/lammey_reprimand_letter_only_2019_11_18.pdf.
[165] 390 P.3d 728, 734 (Wyo. 2017).
[166] *Id.* at 751. The judge was also charged with violation of Rule 1.1 (compliance with the law), 1.2 (appearance of impropriety), and 2.2 (fairness and impartiality). *Id.* at 747-50.
[167] *Id.* at 751 (quoting MODEL CODE OF JUDICIAL CONDUCT r. 2.2 cmt. 2 (AM. BAR ASS'N 2010).
[168] *Id.*
[169] MODEL CODE OF JUDICIAL CONDUCT r. 3.1(B) (AM. BAR ASS'N 2010).
[170] *Id.* r. 3.1 cmt. [3].
[171] *Id.*
[172] *See supra* notes 139-140 and accompanying text (discussing appearance of impropriety standard).

C. The Code of Conduct for United States Judges and Judicial Bias

Finally, it is worth noting the treatment of these issues by the Code of Conduct for United States Judges and the federal statute that establishes the complaint procedure for judicial misconduct. As its name suggests, the Code of Conduct applies to federal judges.[173] Although organized somewhat differently, the Code largely tracks the CJC. So, for example, Canon 1 of both codes require a judge to maintain high standards of conduct in order to uphold the integrity and independence of the judiciary.[174] In Judge Cebull's case, the Ninth Circuit Judicial Conference found that the judge had violated this provision of the Code by sending his racist emails.[175]

In Cebull's case, the Judicial Conference also found that the judge's conduct satisfied the standard for discipline for judicial misconduct. 29 U.S.C. § 351 authorizes the investigation of complaints of judicial misconduct on the part of federal judges. The statute provides that any person alleging conduct prejudicial to the effective administration of the business of the courts may file a complaint, which then triggers a review of the complaint by the chief judge of the circuit.[176] The process may ultimately lead to professional discipline.[177] This same "conduct prejudicial to the effective administration of the courts" appears in several state constitutions as well and has been applied in the case of extrajudicial conduct.[178] In Judge Cebull's case, the Ninth Circuit Judicial Conference found that the judge's emails amounted to conduct prejudicial to the effective administration of justice and warranted public reprimand.[179]

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[173] CODE OF CONDUCT FOR UNITED STATES JUDGES Introduction (2019).
[174] *Id.* Canon 1 ("A judge should maintain and enforce high standards of conduct and should personally observe those standards, so that the integrity and independence of the judiciary may be preserved."); MODEL CODE OF JUDICIAL CONDUCT ("A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary …").
[175] In re Judicial Misconduct, 751 F.3d 611, 623 (Judicial Conference of the United States Committee on Judicial Conduct and Disability 2014).
[176] 29 U.S.C. §§ 351(a), 352(a).
[177] *Id.* § 354.
[178] *See* Judicial Inquiry and Review Commission of Virginia v. Pomrenke, 806 S.E.2d 749, 754-55 (Va. 2017) (finding that judge who violated canons of judicial conduct by attempting to influence witnesses in wife' criminal trial had engaged in conduct prejudicial to the proper administration of justice); In re Jones, 800 So.2d 828, 830 (La. 2001) (finding judge's battery upon another judge violated canons of judicial conduct and amounted to conduct prejudicial to the administration of justice that brings the judicial office into disrepute).
[179] *In re Judicial Misconduct*, 751 F.3d at 624.

V. APPLYING THE LESSONS OF THE CJC'S TREATMENT OF JUDICIAL BIAS TO THE SPECIAL CASE OF EXTRA-PROSECUTORIAL SPEECH

The rules of professional conduct governing lawyers serve multiple functions. They establish standards of conduct in an effort to provide guidance for lawyers.[180] They also serve as the basis for the lawyer disciplinary process, which punishes misconduct and deters future misconduct.[181] But they serve other purposes as well. The rules also articulate fundamental values of the legal profession.[182] Thus, the rules serve an expressive function by making a statement to the profession and the public at large as to the fundamental principles of the profession and what forms of conduct it considers unacceptable.[183] In order to send a message to the public and to deter prosecutors from engaging in extra-prosecutorial conduct that creates the appearance of bias or otherwise calls into question a prosecutor's impartiality or fitness or the office, the ABA and states should borrow from the approach of the Code of Judicial Conduct and amend their rules of professional conduct governing lawyers address the issue.

A. Lessons for Prosecutor from Judicial Ethics

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[180] *See* Robert J. Kutak, *Report of the Commission on Evaluation of Professional Standards, 1*07 A.B.A. ANN. REP. 828, 828 (1982) (stating that one purpose of the project to rewrite the rules of professional conduct was to provide "realistic, useful guidance for lawyer conduct").

[181] *See* Fred C. Zacharias, *The Purposes of Lawyer Discipline*, 45 WM. & MARY L. REV. 675, 698 (2003) (listing deterrence as one of the functions the professional disciplinary process).

[182] *See* Kutak, *supra* note 164 (stating that another purpose of the project to rewrite the rules of professional conduct "was to produce rules of professional conduct that preserve fundamental values").

[183] *See* David L. Hudson, Jr., *Conduct Unbecoming*, ABA J. (Oct. 1, 2020) (quoting Professor Leslie Levin as saying of Rule 8.4(g) that "the rule signals that [discriminatory] conduct is not tolerated by the profession," and "should help deter some of that behavior"), https://www.abajournal.com/magazine/article/opinion-helps-define-the-reach-and-scope-of-aba-model-rule-84g; Veronica Root Martinez, *Combating Silence in the Profession*, 105 VA. L. REV. 805, 855 (2019) ("Similar to formal laws, rules of professional conduct can also serve an expressive function."). Gary A. Munneke, *Dances with Nonlawyers: A New Perspective on Law Firm Diversification*, 61 FORDHAM L. REV. 559, 601 (1992) (stating that the rules "represent a philosophy, and, moreover, an expression of what it means to be a lawyer"); W. Bradley Wendel, *Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities*, 54 VAND. L. REV. 1955, 2052 (2001) ("From a sociological standpoint, ethics rules perform the function of bolstering the public image of the profession …").

