

# **A VOICE FOR ONE, OR A VOICE FOR THE PEOPLE: BALANCING PROSECUTORIAL SPEECH PROTECTIONS WITH COMMUNITY TRUST**

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*Prosecutors, as representatives of the public in the criminal justice system, are the sole advocates for “the People” in a criminal case. Thus, prosecutors are expected to maintain a particular level of integrity that would ensure a fair and just representation of the People. Despite this expectation, the wide discretionary authority prosecutors hold makes it virtually impossible to regulate their conduct. Furthermore, the First Amendment of the U.S. Constitution protects many expressions of viewpoints, and such protections extend—albeit to a limited degree—to prosecutors, thereby giving them even more discretion in how they decide to handle their own cases. Nonetheless, the U.S. Supreme Court has not interpreted the First Amendment to protect prosecutors whose words evidently contravene the functions of the prosecutor’s office. Rather, a prosecutor may be terminated if the office finds that the prosecutor’s speech undermines the office’s interests. What the law does not address, however, is the extent to which the First Amendment protects prosecutors whose unfavorable viewpoints do not affect their individual performance within the workplace but nonetheless detract from the community’s trust in the prosecutor’s office. This Note examines the state of the First Amendment as it applies to prosecutors within the scope of their employment and utilizes the underlying principles to expand the discussion to prosecutorial speech beyond the scope of their employment. Ultimately, this Note proposes that prosecutorial speech should be regulated not only by the effect the speech has on the office’s functions but also by the adverse effect the speech has on the community’s trust in the prosecutor and the office to pursue justice in an unbiased manner.*

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#### INTRODUCTION

Prosecutors are public officials who represent the residents of a community (“the People”) and their interests in the criminal justice system.<sup>1</sup> Thus, prosecutors are responsible for garnering and maintaining the community’s trust in the system. However, this trust may be undermined when the community suspects that prosecutors who hold different ethical views from the community cannot separate their biases from their duties and, therefore, cannot zealously advocate on behalf of the people of the community.<sup>2</sup> In 2014, residents of Orange County, Florida, faced such a conflict when Assistant State Attorney (ASA) Kenneth Lewis, who had a very active online

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1. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS’N 2015).

2. *See id.* § 3-1.6.

presence, posted inflammatory statements on his social media pages.<sup>3</sup> Upon discovering such posts, State Attorney Jeff Ashton warned ASA Lewis of his use of social media, temporarily reassigned him, and ultimately implemented a social media policy in 2015 to limit such discriminatory online posts by the office's prosecutors.<sup>4</sup> Despite the office's implementation of the social media policy, on June 12, 2016—just hours after the shooting at Pulse, a gay nightclub in Orlando—ASA Lewis posted a rant on Twitter in which he stated that “Orlando is a national embarrassment” teeming with “3rd world miscreants and ghetto thugs.”<sup>5</sup> ASA Lewis was ultimately suspended and fired from his position as a prosecutor on the ground that his online posts violated the office's social media policy.<sup>6</sup> However, ASA Lewis argued that such a policy violated his First Amendment rights because his comments were “non-work related” and were posted through his personal account outside of his employment hours.<sup>7</sup> State Attorney Ashton admitted that ASA Lewis, despite his remarks, did not demonstrate any incompetence in his ability to exercise discretion fairly in his cases and therefore did not terminate

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3. See, e.g., Gail Paschall-Brown, *Prosecutor Ken Lewis Who Made ‘Crack Hoes’ Comment Reassigned Temporarily*, WESH 2 NEWS (May 30, 2014, 5:59 AM), <http://www.wesh.com/article/prosecutor-ken-lewis-who-made-crack-hoes-comment-reassigned-temporarily/4434103> [<http://perma.cc/53U6-LG5C>] (“Happy Mother’s Day to all the crack hoes out there. It’s never too late to turn it around.” (quoting ASA Lewis’s posts on his personal Facebook page)).

4. See David Caplan, *Florida Assistant State Attorney Suspended for Controversial Facebook Post Following Orlando Attack*, ABC NEWS (June 18, 2016, 5:20 AM), <http://abcnews.go.com/US/florida-assistant-state-attorney-suspended-controversial-facebook-post/story?id=39954404> [<http://perma.cc/X89D-7XNV>]; Summer Knowles, *Prosecutor Fired over Facebook Post Sounds Off on Twitter*, WESH 2 NEWS (June 24, 2016, 7:34 AM), <http://www.wesh.com/article/prosecutor-fired-over-facebook-post-sounds-off-on-twitter/4450412> [<http://perma.cc/P85R-L3UP>]. State Attorney Ashton implemented a social media policy instead of firing ASA Lewis for such speech because Ashton felt that Lewis’s posts were covered under the First Amendment. See Evan Bleier, *Florida Prosecutor Apologizes for ‘Crack Hoes’ Facebook Post on Mother’s Day: Assistant State Attorney Kenneth Lewis Admitted That He Used a ‘Poor Choice of Words.’* UPI (May 23, 2014, 11:13 AM), [http://www.upi.com/Odd\\_News/2014/05/23/Florida-prosecutor-apologizes-for-crack-hoes-Facbeook-post-on-Mothers-Day/4131400855269/](http://www.upi.com/Odd_News/2014/05/23/Florida-prosecutor-apologizes-for-crack-hoes-Facbeook-post-on-Mothers-Day/4131400855269/) [<http://perma.cc/MC63-55Y6>] (noting that State Attorney Jeff Ashton said he would not punish ASA Lewis for what was “clearly political speech”); Jeff Weiner, *Prosecutor Says ‘Crack Hoes’ Facebook Post Was a ‘Poor Choice of Words.’* ORLANDO SENTINEL (May 22, 2014), [http://articles.orlandosentinel.com/2014-05-22/news/os-prosecutor-controversial-comments-20140522\\_1\\_facebook-post-poor-choice-state-attorney-jeff-ashton](http://articles.orlandosentinel.com/2014-05-22/news/os-prosecutor-controversial-comments-20140522_1_facebook-post-poor-choice-state-attorney-jeff-ashton) [<http://perma.cc/J6R4-N6QT>].