As one court observed, "Judges who freely use racial or other epithets, on or off the bench, create, at the very least, a public perception that they will not fairly decide cases involving minorities."[184] The rules regarding disqualification of judges are based on the maxim that "justice must satisfy the appearance of justice."[185] Ultimately, judicial legitimacy depends on the public's perception of judicial impartiality.[186]

The same logic applies to prosecutors. Given the power and influence prosecutors have over the operation of the criminal justice system and the public scrutiny that their jobs entail, the perception that a prosecutor's professional judgment may be clouded by bias has the potential to damage confidence in the fairness of the system.[187] Therefore, it makes sense to subject prosecutors to standards of conduct similar to those that apply to judges when that conduct may influence public perceptions of impartiality and integrity.

This would not be the first instance in which the law recognized the similarities between judges and prosecutors in terms of their decision-making processes. Courts have frequently referred to a prosecutor's role as being "quasi-judicial" in nature.[188] Judges enjoy absolute immunity from tort liability stemming from the performance of their judicial duties.[189] Prosecutors also typically enjoy absolute immunity based on the courts' recognition of the fact that prosecutors acting in their official capacity act in

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[184] *In re* Lowery, 999 S.W.2d 639, 656-57 (Tex. Rev. Trib. 1998).

[185] *See* Levine, *supra* note 33, at 1457 ("The maxim that 'justice must satisfy the appearance of justice' is central to the Supreme Court's due process rulings on judicial disqualifications …").

[186] *See* Moore, *supra* note 146, at 291 (stating that judges must avoid the appearance of impropriety "because public confidence in the independence, integrity, and impartiality of the judiciary is critical to the public's willingness to accept judicial decision-making and submit to the rule of law."); Robertson, *supra* note 126, at 740 ("Public faith in the impartiality of our courts is the bedrock of American democracy and the rule of law.").

[187] Paul B. Spielman, *Public Prosecutors and the Appearance of Justice: How the Court of Appeals Erred in Gatewood by Treating a State's Attorney as an Ordinary Advocate*, 65 MD. L. REV. 1222, 1248 (2006) ("[A]nything affecting a prosecutor's impartiality can have a significant impact on a defendant's right to a fair trial and on public confidence in the fairness of the trial.").

[188] *See, e.g.,* Ganger v. Peyton, 379 F.2d 709, 714 (4th Cir. 1967) ("The prosecuting attorney is an officer of the court, holding a quasi judicial position …"); Griffin v. U S, 295 F. 437, 439 (3d Cir. 1924) ("The United States Attorney and his assistants are officers of the court, holding quasi judicial positions."); State v. Boyd, 233 S.E.2d 710, 717 (W. Va. 1977) ("This Court has uniformly held that a prosecuting attorney occupies a quasi-judicial position in the trial of a criminal case.").

[189] *See* RESTATEMENT (SECOND) OF TORTS § 656 (AM. LAW INST. 1977) ("A public prosecutor acting in his official capacity is absolutely privileged to initiate, institute, or continue criminal proceedings.").

a "quasi-judicial" capacity.[190] The policy justifications for extending this form of immunity to prosecutors center on the need to preserve a prosecutor's independent judgment and the need to preserve the public trust in that judgment.[191] Without protection from potential tort liability, prosecutors might fear retaliation for exercising discretion as to whether to charge a defendant and how to prosecute that charge.[192] Immunity is therefore necessary to protect the prosecutor's ability to exercise that discretion in good faith and to preserve public trust in the good faith exercise of that discretion.[193] Courts have offered the same justifications for extending immunities to judges in the performance of their official duties.[194]

In order to further the public's trust in the impartiality of the criminal justice system, prosecutors should be under an obligation similar to that of judges in terms of extra-prosecutorial behavior that casts reasonable doubt on a prosecutor's impartiality or integrity. This, of course, does not mean that the rules of conduct for prosecutors and judges should be identical in terms of their regulation of off-duty conduct.[195] There are limits to the similarities between judges and prosecutors. But the similarities between them are sufficiently strong to warrant treating them similarly in terms of speech or conduct that leads to reasonable concerns over impartiality.

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[190] *See, e.g.*, Brown v. Dayton–Hudson Corp., 314 N.W.2d 210, 214 (Minn.1981) (holding that assistant city attorney enjoyed quasi-judicial immunity)); Creelman v. Svenning, 410 P.2d 606, 607 (Wash. 1966) (recognizing immunity for prosecutors, "acting as [they do] in a quasi-judicial capacity").

[191] *See* Butz v. Economou, 438 U.S. 478, 514-15 (1978) (recognizing the importance of preserving independent judgment in the case of hearing officers and analogizing such individuals to prosecutors); Imbler v. Pachtman, 424 U.S. 409, 424-25 (1976) (justifying immunity, in part, on the need to preserve public trust in the prosecutor's office).

[192] *See* Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir.1949) ("[I]t has been long decided that it is better to allow a few wrongs to go unredressed than to expose all prosecutors to the risk of retaliation for their occasional honest mistakes.").

[193] *See* Imbler, 424 U.S. at 425 ("The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages.").

[194] *See* Droscha v. Shepherd, 931 N.E.2d 882, 889 (Ind. Ct. App. 2010) ("The underlying purpose of the immunity is to preserve judicial independence in the decision-making process.").

[195] For example, Rule 3.3 of the CJC prohibits a judge from testifying as a character witness in a judicial, administrative, or other adjudicatory proceeding. MODEL CODE OF JUDICIAL CONDUCT r. 3.3. (AM. BAR ASS'N 2010). The primary concern with this prohibition if abuse of the prestige of the judicial office. *Id.* cmt. [1]. While there might be valid concerns about, for example, an assistant district attorney testifying as a character witness on behalf of another, the concerns do not seem to be pronounced enough to make doing so a disciplinable offense.

B. Potential Objections

Imposing a duty on prosecutors to avoid extra-prosecutorial conduct that calls into question a prosecutor's impartiality would likely raise concerns from some quarters. As discussed below, the history surrounding the passage of ABA Model Rule 8.4(g), the rule prohibiting a lawyer from engaging in conduct the lawyer knows or should know is harassment or discrimination on the basis of race and other traits, suggests that some members of the bar--perhaps including some prosecutors--would likely object to the adoption of the rule. But there are also some strong responses to the anticipated objections.

1. Objections

Rule 8.4(g) has been the subject of intense criticism in some quarters.[196] Since the ABA adopted Model Rule 8.4(g) in 2016, several states have adopted the rule in its entirety or in similar form, but the attorneys general in at least four states have raised constitutional objections to the rule.[197] The criticisms surrounding Rule 8.4(g) suggest several possible lines of attack against a special rule concerning prosecutor bias.

Rule 8.4(g), like so many other issues in today's society, has become a flashpoint in today's ongoing culture wars. The rule has been portrayed by some as the legal profession's version of "cancel culture."[198] The primary

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[196] *See*; Josh Blackman, *Reply: A Pause for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 241, 242 (2017) (raising First Amendment concerns over the rule);); Dennis Rendleman, *The Crusade Against Model Rule 8.4(g),* YOUR ABA (Oct. 2018) (discussing criticisms of the rule), https://www.americanbar.org/news/abanews/publications/youraba/2018/october-2018/the-crusade-against-model-rule-8-4-g-/.

[197] *See* Josh Blackman, *ABA Model Rule 8.4(g) in the States*, 68 CATH. U. L. R. 629, 630-33 (2019) (discussing opposition by attorneys general in Texas, Louisiana, South Carolina, and Tennessee); *N.M. Adopts Anti-Bias Rule Based on Controversial ABA Standard*, BLOOMBERG L., (Oct. 19, 2019 3:13 PM) (noting the adoption by New Mexico, Maine, Missouri, and Colorado), https://news.bloomberglaw.com/us-law-week/new-mexico-adopts-anti-bias-rule-based-on-controversial-aba-rule Pennsylvania has adopted a similar version of the rule. *See* Debra Cassens Weins, *Suit Claims Anti-Bias Ethics Rule Infringes Lawyer's Free Speech Rights*, ABA J., (Aug. 11, 2020, 3:23 PM.) (noting Pennsylvania's adoption and a subsequent legal challenge to the rule), https://www.abajournal.com/news/article/suit-claims-anti-bias-ethics-rule-infringes-lawyers-free-speech-rights.

[198] Mark DuBois, Rule *8.4(g): About Time or Unconstitutional Cancel Culture?*, CONN. L. TRIB. (Aug. 20, 2020, 12:42 PM) (noting free speech objections to the rule), https://www.law.com/ctlawtribune/2020/08/20/rule-8-4g-about-time-or-unconstitutional-cancel-culture/; Rendleman, *supra* note 197 (stating that the rule "has been sucked into the national partisan political morass").

criticisms of Rule 8.4(g) involve overbreadth and vagueness, both in the practical and constitutional senses of the terms.[199]

In terms of overbreadth arguments, the rule prohibits discriminatory conduct not just on the basis of race, sex, and other characteristics that the law has long addressed but also on the basis of characteristics (such as marital status and socioeconomic status) that are not often the subject of state or federal anti-discrimination statutes.[200] The inclusion of some of the traits in this latter category has triggered overbreadth criticisms.[201] In addition, the rule is not limited to discriminatory conduct occurring in the course of the representation of a client or even in a lawyer's professional capacity. Instead, the rule prohibits discriminatory conduct "related to the law."[202] This includes interacting with co-workers and "participating in bar association, business or social activities in connection with the practice of law."[203] For critics, the extension of the rule in this manner represents an unjustified "incursion into the private spheres of an attorney's professional life."[204]

The rule has also generated criticisms over its supposed vagueness.[205] Critics have complained about the failure of the drafters to define key terms, such as "discrimination," "harassment," "socioeconomic status," and "legitimate" advocacy."[206] As a result, they charge, the rule may have a chilling effect on lawyers' willingness to discuss controversial topics or express unpopular opinions.[207]

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[199] *See* Margaret Tarkington, *Throwing Out the Baby: The ABA's Subversion of Lawyer First Amendment Rights*, 24 TEX. REV. L. & POL. 41, 43 (2019) (stating that the rule is "fraught with First Amendment problems").

[200] MODEL RULE 8.4(g).

[201] *See* David L. Hudson, Jr., *States Split on New ABA Model Rule Limiting Harassing or Discriminatory Conduct*, ABA J., (Oct. 1, 2017, 2:30 AM) (noting criticism of inclusion of "socioeconomic status" in the rule); Tennessee Attorney General, Comment Letter Opposing Proposed Amended Rule of Professional Conduct 8.4(g) (stating that the rule covers a "a significant amount of speech and conduct that is not currently prohibited under federal or Tennessee antidiscrimination statutes"), https://www.tn.gov/content/dam/tn/attorneygeneral/documents/foi/rule84g/comments-3-16-2018.pdf.

[202] MODEL RULE 8.4(g).

[203] *Id.* r. 8.4 cmt. [4].

[204] Blackman, *supra* note 196, at 257.

[205] *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 493 (2020) (noting vagueness concerns); Andrew Halaby & Brianna L. Long, *New Model Rule of Professional Conduct 8.4(g): Legislative History, Enforceability Questions, and a Call for Scholarship*, 41 J. LEG. PROF. 201, 236–41(2017) (raising vagueness concerns).

[206] *See* Halaby & Long, *supra* note 205, at 236-37.

[207] *See* Michael S. McGinnis, *Expressing Conscience with Candor: Saint Thomas Moore and First Freedoms in the Legal Profession*, 42 HARV. J.L. & PUB. POL'Y 173, 217 (2019) (noting concerns expressed by opponents).

A recent case from Pennsylvania highlights some of the obstacles that amending the rules of professional conduct to add a rule addressing prosecutor bias might face. In December 2020, a federal court in Pennsylvania enjoined the enforcement of Pennsylvania's version of the rule on First Amendment grounds in *Greenberg v. Haggerty*.[208] On its face, Pennsylvania's version of Rule 8.4(g) would seem to be narrower than ABA Model Rule 8.4(g) insofar as it only addresses a lawyer's conduct occurring "in the practice of law" as opposed to conduct "related to the law."[209] But a comment to the Pennsylvania rule explains that, like the Model Rule, the Pennsylvania rule applies to "participation in activities that are required for a lawyer to practice law," including continuing legal education events.[210] The language of Pennsylvania's rule borrows not only from Model Rule 8.4(g) but from Rule 2.3 of the Code of Judicial Conduct.[211] So, in addition to prohibiting discriminatory or harassing speech or conduct, the rule prohibits a lawyer from "knowingly manifest[ing] bias or prejudice" on the basis of race and other characteristics."[212]

The plaintiff in *Greenberg* was a lawyer who presented on hate speech cases among other issues at continuing legal education programs.[213] While presenting, the plaintiff would quote the speech at issue, which would sometimes contain offensive language or epithets.[214] He expressed the concern that in accurately quoting language from and expressing his opinions on these cases, he ran the risk that audience members would perceive his speech as manifesting bias or prejudice and that he might potentially face disciplinary action under Rule 8.4(g).[215]