5. 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), <http://www.nydailynews.com/news/national/prosecutor-fired-facebook-post-orlando-massacre-article-1.2685858> [<http://perma.cc/XM6U-D64B>]; see also Kenneth Lewis (@Prosecutorslife), TWITTER (June 12, 2016, 9:06 AM), <https://twitter.com/Prosecutorslife/status/741980054515769348> [<http://perma.cc/PP34-UJEC>] (“Orlando is a complete cesspool. It is a melting pot of the 3rd world and ghetto thugs.”).

6. Kenneth Lewis had posted other inflammatory remarks on his Twitter feed. See, e.g., Kenneth Lewis (@Prosecutorslife), TWITTER (June 9, 2016, 7:10 AM) <https://twitter.com/Prosecutorslife/status/740908820084359168> [<http://perma.cc/V8RP-XNY5>] (“Has anyone who has been to Disney actually been to downtown Orlando? It’s a giant toilet.”).

7. Salinger, *supra* note 5.

him.<sup>8</sup> However, Ashton eventually terminated Lewis a year later on the ground that Lewis undermined the community's trust in the criminal justice system.<sup>9</sup> Thus, this situation presents a conflict between a prosecutor's First Amendment right to freedom of speech and the community's trust that the People's interests will be adequately represented in the criminal justice system.

This Note seeks to address this conflict by analyzing two specific questions. First, how far should the First Amendment's protection extend when a prosecutor's private speech undermines the community's trust in the criminal justice system?<sup>10</sup> Second, can a prosecutor be terminated for engaging in speech that suggests the prosecutor's personal viewpoints are drastically opposed to the interests of the community? Part I of this Note gives an overview of the prosecutor's unique role in society as well as the public's perception and expectation of prosecutors as the People's sole representatives in the criminal justice system. This Part then discusses the heightened standards of professional responsibility prosecutors hold by examining the American Bar Association's (ABA) Model Rules of Professional Conduct and Criminal Justice Standards for the Prosecution Function.

Part II addresses two ethical concepts that underlie prosecutors' professional responsibility—prosecutorial discretion and conflicts of interest. An understanding of these two ethical concepts helps to structure the discussion of whether and, if so, to what extent prosecutorial speech should be protected. Part III identifies the legal concerns that the U.S. Supreme Court addresses in evaluating the extent to which prosecutors may exercise their freedom of speech. This Part then discusses employment practices that several circuits have adopted in dealing with prosecutorial speech. These discussions serve to lay out the legal landscape that frames the ultimate resolution of this Note by identifying constitutional limits to the stringent standards imposed on prosecutors.

Part IV finally consolidates the legal and ethical concerns surrounding problematic prosecutorial speech and reemphasizes the importance of community trust in the criminal justice system. Ultimately, this Note extends the current laws governing the employment of prosecutors by refining the definition of prosecutors' employment and characterizing the People as the prosecutors' employer. With this characterization, this Note proposes that the People should be able to terminate prosecutors who express biases that

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8. See Weiner, *supra* note 4 (“I’ve never had a victim come to us and say this man is not treating us with respect.”).

9. Elisha Fieldstadt, *Suspended Florida Official Kenneth Lewis Fired over Anti-Orlando Facebook Post*, NBC NEWS (June 25, 2016, 12:08 AM), <https://www.nbcnews.com/storyline/orlando-nightclub-massacre/suspended-florida-official-kenneth-lewis-fired-over-anti-orlando-facebook-n598806> [<https://perma.cc/729F-LMZM>] (stating that Ashton decided to terminate Lewis because “public trust in the criminal justice system can only be maintained when those empowered to execute the law are, and are perceived to be, free of bias in the execution of their duties”).

10. See Knowles, *supra* note 4 (“When you have people believing prosecutors aren’t trying to defend everyone, it undermines faith in the justice system . . .”).

undermine the community's trust in their ability to carry out their duties effectively.

### I. THE UNIQUE ROLE OF PROSECUTORS IN SOCIETY

As the only people who can bring a criminal charge against a suspected criminal, prosecutors occupy a unique niche in the legal system and society. Part I.A first highlights the important role that prosecutors play in society. In doing so, Part I.A establishes why a prosecutor must maintain the community's trust in the criminal justice system to function effectively. Part I.B then examines the ABA standards and rules that exist specifically to govern and regulate the professional responsibilities of prosecutors.

#### *A. The Prosecutor as an Officer of the Court and Representative of the Criminal Justice System*

Prosecutors are unique in that they are the sole representatives of the community in a criminal trial. Unlike in civil cases, where any litigant may easily choose and replace his or her counsel, in criminal cases, the community has only one option for representation: the prosecutor.<sup>11</sup> Furthermore, unlike civil or criminal defendants who can bring an ineffective assistance of counsel claim against their counsel when they feel that they were inadequately represented, the community does not have the ability to sue a prosecutor for inadequate representation that leads to a defendant's acquittal.<sup>12</sup> If a prosecutor fails to fulfill his or her role adequately in prosecuting a criminal defendant, the community has no recourse. Thus, prosecutors make up a body of plaintiffs' lawyers who take on the role of being not only an officer of the court but also an irreplaceable representative within the criminal justice system.<sup>13</sup>

Due to their role, prosecutors are expected to abide by more stringent standards of professional responsibility. In discussing the professional responsibility of prosecutors, the ABA's Criminal Justice Standards for the Prosecution Function expressly state that a prosecutor's main goal is to seek justice and, in doing so, to "act with integrity and balanced judgment . . . by exercising discretion" appropriately.<sup>14</sup> These standards exist to ensure that a prosecutor acts under a higher standard of professional responsibility than other lawyers to promote justice.<sup>15</sup> If a prosecutor demonstrates that he or she lacks the ability to act with integrity and balanced judgment, it is

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11. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2015).

12. The Double Jeopardy Clause of the Fifth Amendment prevents individuals from being tried twice for the same crime. U.S. CONST. amend. V ("No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb . . .").

13. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a)-(f).

14. *Id.* § 3-1.2(b).