The United States District Court for the Eastern District of Pennsylvania held that Pennsylvania's Rule 8.4(g) amounted to unconstitutional viewpoint discrimination.[216] The court took issue with various aspects of the rule, including the fact that the rule restricts speech "outside of the courtroom, outside of the context of a pending case, and even outside the much broader playing field of 'administration of justice.'"[217] The court was also troubled by what it saw as the lack of clear standards concerning what conduct would qualify as manifesting bias or

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[208] Greenberg v. Haggerty, No. 20-3822, 2020 WL 7227251, *8 (E.D. Pa. Dec. 8, 2020).
[209] PA. RULES OF PROF'L CONDUCT r. 8.4(g).
[210] *Id.* r. 8.4 cmt. [3].
[211] *See Greenberg*, 2020 WL 7227251 at *6.
[212] PA. RULES OF PROF'L CONDUCT r. 8.4(g).
[213] *Greenberg*, 2020 WL 7227251 at *6
[214] *Id.* at *6.
[215] *Id.*
[216] *Id.* at *15.
[217] *Id.*

prejudice. In the court's view, the rule would chill constitutionally protected speech and force lawyers to "scour every nook and cranny of each ordinance, rule, and law in the Nation" for guidance as to what conduct is prohibited.[218]

Given the polarized nature of debate in the U.S. on the issues of race, gender identity, and religion (among other topics), opposition to a rule of professional conduct that limits prosecutor speech or conduct involving these topics unrelated to the practice of law is foreseeable, if not guaranteed. Critics will undoubtedly cite the same irony that the *Greenberg* court perceived, namely that "attorneys, those who are most educated and encouraged to engage in dialogues about our freedoms, are the very ones here who are forced to limit their words . . . ."[219] In short, any addition to the rules of professional conduct addressing prosecutor bias is likely to generate at least some pushback.

2. Responses

Whatever the strength of the arguments may be against subjecting *all* lawyers to potential discipline for engaging in speech or conduct that manifests bias, the arguments are considerably weaker when the disciplinary rule in question applies only to prosecutors. Trying to make sense of First Amendment law as it applies to lawyers and judges is a daunting task, and it is (blessedly) not the purpose of this Article to engage in a deep dive into all of the First Amendment implications of possible regulation of prosecutors' extra-judicial speech.[220] Complicating the task in this instance is that there are relatively few judicial discipline cases involving First Amendment challenges outside of the judicial election context, and prosecutor discipline cases involving First Amendment challenges are hen's teeth rare. But the existing caselaw involving First Amendment challenges to regulation of judicial conduct does provide some useful guidance.

1. Strict Scrutiny Analysis

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[218] *Id.*
[219] *Id.* at * 15.
[220] *See* Rebecca Aviel, *Rule 8.4(g) and the First Amendment: Distinguishing Between Discrimination and Free Speech*, 31 GEO. J. LEGAL ETHICS 31, 32 (2018) (noting the "erratic quality" of decisions in the area and stating that that it is "difficult if not impossible to develop a coherent paradigm for assessing when the bar can restrict or prohibit lawyer speech").

One theme that emerges from the decisional law is that the state has greater ability to regulate the expressive conduct of lawyers and judges than it does in other areas.[221] As Professor Rodney Smolla has observed, "[t]he restrictions commonly placed on the expressive rights of judges and lawyers would thus almost certainly be struck down under the First Amendment if the general marketplace rules were applied."[222] The state's ability to restrict expressive conduct on the part of judges, in particular, is undoubtedly at its zenith when the restriction involves the performance of judicial functions. For example, Professor Smolla observes that CJC Rule 2.3(B)'s prohibition on the manifestation of bias in the performance of judicial duties would face no serious First Amendment challenge under generally-applicable First Amendment tests, let alone under the more permissive approach that applies in the case of lawyers and judges.[223]

A restriction on a judge's expressive conduct outside the context of the performance of judicial duties is likely to face strict scrutiny.[224] But another theme that emerges from the decisional law in the area is that the state has compelling interests in protecting the appearance of judicial impartiality, integrity, and independence as well as maintaining actual impartiality, integrity, and independence.[225] The 2015 Supreme Court decision of

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[221] Professor Rebecca Aviel has cataloged some of the situations in which courts have held that the First Amendment does not prevent the state from restricting lawyer speech:

> For better or for worse, the First Amendment that guides this discussion is the same one that has allowed lawyers to be sanctioned for writing letters to accident victims, criticizing judges, or soliciting campaign contributions for judicial elections. Over First Amendment objections, lawyers have been held civilly liable for refusing partnership to women, potentially subject to criminal liability for providing advice to clients about pursuing claims in front of international tribunals, and excluded from the practice of law altogether for espousing white supremacy.

Id. at 36-37.

[222] Rodney A. Smolla, *Regulating the Speech of Judges and Lawyers: The First Amendment and the Soul of the Profession*, 66 FLA. L. REV. 961, 965 (2014).

[223] *Id.* at 970-71; *see also In re* Neely, 390 P.3d 728 (Wyo. 2017) (upholding constitutionality of Rule 2.3(B)).

[224] *See* Griffen v. Ark. Judicial Discipline and Disability Comm'n, 130 S.W.3d 524, 535-36 (Ark. 2003) (stating it was "crystal clear" that strict scrutiny review applied to rule prohibiting judges from appearing at a public hearing before a legislative body except on matters concerning the law, the legal system or the administration of justice or except when acting pro se in a matter involving the judge or the judge's interests).

[225] *See* Platt v. Board of Comm'rs on Grievances and Discipline of Ohio Sup. Ct., 894 F.3d 235, 254 (6th Cir. 2018) (stating that "maintaining judges' actual independence and impartiality, and maintaining the public's trust in the judiciary's independence and impartiality" are both compelling interests); French v. Jones, 876 F.3d 1228, 1237 (9th Cir. 2017) (holding state has a compelling state interest "in both actual and perceived impartiality"); Guffey v. Duff, 459 F.Supp.3d 227, 232 (D.D.C. 2020) (recognizing state's interest in protecting the appearance of judicial integrity and impartiality to be compelling);

Williams-Yulee v. Florida Bar provides the clearest example of this principle.[226]

Williams-Yulee involved a First Amendment challenge to Florida's judicial conduct rule prohibiting judges from personally soliciting campaign funds.[227] The case does not involve the type of purely personal speech having no direct connection to the judicial office discussed in this Article. But neither is it an example of speech occurring as part of a judge's official duties where the state unquestionably has greater latitude in terms of the restrictions it imposes. Instead, the Court applied heightened scrutiny given the potential for the restriction to stifle speech closely related to matters of public concern and democratic self-governance.[228] As such, the case illustrates the type of scrutiny that would likely apply to restrictions on extra-judicial (or extra-prosecutorial) speech.