15. MODEL CODE OF PROF'L RESPONSIBILITY EC 7-13 (AM. BAR ASS'N 1980) ("The responsibility of a public prosecutor differs from that of the usual advocate . . ."). The ABA standards are nonbinding, so a prosecutor who does not live up to these standards would not necessarily face sanctions, termination, or disbarment solely under these standards. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b).

questionable whether that individual is professionally fit to serve the public as a prosecutor.<sup>16</sup>

Despite prosecutors' heightened standards of professional responsibility, people have proven to be unsatisfied in terms of their trust in the criminal justice system.<sup>17</sup> Annual surveys conducted from 1993 to 2017 consistently reveal that the public has very low confidence in the criminal justice system.<sup>18</sup> The public's negative perception of the court in the criminal justice system is rooted in concerns of inequitable treatment.<sup>19</sup> In fact, the public views the criminal justice system as favoring suspects or offenders rather than victims.<sup>20</sup> Therefore, any indication that prosecutors are biased<sup>21</sup> or take any actions that contravene the public interest will make it more difficult for the prosecutors' office to demonstrate that it meets the heightened standards of professional responsibility.<sup>22</sup>

### B. *The ABA's Professional Standards for Prosecutors*

The ABA has published several rules, both in its Model Rules of Professional Conduct and its Criminal Justice Standards for the Prosecution Function, to regulate prosecutorial actions and guide prosecutors to meet heightened standards of professional responsibility.<sup>23</sup> For instance, Rule 3.8 of the ABA's Model Rules of Professional Conduct regulates prosecutorial conduct both at the start of a potential criminal prosecution by requiring the

16. See Robert H. Jackson, U.S. Attorney Gen., Address at the Second Annual Conference of United States Attorneys: The Federal Prosecutor (Apr. 1, 1940) (“[Prosecutors] are thus required to win an expression of confidence in [their] character by both the legislative and the executive branches of the government before assuming the responsibilities of a . . . prosecutor.”).

17. See Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 99, 131 (1992) (“There is also a perception—held by a significant number of Americans—that one of the causes of crime is the criminal justice system itself.”).

18. *Confidence in Institutions*, GALLUP, <http://news.gallup.com/poll/1597/%20Confidence-Institutions.aspx> [<http://perma.cc/TBB3-8XU2>] (last visited Nov. 19, 2017) (showing that less than one-third of the surveyed population in recent years has a great deal of confidence in the criminal justice system); see also Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 951 (2006) (“Perhaps because of these factors, nearly three-quarters of Americans lack much confidence and trust in the criminal justice system.”); Roberts, *supra* note 17, at 139 (noting that surveys reveal judges and prosecutors to be among the least credible actors within the criminal justice system).

19. Roberts, *supra* note 17, at 140 (“Negative attitudes toward the courts focus on . . . perceptions that certain groups are treated inequitably . . .”).

20. *Id.*

21. This bias also comes into play in the public perception of sentencing. See *id.* at 142 (explaining the need for a scale of severity in punishments to correlate with public perception of the severity of the crime itself).

22. See generally *id.*

23. See CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.1(b) (AM. BAR ASS'N 2015) (noting that the standards, along with the Model Rules of Professional Conduct, serve to provide guidance as to what the best practices would be for prosecutors). The Model Rules of Professional Conduct, much like the Model Penal Code, are general standards that have been adopted either entirely or in large part by states in writing their own set of rules for professional responsibility. These rules are not statutes and do not have the force of law, but they are used as guidelines in disciplinary proceedings to regulate the actions of lawyers.

prosecutor to find probable cause before prosecuting a charge<sup>24</sup> and at the end of the criminal prosecution by requiring a prosecutor to remedy a wrongful conviction.<sup>25</sup> These rules serve to keep prosecutors in check by making sure that they do not prosecute individuals for an improper purpose.<sup>26</sup> Included within the scope of improper purposes are personal biases, both implicit and explicit, that may be manifested by a prosecutor's words or conduct.<sup>27</sup>

These rules mainly address situations in which the prosecutor is subjectively biased *against* the criminal defendant and thereby prosecutes that individual with an improper motive. However, the rules fail to address situations in which a prosecutor's bias sways his or her discretion *in favor* of the criminal defendant, thereby contravening the public's interest.<sup>28</sup> In other words, if a prosecutor demonstrates that he or she is fine with—or even supportive of—actions that the community deems repugnant, how can the People trust that prosecutor, or any other prosecutor in the same office, to prosecute readily those crimes the community seeks to punish? The ABA's rules and standards do nothing to promote the community's trust in the criminal justice system when a prosecutor holds a view that contravenes public interest. This is problematic because, due to the prosecutor's irreplaceable role, the People—and the victim—are left with no legal recourse in the criminal justice system when a prosecutor does not zealously prosecute a particular case. Thus, it is imperative that the system has a means of ensuring and protecting the “people's right to counsel,” which entails that prosecutors will zealously prosecute crimes that the *community* seeks to punish.

## II. ETHICAL CONSIDERATIONS IN EXTENDING OR LIMITING FIRST AMENDMENT PROTECTION OF PROSECUTORIAL SPEECH

Notwithstanding the rules and standards that govern prosecutors, no regulation expressly limits prosecutorial speech beyond the scope of a

24. MODEL RULES OF PROF'L CONDUCT r. 3.8(a) (AM. BAR ASS'N 2013).

25. *Id.* r. 3.8(h). These principles are also reflected in the heightened duty of candor for prosecutors as opposed to other lawyers. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.4.

26. *See* Jackson, *supra* note 16 (“While the prosecutor at his best is one of the most beneficent forces in our society, when he acts from malice or other base motives, he is one of the worst.”). The principles underlying these rules are also apparent in civil claims of malicious prosecution against a prosecutor who brought charges against a criminal defendant for an improper motive. *See, e.g.,* Sorrell v. County of Nassau, 162 F. Supp. 3d 156, 170 (E.D.N.Y. 2016) (defining malicious prosecution as bringing criminal charges with “a wrong or improper motive, something other than a desire to see the ends of justice served” (quoting Khan v. Ryan, 145 F. Supp. 2d 280, 285 (E.D.N.Y. 2001))); Bianchi v. McQueen, 58 N.E.3d 680, 699 (Ill. App. Ct. 2016) (“‘Malice’ in the context of malicious prosecution is defined as the actuation of a prosecution for an improper motive.”).

27. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6.

28. *See* Jackson, *supra* note 16 (“If the prosecutor is obliged to choose his cases, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than pick cases that need to be prosecuted.”).

prosecutor's employment.<sup>29</sup> The ABA's Model Rules of Professional Conduct, as well as the ABA's Criminal Justice Standards for the Prosecution Function, establish two ethical values that help to inform the discussion of such prosecutorial speech—prosecutorial discretion<sup>30</sup> and conflict of interest.<sup>31</sup> Because the public inevitably relies heavily on the prosecutorial system to bring charges against criminal defendants, it is imperative that the public is assured that its prosecutors will not allow personal biases to improperly sway their discretion. In the event of a bias that is bound to result in an improper influence on the prosecutor, the public would expect the prosecutor to recuse himself or herself from the case for having a conflict of interest.<sup>32</sup> However, because it is impractical for even the most biased prosecutor to recuse himself or herself from every single case, the public needs some degree of confidence in their prosecutors' viewpoints or in their ability to separate their viewpoints from their duties.

Part II.A discusses how the wide scope of prosecutorial discretion, although a core value for the criminal justice system, raises concerns about a prosecutor's personal biases. This Part also highlights how prosecutorial discretion is virtually undetectable and highly unregulated by the courts, thereby providing little substantive guidance for prosecutorial speech. Part II.B points out that there are more substantive regulations when a prosecutor has a conflict of interest. However, this Part further explains that, while the underlying principles are useful in addressing the issue that this Note addresses, the substantive regulations themselves do little to address prosecutorial speech that demonstrates a problematic viewpoint.

#### A. *The Largely Unregulated Nature of Prosecutorial Discretion*

Prosecutors exercise wide discretion in almost every aspect of the criminal justice system, from bail hearings and granting immunity to charging and sentencing.<sup>33</sup> One important area in which prosecutors exercise wide, unreviewable<sup>34</sup> discretion is in filing criminal charges—a duty, and authority,

29. *See infra* Part III.B.

30. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION §§ 3-4.2, 3-4.4.

31. *Id.* § 3-1.7.

32. *See, e.g., id.* § 3-1.7(a).

33. *See* Robert L. Misner, *Recasting Prosecutorial Discretion*, 86 J. CRIM. L. & CRIMINOLOGY 717, 741 (1996). *See generally* Jackson, *supra* note 16.

34. Misner, *supra* note 33, at 743 (“The prosecutor’s decision not to prosecute a case is virtually unreviewable.”); *see also* United States v. Stewart, 590 F.3d 93, 122 (2d Cir. 2009) (“[T]he decision . . . whether to prosecute generally rests within broad discretion of the prosecutor, and a prosecutor’s pretrial charging decision is presumed legitimate.” (first alteration in original) (quoting United States v. Sanders, 211 F.3d 711, 716 (2d Cir. 2000))); Mikhail v. Kahn, 991 F. Supp. 2d 596, 637 (E.D. Pa. 2014) (“[W]hether to prosecute and what charge to file or bring before federal grand jury are decisions that generally rest in the prosecutor’s discretion,” and even when individuals are wronged in a manner cognizable under criminal law, they ‘do not have a constitutional right to the prosecution of alleged criminals.’” (quoting United States v. Batchelder, 442 U.S. 114, 124 (1979); then quoting Capogrosso v. Supreme Court, 588 F.3d 180, 184 (3d Cir. 2009) (per curiam))); United States v. Cameron, 658 F. Supp. 2d 241, 244 (D. Me. 2009) (“[The government’s] broad discretion [as to whom to prosecute] is based largely on the recognition that ‘the decision to prosecute is particularly ill-suited to judicial review.’” (quoting Wayte v. United States, 470 U.S. 598, 607 (1985)));



that make the prosecutor one of the most influential players in the criminal justice system.<sup>35</sup> As characterized by Attorney General Robert H. Jackson, however, this tremendous discretion is dangerous because it gives the prosecutor “more control over life, liberty, and reputation than any other person in America.”<sup>36</sup> Unfortunately, it is impossible to know—and therefore impossible to monitor—what considerations a prosecutor makes when exercising his or her discretion,<sup>37</sup> but that is why lawyers, and thus prosecutors, are expected to have a requisite standing of good character before being admitted to their state’s bar.<sup>38</sup>

Even if it seems unfavorable to grant prosecutors such wide discretion, prosecutorial discretion must be preserved, first and foremost, because it is practically unfeasible for any prosecutor to investigate every crime.<sup>39</sup> The centralization of discretion to the prosecutor’s office is the result of historical development, and, as of now, granting this discretion to prosecutors is the most efficient method of maintaining a functional criminal justice system.<sup>40</sup>

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United States v. Tobin, 598 F. Supp. 2d 125, 132 (D. Me. 2009) (“To be sure, courts must tread lightly when assessing prosecutorial charging decisions. ‘Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.’ These decisions are necessarily informed by sensitive judgments about dangerousness, deterrence, and enforcement priorities, which courts ought not readily second-guess.” (citation omitted) (quoting *Batchelder*, 442 U.S. at 124).

35. See Misner, *supra* note 33, at 743 (“In the area of charging, prosecutorial decisions—such as whether to prosecute, how to prosecute, how long to sentence, and whether to dismiss charges—all contribute to the creation of the prosecutor as the real policy-maker within the criminal justice system.”); see also *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (“There is no doubt that the breadth of discretion that our country’s legal system vests in prosecuting attorneys carries with it the potential for both individual and institutional abuse.”).

36. Jackson, *supra* note 16.

37. Richard M. Re, *Imagining Perfect Surveillance*, 64 UCLA L. REV. DISCOURSE 264, 286 (2016) (“Further, it was generally difficult or even impossible for any other institutional actor to monitor executive enforcement decisions, if only because there were so many discretionary choices that most would inevitably evade review.”).

38. See MODEL CODE OF PROF’L RESPONSIBILITY EC 1-3 (AM. BAR ASS’N 1980) (“Before recommending an applicant for admission, a lawyer should satisfy himself that the applicant is of good moral character.”); Comment, *Procedural Due Process and Character Hearings for Bar Applicants*, 15 STAN. L. REV. 500, 500 (1963) (“Every state in the United States, as a prerequisite for admission to the practice of law, requires that applicants possess ‘good moral character.’” (quoting RULES FOR ADMISSION TO THE BAR IN THE UNITED STATES AND TERRITORIES (36th ed. 1959))); Jackson, *supra* note 16 (“[T]he post of Federal District Attorney from the very beginning has been safeguarded by presidential appointment, requiring . . . an expression of confidence in . . . character . . . before assuming the responsibilities of a federal prosecutor.”). See generally NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 1-2.1 (3d ed. 2009) (emphasizing that prosecutors are to exercise good faith and integrity in their professional capacity and place the interests of society at large before anything else); *infra* Part III.C.1 (discussing *Hale v. Committee on Character & Fitness*, 335 F.3d 678 (7th Cir. 2003)).