Florida's stated concern in enforcing the restriction was that "personal solicitations by judicial candidates create a public appearance that undermines confidence in the integrity of the judiciary."[229] Drawing upon the notion that "justice must satisfy the appearance of justice," the Court recognized this as a compelling state interest.[230] The restriction was narrowly tailored insofar as it permitted candidates for judicial office to advertise their candidacies and discuss matters of public concerns through other means, such as writing letters, giving speeches, putting up billboards, and directing their campaigns to directly solicit contributions.[231]

Any rule regulating a prosecutor's extra-prosecutorial conduct would need to advance a compelling state interest and be narrowly tailored. *Williams-Yulee* suggests that preserving the integrity and impartiality and the appearance of integrity and impartiality of prosecutors should easily qualify as compelling interests. Provided any restriction on extra-prosecutorial speech is narrowly tailored, such restrictions should withstand constitutional challenge.

2. Vagueness Challenges

In addition, the *Greenberg* decision also suggests that any attempt to regulate prosecutors' extra-prosecutorial speech must be able to withstand a

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Griffen, 120 S.W. 3d at 536 (stating that safeguarding an independent judiciary is a compelling state interest).

[226] 575 U.S. 433 (2015).

[227] *Id.* at 441.

[228] *See id.* at 443.

[229] *Id.* at 454.

[230] *Id.* at 446 (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

[231] *See id.* at 452.

potential vagueness challenge.[232] The decisions in the judicial context suggest that reliance upon the language of the CJC may aid in that defense. The standard that is most susceptible of vagueness criticism is the "appearance of impropriety" standard. But even this standard has withstood numerous vagueness challenges in the past.[233] The Supreme Court's decision in *Williams-Yulee* suggests that a rule tethered to the values of integrity and impartiality is even more likely to withstand a vagueness challenge.[234] The CJC defines both terms, thus reducing come concerns over vagueness.[235] And the terms "bias" and "prejudice," which appear both as part of the definition of "impartiality" and as part of other rules, have been further defined by the Supreme Court in the context of judicial disqualification decisions.[236] More generally, there is a wealth of decisional law in the judicial disqualification and discipline cases that help to flesh out the contours of these concepts.[237] First Amendment caselaw involving lawyers and judges reveals that standards that might be impermissibly vague in other contexts are enforceable when applied to lawyers given their experience within the profession.[238] Ultimately, the legal profession should be able to draft rules regarding extra-prosecutorial conduct that are sufficiently clear to withstand vagueness challenges.

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[232] Greenberg v. Haggerty, Civil Action No. 20-3822, 2020 WL 7227251, *1 (E.D. Pa. Dec. 8, 2020) (noting plaintiff's vagueness challenge).

[233] *See* Moore, *supra* note 146, at 293-94 (noting that the clear majority of decisions have upheld rules based on this standard against vagueness challenges).

[234] *See supra* notes 226-231 and accompanying text; *In re* Neely, 390 P.3d 728, 746-47 (Wyo. 2017) (rejecting vagueness challenge to rule of judicial conduct designed to promote values of judicial integrity and impartiality). It is also noteworthy that the terms "bias" and "prejudice," which appear in the CJC both as part of the definition of impropriety.

[235] *See supra* notes 135-136 and accompanying text.

[236] *See* Liteky v. United States, 510 U.S. 540, 550 (1994) (stating the terms "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate*, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ... or because it is excessive in degree").

[237] *See* Robertson, *supra* note 126, at 768 (noting decisions discussing the concepts). A 2016 Supreme Court decision actually discussed the issue of bias in a case involving a prosecutor who had worked on a death penalty case and later became a judge who was asked to rule on the individual's habeas petition. Pennsylvania v. Williams, 136 S. Ct. 1899 (2016).

[238] Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 666 (1985) (Brennan, J., concurring in part and dissenting in part) ("Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for 'conduct which all responsible attorneys would recognize as improper for a member of the profession.'") (citations omitted).

C. Amending the Rules of Professional Conduct

There remains the issue of how an amendment to the rules of professional conduct should be structured in order to address the problem of extra-prosecutorial conduct that raises concern over impartiality. There are several possible approaches a jurisdiction might take. The following section explores the various options, proceeding in order of least promising to most promising.

1. Adding an Updated Version of DR 1-102(A)(6)

One possibility would be to enact a rule based on prior DR 1-102(A)(6), which prohibits a lawyer from engaging in conduct that adversely reflects on the lawyer's fitness to practice law.[239] This would be unwise, however. The concerns over vagueness involving this standard are even more pronounced than they are in the case of Rule 8.4(g) in terms of what conduct the rule prohibits.[240] Such a rule would likely be met with widespread opposition.

2. Reinterpreting Model Rule 8.4(d) or Creating A Prosecutor-Specific Version of the Rule

Another possibility would be for jurisdictions to interpret Model Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice,[241] as reaching discriminatory words or conduct occurring outside a lawyer's professional capacity. One concern with this approach is that it would require courts to overrule prior precedent defining the scope of the rule. The fact that a prosecutor's professional judgment is influenced or appears to be influenced by impermissible biases as evidenced by the prosecutor's extra-prosecutorial speech certainly interferes with the administration of justice in the sense that it may cause the public to doubt that justice is being done when a particular prosecutor is involved. But, as discussed, the vast majority of courts have interpreted the rule to require that the misconduct have some bearing on the judicial process in connection with an identifiable case or tribunal.[242] Unless the extra-prosecutorial

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[239] *See supra* notes 81-90 and accompanying text and accompanying text.
[240] See Stephen Gillers, *A Rule to Forbid Bias and Harassment in Law Practice: A Guide for State Courts Considering Model Rule 8.4(g)*, 30 GEO. J. LEGAL ETHICS 195, 216 n.80 (2017) ("The 'adversely reflects' rule offers much less guidance on the forbidden conduct than does Rule 8.4(g).").
[241] *See supra* notes 55-80 and accompanying text.
[242] *See supra* note 57 and accompanying text.

conduct involves an ongoing matter, the rule would not apply under the majority approach.[243] Interpreting the rule to reach, for example, a prosecutor's generalized anti-Muslim tweets would require the overwhelming majority of jurisdictions to reverse their prior interpretations of the rule. However, such a change might not be as radical as it might first appear. As discussed, federal judges and many state judges are already subject to essentially the same standard, which has been applied to extrajudicial conduct unrelated to any ongoing matter.[244] Applying the same standard to prosecutors would be consistent with existing law in this respect.