39. Jackson, *supra* note 16 (“There is a most important reason why the prosecutor should have, as nearly as possible, a detached and impartial view of all groups in his community. Law enforcement is not automatic. It isn’t blind. One of the greatest difficulties of the position of prosecutor is that he must pick his cases, because no prosecutor can even investigate all of the cases in which he receives complaints.”).

40. Misner, *supra* note 33, at 718–19 (“Because courts cannot mold an effective system of law enforcement, and because legislatures are unsuited to the daily implementation of broad

Furthermore, courts have historically been unsuccessful in their attempts to impose any sort of judicial review on prosecutors and have therefore been increasingly more deferential to prosecutors' discretion.<sup>41</sup>

The law provides some, albeit minimal, protections for criminal defendants from prosecutors who may be influenced by personal biases and consequently exercise discretion improperly. In interpreting the Due Process Clause, the Supreme Court has held that a prosecutor's discretion and decision to charge a defendant may not be "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification."<sup>42</sup> The ABA Criminal Justice Standards for the Prosecution Function—although not legally binding—also provides that "prosecutor[s] should not manifest or exercise, by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, gender identity, or socioeconomic status."<sup>43</sup> Furthermore, in interpreting the Equal Protection Clause of the Constitution, the Court has held that a person's constitutional rights are violated when a public official representing the state acts in such a way that practically denies a person the equal protection of the law.<sup>44</sup>

Still, while the law protects criminal defendants from prosecutors who act under unjustifiable biases, the law does not protect the community from prosecutors who express such biases through speech rather than through conduct in a particular case. Thus, the question remains as to whether a prosecutor who holds and expresses bias or animosity through speech can be entrusted with such expansive discretion.<sup>45</sup>

### *B. Conflict of Interest as a Restraint on the Scope of Representation*

Prosecutors have a duty to be impartial, neutral, and disinterested in their role as advocates for justice.<sup>46</sup> Although this Note addresses the problems associated with the expression of a prosecutor's personal views, it would be unreasonable to require prosecutors to hold no personal views at all. In fact,

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policy, the time has come to encourage prosecutors to fashion local policies of law enforcement to suit the current needs of their communities.").

41. *Id.* at 736.

42. *Wayte v. United States*, 470 U.S. 598, 608 (1985) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)); *see also* *United States v. Armstrong*, 517 U.S. 456, 464 (1996). Similarly, courts limit prosecutors' unconstitutional discretion in the context of jury selection. *See generally* *Batson v. Kentucky*, 476 U.S. 79 (1986).

43. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.6(a) (AM. BAR ASS'N 2015).

44. *Yick Wo v. Hopkins*, 118 U.S. 356, 373–74 (1886) ("No reason for [the disparate treatment] is shown, and the conclusion cannot be resisted that no reason for it exists except hostility to the race and nationality to which the petitioners belong, and which, in the eye of the law, is not justified. The discrimination is therefore illegal, and the public administration which enforces it is a denial of the equal protection of the laws, and a violation of the fourteenth amendment of the constitution.").

45. Situations in which prosecutors hold biases but do not express them are beyond the scope of this Note.

46. Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors' Conflicts of Interest*, 58 B.C. L. REV. 464, 471 (2017).

prosecutors themselves may not be aware that the implicit or cognitive biases they have are affecting their work in unconscious ways.<sup>47</sup> Realistically, every prosecutor holds some political preference or personal belief, and it would not be a ridiculous proposition to state that virtually all “of [a] lawyer’s political, social, and emotional interests, as well as the full spectrum of the lawyer’s thoughts, beliefs [and] feelings” may influence a prosecutor’s decision-making process.<sup>48</sup> What would be ridiculous, however, is to say that all such interests create an unwaivable conflict that would bar the prosecutor from properly functioning as an officer of the court and a representative of the criminal justice system.<sup>49</sup> In fact, the ABA, as well as the judiciary, acknowledge that prosecutors should be allowed to have personal views as long as the prosecutor keeps his or her professional work completely separated from those views.<sup>50</sup>

The standard for determining whether a prosecutor can try a case despite having conflicting interests hinges on whether the conflict adversely affects the prosecutor’s performance.<sup>51</sup> For example, because ASA Kenneth Lewis

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47. *Id.* at 483 (“The professional literature has traditionally assumed that private lawyers’ conflicting interests can influence their exercise of professional judgment in unconscious ways. This is no less true for prosecutors.”); *see also* *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 HARV. L. REV. 1244, 1296 (1981); Tigran W. Eldred, *The Psychology of Conflicts of Interest in Criminal Cases*, 58 U. KAN. L. REV. 43, 48 (2009).

48. Green & Roiphe, *supra* note 46, at 472; *see also* ROY D. SIMON WITH NICOLE HYLAND, SIMON’S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 418–20 (2017).

49. *See* Green & Roiphe, *supra* note 46, at 476–77 (“If conflicts of interest are broadly conceived to include any ‘political, social, and emotional interests’ or ‘thoughts, beliefs, feelings, and creeds’ that may affect the prosecutor’s decision-making, then a similar allegation could be made no matter which prosecutor is assigned to a criminal case with political implications.”).

50. *See* *Johnston v. Koppes*, 850 F.2d 594, 596 (9th Cir. 1988) (“Loyalty to a client requires subordination of a lawyer’s personal interests when acting in a professional capacity. But loyalty to a client does not require extinguishment of a lawyer’s deepest convictions . . . .”); MODEL RULES OF PROF’L CONDUCT r. 1.2(b) (AM. BAR ASS’N 2013) (“A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social or moral views or activities.”); *see also* NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 1-2.1(b) (3d ed. 2009) (“A prosecutor should not express personal animosity toward opposing counsel, regardless of personal opinion.”). Of course, there is a distinction between a prosecutor’s conflicts and an ordinary lawyer’s conflicts because a prosecutor’s client is society rather than an individual. *See* Green & Roiphe, *supra* note 46, at 465 & nn.5–6.

51. *Compare* MODEL RULES OF PROF’L CONDUCT r. 1.7(a)(2) (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.”), *with id.* r. 1.7(b)(1) (“Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if . . . the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client . . . .”). From an administrative standpoint, courts have the right to determine whether a prosecutor has a conflict of interest that will adversely affect the prosecutor’s performance. *See* 58 AM. JUR. 2D *New Trial* § 135 (2012) (“A trial court has the power to disqualify a prosecuting attorney from proceeding with a particular criminal prosecution if it is determined that the prosecuting attorney suffers from a conflict of interest that might prejudice him or her against the accused.”); *see, e.g.*, *State v. Williams*, 217 N.W.2d 573, 575 (Iowa 1974) (“If there was a conflict of interest it does not follow it affected the outcome of the trial. . . . [W]e find no

was not assigned to the Orlando nightclub case, he had no conflict despite having expressed animus toward the victims of the massacre. However, the situation may change if ASA Lewis were, in fact, assigned to this case or any other case that involves gay people, mothers, or other groups of people against whom he demonstrated a personal bias.<sup>52</sup> Nonetheless, while the current rules concerning a prosecutor's conflict of interest aid in determining whether a criminal *defendant's* rights have been violated during a criminal trial,<sup>53</sup> the rules do not address the main question whether a particular prosecutor should even be allowed to serve the *community* despite his or her personal biases.

A common practice in the legal profession is to have the lawyer or prosecutor recuse himself or herself from a case when a conflict exists.<sup>54</sup> Therefore, if ASA Lewis's biases are considered conflicts, he would have to recuse himself from cases dealing with gay people or mothers. However, although seemingly simple, such a recusal is impractical.

There are two tiers of conflicts: potential conflicts and per se conflicts.<sup>55</sup> Potential conflicts are those in which a court evaluates the possibility that some relationship between the lawyer and another person *could* affect the fairness of the present case, whereas per se conflicts have a *presumption* of prejudice and require an affirmative waiver to overcome.<sup>56</sup> One factor that courts use to determine the existence of a per se conflict is "whether, and to what extent, public confidence in the integrity of the law profession might be compromised or eroded by permitting the case to proceed notwithstanding the potential for mischief."<sup>57</sup> Whether ASA Lewis must be recused from cases involving parties who are gay, mothers, or otherwise "distasteful" to him would then pose a hybrid or intermediate tier of conflict: would the potential, or likelihood, of a per se conflict entirely bar a prosecutor from taking cases that involve parties against whom the prosecutor is biased?<sup>58</sup>

While it would be efficient to consider a publicly known, biased prosecutor to have a per se conflict of interest in any case that involves parties toward whom the prosecutor has demonstrated bias, such considerations would also

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indication a conflict of interest on the part of the county attorney had any effect on the conduct or outcome of the trial.").

52. See Green & Roiphe, *supra* note 46, at 465–66 ("Broadly construed, prosecutors' conflicts can arise not only out of personal and professional relationships . . . but [also] out of any personal belief . . . that undermines the prosecutors' ability to pursue justice in a disinterested way."); *supra* Part I.A.

53. See 58 AM. JUR. 2D *New Trial* § 135 (2012) ("[A]s a general rule, some resulting prejudice to the *defendant* must be demonstrated to warrant a new trial even though such a conflict of interest exists." (emphasis added)).

54. See, e.g., CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7(a) (AM. BAR ASS'N 2015).

55. See *State v. Norman*, 697 A.2d 511, 520 (N.J. 1997) ("*Bellucci* thus created a two-tier system for evaluating conflict-of-interest claims . . .").

56. *Id.*; *State v. Shieka*, 766 A.2d 1151, 1160 (N.J. Super. Ct. App. Div. 2001).

57. *Shieka*, 766 A.2d at 1161.

58. Because the biased prosecutor has not been assigned to a case, there is no per se conflict. However, the evaluation of the potential conflict requires an examination as to whether a per se conflict would exist in the event that the prosecutor does, in fact, take a case that involves the very group of people toward whom he or she has animosity.

greatly limit the scope of cases that any prosecutor can take once he or she expresses personal bias. The regulations surrounding conflicts of interest would thus undermine the functionality of the prosecutors' office because constant recusals detract from prosecutors' ability to function effectively. Narrow rules require prosecutors to recuse themselves only from cases where a conflict of interest exists.<sup>59</sup> Classification of certain forms of speech as conflicts could ultimately cause such rules to constructively remove a prosecutor from office when he or she has too many "conflicts" to take on any cases. Such an application might hinder the efficiency of the prosecutor's office and prevent many lawyers from becoming prosecutors. Therefore, an attempt to extend the existing rules concerning conflicts of interest reveals the inability of current regulations to handle prosecutors who express biases that contravene the public's interest.

### III. EXISTING LEGAL RESTRAINTS ON PROSECUTORIAL SPEECH FOCUS ONLY ON ADVERSE EFFECTS WITHIN THE WORKPLACE

Although standards surrounding prosecutorial discretion and conflicts of interest do not adequately regulate the expressions of a biased prosecutor, prosecutorial speech is not untethered. Legal restraints exist in both the Supreme Court's interpretation of the First Amendment as it applies to prosecutors<sup>60</sup> as well as in other rules within the ABA Model Rules of Professional Conduct.<sup>61</sup> The First Amendment of the Constitution grants citizens, among many rights, the freedom of speech.<sup>62</sup> However, public employees—especially prosecutors—have fewer protections of speech under the First Amendment because their speech may directly and adversely affect their offices' ability to function effectively.<sup>63</sup>

Before addressing whether prosecutorial speech that undermines community trust in the criminal justice system may be limited absent any apparent, adverse effect on performance, it helps to examine the broader concerns of the Supreme Court in its interpretation and limitation of free speech for prosecutors. Part III.A first discusses First Amendment jurisprudence as it applies to public employees and explains how public employees have qualified protections under the First Amendment by virtue of their employment in a public office. This Part focuses its discussion on three Supreme Court cases that establish and highlight these limitations. Part III.B then extends the discussion and examines how prosecutors have even fewer protections of speech under the ABA Model Rules of Professional Conduct when speech is related to prosecutors' cases. Finally, Part III.C discusses how certain states apply these qualified protections to help

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59. MODEL RULES OF PROF'L CONDUCT *rr.* 1.7–1.11 (AM. BAR ASS'N 1980) (stating that lawyers need only to refuse or withdraw from the representation of a client when a conflict exists).

60. *See infra* Part III.A.

61. *See infra* Part III.B.