The other concern with applying the "prejudicial to the administration of justice" standard to extra-prosecutorial speech is the likelihood of opposition from prosecutors and First Amendment challenges. The rule has previously withstood constitutional challenges on vagueness and overbreadth grounds,[245] but courts and commentators have expressed concern over the reach and potential vagueness of the "prejudicial to the administration of justice" standard.[246] The vagueness and overbreadth concerns may take on greater weight when the standard is applied to speech having no direct relation to an ongoing matter. The concerns over the potential chilling effect of the rule on speech are likely to be most pronounced in those borderline instances in which a prosecutor's extrajudicial statements are not overtly racist.

If a jurisdiction wanted to adopt a prosecutor-specific rule dealing with conduct prejudicial to the administration of justice, the logical place to include such a rule would be within Rule 3.8, the rule devoted to the special responsibilities of prosecutors. Logically, any lawyer – a prosecutor, a criminal defense, or civil lawyer – could commit a violation of the rule through biased social media postings or other extra-prosecutorial speech under the revised approach. But as discussed, the state has a stronger interest in imposing special duties upon prosecutors than other types of attorneys, so a special application of the rule that applies to prosecutors

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[243] *See supra* notes 66-67 and accompanying text.
[244] *See supra* notes 176-179 and accompanying text.
[245] *See* Howell v. State Bar, 843 F.2d 205, 208 (5th Cir. 1988).
[246] *See* Matter of the Discipline of Two Attorneys, 660 N.E.2d 1093, 1099 (Mass. 1996) (stating that the broad language of the rule "presents the risk of vagueness and arbitrary application" (internal quotation marks omitted)); Grievance Adm'r v. Fried, 570 N.W.2d 262, 265 (Mich. 1997) (per curiam) (noting that application of such a "broad rule" requires caution); Bruce A. Green, *Lawyers' Professional Independence: Overrated or Undervalued*, 46 AKRON L. REV. 599, 627 (2013) (referring to Rule 8.4(d) as "a vague catch-all rule"); Noah D. Stein, Note, *Prosecutorial Ethics and the McNulty Memo: Should the Government Scrutinize an Organization's Payment of its Employees' Attorneys' Fees?*, 75 FORDHAM L. REV. 3245, 3261 (2007) (noting vagueness concerns).

might be justified more easily.[247] Therefore, if a jurisdiction were to adopt a prosecutor-specific version of Rule 8.4(d), it should be included as a part of Rule 3.8.

3. Adding a "Manifestation of Bias" Standard

A jurisdiction might also consider adding a version of CJC Rule 2.3(B) to its rules of professional conduct governing lawyers, thereby prohibiting a prosecutor from manifesting bias or prejudice in the performance of prosecutorial duties.[248] In order to address the problem of extra-prosecutorial speech, however, the language of the rule would need to be amended because, on its face, the rule only addresses conducting occurring in the performance of prosecutorial duties. [249] Pennsylvania took a similar approach in its rules by adding language from CJC Rule 2.3(B) to its version of Rule 8.4(g); this, of course, led to the suit in *Greenberg*.[250] The fact that this "manifestation of bias" language has been the subject of a successful constitutional challenge suggests that the adoption of such a rule would be met with some opposition and potential litigation. While there are valid arguments in response to the constitutional objections, another concern is that the rule might not address the situation in which a prosecutor makes a statement that is not overtly racist but nonetheless calls into question the prosecutor's understanding of the special role of a prosecutor. For example, a rule for prosecutors based on Rule 2.3(B) probably would not apply to the prosecutor who, as discussed in the Introduction, posted a suggestion on social media that law enforcement shoot protesters.[251] Therefore, while such a rule might address the worst types of biased public statements by prosecutors, it would not, standing alone, address other statements that call into question the prosecutor's integrity or fitness for office.

4. Adding an Appearance of Impropriety Standard

Another means of addressing a prosecutor's extra-prosecutorial speech that manifests racial bias or that otherwise calls into question a prosecutor's fitness would be to add an "appearance of impropriety" rule--like the one in

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[247] *See supra* notes 221-231 and accompanying text.
[248] *See supra* notes 161-162 and accompanying text.
[249] *See In re* Neely, 390 P.3d 728, 760-62 (Wyo. 2017) (Kautz, J., dissenting) (arguing that Rules 2.2 and 2.3 only apply to actions occurring within the context of a particular matter).
[250] *See supra* notes 208-218 and accompanying text.
[251] *See supra* note 9 and accompanying text.

the CJC[252]--to Model Rule 3.8, the rule regarding a prosecutor's responsibilities. The CJC's appearance of impropriety standard has been attacked for its vagueness and lack of clear standards.[253] The standard has been decried as being "unbelievably ambiguous"[254] and "the poster child of statutory imprecision."[255] Underlying these concerns is the somewhat subjective nature of the term; as explained by one judge, "Propriety . . . . is often in the eye of the beholder."[256] As a result, critics charge, judges may not know when their conduct crosses the line, and it becomes too easy for any aggrieved individual or enemy to allege a violation of the rule.[257] Indeed, the criticism concerning the standard was substantial enough that the ABA Joint Commission to Evaluate the Model Judicial Code went back and forth several times on the question of whether the "appearance of impropriety" standard should be included as a black-letter rule in the CJC.[258] Ultimately, the ABA approved the current version of the CJC, which includes both Canon 1 ("A Judge Shall Uphold and Promote the Independence, Integrity, and the Impartiality of the Judiciary, and Shall Avoid Impropriety and the Appearance of Impropriety") as well as Rule 1.2, which provides that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[259]

The "appearance of impropriety" standard has also appeared in ethics rules governing lawyers before being jettisoned over vagueness concerns. Canon 9 of the older Model Code of Professional Responsibility instructed lawyers to avoid even the appearance of professional impropriety.[260] While the accompanying Disciplinary Rule 9-101 was titled "Avoiding Even the

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[252] *See supra* notes 143-160 and accompanying text.
[253] *See* Cynthia Gray, *Avoiding the Appearance of Impropriety: With Great Power Comes Great Responsibility*, 28 UALR L. REV. 63, 93 (2005) (noting the vagueness criticisms of the standard); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1936 (2010) (noting concerns that the standard may be so vague as to violate due process); Ronald D. Rotunda, *Judicial Ethics, the Appearance of Impropriety, and the Proposed New ABA Judicial Code*, 34 HOFSTRA L. REV. 1337, 1339 (2006) (noting that the term has not been defined with any precision).
[254] Gray, *supra* note 253, at 93 n.187 (quoting Supreme Court Justice Arthur Goldberg).
[255] McKoski, *supra* note 253, at 1936.
[256] *In re* Larsen, 616 A.2d 529, 580-81 (Pa. 1992) (per curiam).
[257] *See* Rotunda, *supra* note 253, at 1338 ("Unnecessarily imprecise ethics rules allow and tempt critics, with minimum effort, to levy a plausible and serious charge that the judge has violated the ethics rules.").
[258] *See* Moore, *supra* note 146, at 285-87 (discussing the history of the provision).
[259] MODEL CODE OF JUDICIAL CONDUCT Canon 1 (AM BAR ASS'N 2010); *id.* r. 1.2.
[260] MODEL CODE OF PROF'L RESPONSIBILITY Canon 9 (AM BAR ASS'N 1969).

Appearance of Impropriety," the language of the rule itself did not use this language or specifically prohibit conduct that resulted in the appearance of impropriety.[261] Instead, the "appearance of impropriety" standard was most frequently invoked in in disqualification motions.[262] Where an attorney's continued representation of a client might damage the public's trust, the representation would result in the appearance of impropriety and disqualification was appropriate.[263] But concerns over the subjectivity and vagueness of the standard ultimately led the drafters of the Model Rules of Professional Conduct to omit the "appearance of impropriety" standard.[264]

Given the "appearance of impropriety" standard's somewhat shady reputation, one can foresee organized opposition to the inclusion of such a standard in the rules of professional conduct governing lawyers. But there are arguments on the other side as well. There is a good argument that the concerns over the vagueness of standard are overstated, at least as applied to cases decided under the Code of Judicial Conduct.[265] Judicial conduct commissions and reviewing courts have generally limited application of the standard to situations involving fairly egregious judicial conduct.[266] In addition, the CJC defines the concept by reference to the ideas of independence, integrity, and impartiality, which, in turn, have their own

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[261] *Id.* DR 9-101. The accompanying disciplinary rules prohibited such conduct as accepting private employment in a matter upon the merits of which the lawyer acted in a judicial capacity or had substantial responsibility as a public employee, implying the ability to influence a public official, and improperly safeguarding client funds. *Id.* DR 9-101, 102.

[262] *See* Flowers, *supra* note 277, at 14 (noting that some courts used Canon 9 as a basis for disqualifying attorneys); David Luban & Michael Millemann, *Good Judgment: Ethics Teaching in Dark Times*, 9 GEO. J. LEGAL ETHICS 31, 44 (1995) ("Canon 9, in particular, which enjoins lawyers to avoid even the appearance of impropriety, was often quoted in conjunction with conflict of interest rules to tip borderline cases, despite the fact that its language is not duplicated [in the disciplinary rules].").

[263] Flowers, *supra* note 27, at 713-16 (discussing use of the standard in the disqualification context).

[264] *See* Flowers, *supra* note 27, at 717; *see also* Bruce A. Green, *Conflicts of Interest in Legal Representation: Should the Appearance of Impropriety Rule Be Eliminated in New Jersey—or Revived Everywhere Else?*, 28 SETON HALL L. REV. 315, 332-33(1997) (discussing the decision to omit the standard from the AB's Model Rules of Professional Conduct.)

[265] *See* Gray, *supra* note 253, at 93-95 (discussing successful defenses of the standard in the face of vagueness challenges); Moore, *supra* note 139, at 295–96 (dismissing criticism that the rule may be applied "on a whim").

[266] Moore, *supra* note 146, at 296 (noting that in most instances, the conduct in question "was, at best, highly questionable"); *see also* Gray, *supra* note 253, at 65 ("[J]udicial discipline authorities are not using the standard as an arbitrary smell test but are applying it in a cautious, reasoned, and appropriate manner with no evidence of overly subjective interpretation.").

definitions.[267] These definitions reduce some of the uncertainty associated with the standard.

Moreover, requiring prosecutors to abide by an "appearance of impropriety" standard is not a new concept.[268] The ABA Criminal Justice Standards for the Prosecution Function already provides that a prosecutor "[s]hould avoid an appearance of impropriety in performing the prosecution function."[269] The new wrinkles would be making this obligation mandatory as opposed to aspirational and having it apply to extra-prosecutorial conduct as well as conduct occurring during the prosecution function.

5. Adding a Version of CJC Rule 3.1(C)

Perhaps the most practical approach to the specific problem of extra-prosecutorial speech that involves racial and other forms of bias or that otherwise calls into question the prosecutor's fitness for office would be to add a new paragraph to the rule of conduct covering prosecutors that is based on Rule 3.1 of the Code of Judicial Conduct.[270]

> Rule 3.8: Special Responsibilities of a Prosecutor
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> …
>
> (B) A prosecutor shall conduct the prosecutor's personal and extra-prosecutorial activities to minimize the risk of conflict with the obligations of the prosecutor's office. When engaging in extra-prosecutorial activities, a prosecutor shall not:
>
> (i) participate in activities that will interfere with the proper performance of the prosecutor's official duties;
>
> (ii) participate in activities that will lead to frequent disqualification of the prosecutor;

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[267] *See supra* note 150 and accompanying text.
[268] *See* Flowers, *supra* note 27, at 736 (arguing in favor of adding an appearance of impropriety standard to Model Rule 3.8).
[269] AM. BAR ASS'N CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(c) (4th ed. 2017).
[270] *See supra* notes 169-172 and accompanying text.