62. U.S. CONST. amend. I.

63. *See Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

determine whether the office should hire or fire a particular individual who expressed certain viewpoints.

*A. The Supreme Court's Interpretation of  
First Amendment Rights for Public Employees*

In an effort to preserve the freedom of speech for citizens, the Supreme Court has interpreted the First Amendment to protect even the most outlandish statements made by citizens as long as the speech does not pose an imminent lawless action that ought to be prevented.<sup>64</sup> Thus, the Constitution protects individuals' speech even when the speech is inflammatory or otherwise provocative of others' emotions.<sup>65</sup> If, however, a prosecutor expresses hatred toward a particular group of people, as did ASA Lewis, citizens may justifiably feel unsafe or unprotected in their own country or state. This threat is amplified by the fact that charging decisions are solely up to the prosecutors' discretion and are not subject to judicial review, thereby eliminating any legal recourse for the public when a prosecutor decides to prosecute—or dismiss—a certain criminal charge.<sup>66</sup>

Furthermore, because a prosecutor is an employee of the state or federal government, his or her expression of bias may broadcast mixed messages to the public concerning the state or federal government's views.<sup>67</sup> Prosecutors ought to pursue justice rather than any particular individual's interests.<sup>68</sup>

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64. Compare *Dennis v. United States*, 341 U.S. 494, 505 (1951) (holding that advocating for communism created a clear and present danger and should thus be prohibited), and *Schenck v. United States*, 249 U.S. 47, 52 (1919) (prohibiting the distribution of leaflets urging resistance of the draft because such words presented a clear and present danger during wartime), with *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (utilizing the "imminent lawless action" standard and interpreting the First Amendment so as not to ban any viewpoint absent an imminent lawless act). The imminent lawless action standard is looser than the clear and present danger standard.

65. Because the Constitution grants protections for opinions, unless there is a specified target of an imminent lawless action—which would constitute hate speech—there is no violation of a constitutional right for someone who feels offended or threatened by that speech. See, e.g., *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992) (holding that burning a cross on the lawn of an African American family is a protected form of expression despite its threatening symbolism of the Ku Klux Klan); *Nat'l Socialist Party v. Village of Skokie*, 432 U.S. 43, 44 (1977) (holding that using a swastika to demonstrate against the Jewish population was a protected opinion because it is general speech that can be directed toward anyone).

66. See *supra* note 34 and accompanying text.

67. The Constitution grants states the right to express viewpoints so long as the states do not impose these viewpoints on citizens. See *Walker v. Sons of Confederate Veterans*, 135 S. Ct. 2239, 2245–46 (2015). State speech is generally inferred from a certain action of policy that endorses a particular viewpoint. See, e.g., *id.* at 2253 (permitting states to choose the content of their speech by denying the placement of confederate flags on a customized license plate); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 689–90 (2010) (allowing state universities to deny support for student organizations that do not adopt an antidiscrimination policy); *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (holding that granting of funds to families not participating in abortion planning is a permitted form of speech by the state). But see *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 821 (1995) (finding that imposing financial burdens on an "unfavorable" group is discriminatory and therefore a violation of the First Amendment).

68. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015) ("The primary duty of the prosecutor is to seek justice within the bounds of the

However, when a prosecutor who works for the state holds a different opinion or viewpoint than that set forth by the state, the state has an interest in limiting or separating that prosecutor's speech from its own. Thus, First Amendment jurisprudence concerning free speech for prosecutors is predominantly concerned with balancing the public's interest in having an informed, unhindered discussion about matters of public concern with the state's interest in ensuring that its functionality is not compromised by the constitutional rights of its employees.<sup>69</sup>

Due to the potential conflicts that arise between public employees and the state, the protections under the First Amendment are limited when applied to state or federal officials. When employed by the government, individuals are expected to waive certain constitutional rights.<sup>70</sup> This expectation stems from the notion that the government as an employer needs greater control over its employees to function effectively.<sup>71</sup> The contravening concern, however, is that a public official's employment may not be conditioned on an infringement of that individual's constitutional freedom of expression.<sup>72</sup>

The Court in *Connick v. Myers*<sup>73</sup> held that "content, form, and context" are crucial in determining whether particular speech should be protected.<sup>74</sup> When Sheila Myers, an Assistant District Attorney in New Orleans, was being transferred to another section, she expressed her opposition to the transfer by discussing her complaints about several office matters, including the office transfer policy.<sup>75</sup> She subsequently circulated a questionnaire to ask other assistant district attorneys about their opinions concerning these office matters.<sup>76</sup>

Justice Byron White emphasized that the Court has an interest in "ensur[ing] that citizens are not deprived of fundamental rights by virtue of working for the government."<sup>77</sup> Nonetheless, this interest does not mean that government employees have an absolute right of free speech. Rather, governments have relatively broad authority to manage the speech of their employees when the content, form, and context of the expression<sup>78</sup> "cannot be fairly considered as relating to any matter of political, social, or other concern to the community."<sup>79</sup> Absent this authority, employers will be forced to keep "a disruptive or otherwise unsatisfactory employee," and the retention of such a prosecutor would "ultimately impair the efficiency of [the]

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law[.] . . . [to] serve[] the public interest and . . . increase public safety[,] . . . protect the innocent and convict the guilty, consider the interests of victims and witnesses, and respect the constitutional and legal rights of all persons, including suspects and defendants.").

69. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 573 (1968).

70. *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006).

71. *Id.*

72. *Connick v. Myers*, 461 U.S. 138, 142 (1983).

73. 461 U.S. 138 (1983).

74. *Id.* at 147–48.

75. *Id.* at 141.

76. *Id.*

77. *Id.* at 147.

78. *Id.* at 147–48.