> (iii) participate in activities that would appear to a reasonable person to undermine the prosecutor's independence, integrity, or impartiality.[271]

This rule would address the specific problem of racist or similarly offensive online speech as well as other forms of extra-prosecutorial conflict that might lead to reasonable questions concerning a prosecutor's professional judgment and ability to carry out the obligations of the office with integrity and impartiality. The restriction is narrowly tailored insofar as it permits prosecutors to discuss or even announce their views on matter of public concern, provided their actions do not raise reasonable concerns about their independence, integrity, or impartiality. Any concerns about clarity of language could be addressed by borrowing the definitions of "independence," "integrity," and "impartiality" from the CJC and the accompanying comments to the rule.[272] The wealth of disciplinary and judicial decisions involving these concepts would also be relevant in determining when a prosecutor's conduct amounts to a violation.

Judicial ethics opinions may also provide greater clarity and guidance concerning when extra-prosecutorial speech and activity on social media in particular may violate the rule. Judicial ethics opinions on the subject make clear that the rule prohibits a judge from "liking" a friend's demeaning or offensive posts.[273] Reposting a Facebook friend's discriminatory communication might also amount to the sort of endorsement that violates the rule.[274] A California opinion explains that a judge has an obligation under the rule to delete "or otherwise repudiate demeaning or offensive comments made by others that appear on the judge's social networking site.[275]

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[271] Adding this provision would require reorganizing the existing version of Rule 3.8. The language in the text accompanying this note is provided as an example of how the rule might be restructured.

[272] MODEL CODE OF JUDICIAL CONDUCT Terminology (AM. BAR ASS'N 2010). *See generally* Rotunda, *supra* note 231, at 1340 ("[F]or all its problems, the test of 'impartiality might reasonably be questioned' is not as troublesome as is the even more formless, 'appearance of impropriety.'").

[273] *See* Mass Comm. on Judicial Ethics Op. No. 2016-01 (2016), https://www.mass.gov/opinion/cje-opinion-no-2016-01; Mo. Comm. on Ret., Removal and Discipline Op. 186 (2015) (on file with author).

[274] *See* Mass. Comm. on Judicial Ethics Op. No. 2016-01 (2016), https://www.mass.gov/opinion/cje-opinion-no-2016-01

[275] Ca. Judges Ass', Judicial Ethics Op. 66, https://www.caljudges.org/docs/Ethics%20Opinions/Op%2066%20Final.pdf. Some opinions advise that if a judge becomes aware of discriminatory content on a friend's social media site, the judge must stop "liking" or "following" that individual, lest the judge's failure to act be construed as an endorsement of that individual's views that would

CONCLUSION

This Article has devoted considerable time to anticipating objections to the adoption of a new rule of conduct addressing extra-prosecutorial speech and conduct that manifests bias on the basis of race and other characteristics. But it is worth noting that individual prosecutors' offices might also adopt their own internal ethics codes. For example, Connecticut's Division of Criminal Justice has adopted its own ethics policy, which begins by announcing that employees of the Division "shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the Division of Criminal Justice and the State of Connecticut's Criminal Justice system."[276] One rule within the policy adopts an "appearance of impropriety" rule, prohibiting employees from engaging in any personal or professional activity that creates the reasonable appearance of impropriety or conflict with the proper discharge of his or her duties or employment in the public interest.[277] Another discusses activities outside of an employee's official duties and borrows language from Canon 3 of the Code of Judicial Conduct, including the language from Rule 3.1(C) prohibiting a judge from participating in activities that would appear to a reasonable person to undermine the employee's independence, integrity, or impartiality.[278]

At least until more prosecutor offices adopt such policies, the legal profession should formally do so. The CJC provides some examples of possible approaches that might be tailored in order to withstand a First Amendment challenge. But ultimately, the failure of the legal profession to adopt such an approach may cause an increased lack of faith in the criminal justice system.

One final example from the judicial realm provides an illustration of the need for such a rule. *Mississippi Commission on Judicial Performance v. Wilkerson* is a 2004 decision from Mississippi.[279] In *Wilkerson*,

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negatively influence the integrity or impartiality of the judiciary. Mass. Comm.on Judicial Ethics Op. No. 2016-01 (2016), https://www.mass.gov/opinion/cje-opinion-no-2016-01; Mo. Comm. on Rwt., Removal and Discipline Opinion 186 (2015).

[276] State of Conn. Div. of Criminal Justice, Admin. Policies and Procedures, Office of the Chief State's Attorney, Policy No, 106, https://portal.ct.gov/-/media/Ethics/Ethics_Policies/2019-2020/Division-of-Criminal-Justice-Ethics-Policy-2019.pdf?la=en; https://portal.ct.gov/-/media/DCJ/Division_of_Criminal_Justice_Ethics_Policy.pdf

[277] *Id.*

[278] *Id.*

[279] 876 So. 2d 1006 (Miss. 2004).

Mississippi's judicial conduct commission concluded that a justice of the peace had violated the state's rule of judicial conduct prohibiting a judge from engaging in extrajudicial conduct that casts reasonable doubt on the judge's ability to act impartially as a judge.[280] The commission reached this conclusion after the justice of the peace wrote a letter to the editor of a local paper complaining about the fact that some states had permitted same-sex partners to sue in a capacity traditionally only afforded to spouses. Specifically, the justice of the peace wrote, "[i]n my opinion, gays and lesbians should be put in some type of mental institute instead of having a law like this passed for them . . . ."[281] The Mississippi Supreme Court held that while the state had a compelling interest in preserving the impartiality of the judiciary, it did not have a compelling interest in preserving the appearance of impartiality.[282] In reaching this decision, the court referenced "an old Malayan proverb which states: 'Don't think there are no crocodiles because the water is calm.'"[283] According to the court, the state should be preserving the impartiality of the bench by helping "citizens to spot the crocodiles" by letting biased judges speak rather than creating the appearance that there are no crocodiles.[284]

Whatever one's views are on the relative merits of crocodiles and crocodile-spotting, a reasonable person knows that crocodiles are dangerous. And a reasonable person might also assume that where there is one crocodile, there may be more. At that point, a reasonable person might lose all faith that the water is reasonably safe and simply avoid going anywhere near the water altogether. That is not something the criminal justice can afford to let happen. Perhaps the better approach is to announce to potential visitors that crocodiles are dangerous, are not welcome in these waters, and will be dealt with should they appear.

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[280] *Id.* at 1009-10.
[281] *Id.* at 1009.
[282] *Id.* at 1015.
[283] *Id.* at 1016.
[284] *Id.*