79. *Id.* at 146.

office.”<sup>80</sup> Due to this qualification, the Court held that Myers’s questionnaire was not protected under the First Amendment because it did not “bring to light actual or potential wrongdoing or breach of public trust on the part of Connick and others.”<sup>81</sup> The questionnaire, if released to the public, would only indicate that an employee is not satisfied with her office’s policies.<sup>82</sup>

In an effort to consolidate the contrary interests of a public employee and the government, the Court narrowly classified unprotected speech in *Garcetti v. Ceballos*.<sup>83</sup> Because public employees are nonetheless citizens, any restrictions on their constitutional rights as a condition of employment must be limited to what is *necessary* for the employer to efficiently and effectively perform its services.<sup>84</sup>

After receiving a call from a defense attorney alleging that an affidavit used to obtain a search warrant was inaccurate, Deputy District Attorney Richard Ceballos examined the affidavit and realized that it contained serious misrepresentations.<sup>85</sup> In his attempt to remedy the misrepresentations, Ceballos submitted a memorandum to his supervisor recommending a dismissal of the case on the ground that the search warrant resulted from misrepresentations.<sup>86</sup> However, Ceballos’s supervisor ignored the memorandum and continued to prosecute the case.<sup>87</sup> At the close of the case, the supervisor reassigned Ceballos, transferred him to another courthouse, and denied him a promotion.<sup>88</sup> Ceballos asserted that he was retaliated against for the content of the memorandum, which should have been protected by the First Amendment.<sup>89</sup>

The Court was faced with the question of how far the First Amendment extends beyond the individual speaker to the public at large. Justice Kennedy reemphasized in *Garcetti* the extent to which the First Amendment may protect a public employee: the Court held that a public official’s speech is protected only when the public official is not acting within his or her official capacity.<sup>90</sup> Contrarily, because Ceballos was speaking pursuant to his duties, the content of the memorandum was not protected under the First Amendment.<sup>91</sup> Thus, when the motivation and opportunity for speaking on any given matter are created by the government by virtue of the prosecutor’s

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80. *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

81. *Connick*, 461 U.S. at 148.

82. *Id.*

83. 547 U.S. 410 (2006).

84. *Id.* at 419.

85. *Id.* at 413–14.

86. *Id.* at 414.

87. *Id.* at 414–15.

88. *Id.*

89. *Id.* at 415.

90. *Id.* at 417 (“The Court has made clear that public employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”).

91. *Id.* at 421 (“We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”).



employment, that speech is subject to the government's control in all respects.<sup>92</sup> The Court emphasized that the controlling factor in *Garcetti* was that Ceballos was acting pursuant to his duties, not that Ceballos made his speech within the workplace or spoke of a matter pertinent to his employment.<sup>93</sup> However, the Court also noted that no limitation of the First Amendment may infringe upon the public's right to an "informed, vibrant dialogue in a democratic society."<sup>94</sup>

In fact, the Court has long emphasized the importance of preserving speech that contributes to the public forum.<sup>95</sup> In *Pickering v. Board of Education*,<sup>96</sup> Marvin L. Pickering, a high school teacher in Illinois, was terminated from his position for submitting a letter to a local newspaper criticizing the school district's means of raising revenue.<sup>97</sup> Although the school justified its actions by saying the letter was detrimental to the interests of the education system,<sup>98</sup> the Supreme Court held that Pickering's termination was wrongful and violated his First Amendment right to freedom of speech.<sup>99</sup>

The Court noted that the fundamental goal of democracy is to preserve "[t]he public interest in having free and unhindered debate on matters of public importance."<sup>100</sup> As citizens of a democratic society, public employees must have the right to comment "on matters of public concern."<sup>101</sup> The Court sidestepped the concern of public employers by stating that, when speech concerns a matter of public importance, the fact that the declarant is a public employee is unrelated to the individual's interest in speaking as a member of the public.<sup>102</sup>

Ultimately, these cases demonstrate that prosecutorial speech is not protected when the speech (1) interferes with the office's functions, (2) is

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92. *Id.* at 421–22 ("Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created.").

93. *Id.* at 420–21.

94. *Id.* at 419.

95. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 573–74 (1968).

96. 391 U.S. 563 (1968).

97. *Id.* at 564.

98. *Id.*

99. *Id.* at 574–75.

100. *Id.* at 573.

101. *Id.* at 574; *see also* *Johnston v. Koppes*, 850 F.2d 594, 596 (1988) (extending employees' rights beyond freedom of speech to freedom of association and holding that transferring an employee for attending an abortion rights panel during her vacation was a violation of the employee's First Amendment rights because abortion is a matter "of great public concern"). Although this is an absolute right granted by the First Amendment, the Court laid out some qualifying factors. Because the public interest lies in having an unhindered debate, the Court excludes statements that would not add to the public debate, including statements made by a declarant who either knows of or recklessly disregards the falsity of the statement. *Pickering*, 391 U.S. at 573.

102. *Pickering*, 391 U.S. at 574 ("However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.").

made pursuant to the prosecutor's duties, or (3) does not address a matter of public concern.

*B. Prohibited Use of Private Speech for Prosecutors*

Prosecutorial speech is also regulated, to some extent, by the ABA Model Rules of Professional Conduct. Rule 3.8(f) of the ABA Model Rules of Professional Conduct requires prosecutors to

refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would [otherwise] be prohibited from making.<sup>103</sup>

Thus, a prosecutor may not use extrajudicial statements to benefit the prosecution's case against a criminal defendant.<sup>104</sup> Under this rule, a prosecutor who makes a statement that is otherwise protected under the First Amendment, such as commenting on a matter of public concern,<sup>105</sup> may be prohibited from exercising that right because it violates the defendant's due process right under the Constitution<sup>106</sup> and interferes, either positively or negatively, with the office's mission to pursue justice fairly.<sup>107</sup>

While a narrow reading of Rule 3.8 yields a simple regulation stating that prosecutors may not use extrajudicial statements to gain an advantage over a criminal defendant beyond what the evidence admitted at trial allows, a broader reading interprets Rule 3.8 as a limitation of prosecutorial conduct. Under that broader reading, prosecutors cannot use their speech to reach beyond their professional capacity and thereby further their case. Thus, the underlying principle may be that prosecutors cannot use their private, extrajudicial statements to promulgate their own views or personal opinions in any professional matter, even if it is not necessarily linked to unfairly, or illegally, disadvantaging a defendant in a particular case.<sup>108</sup> Whereas the narrower reading is concerned with a criminal defendant's constitutional right,<sup>109</sup> the broader reading is concerned with a prosecutor's professional responsibility.<sup>110</sup> Under the broader reading, ASA Lewis's extrajudicial statements expressing his animus toward gay people and mothers is a form

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103. MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 2013).

104. For a detailed discussion of contemporary limitations of prosecutorial speech within the scope of their employment as outlined by the ABA, see generally Emily A. Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367 (2015).

105. *Pickering*, 391 U.S. at 574.

106. U.S. CONST. amend XIV.

107. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(b) (AM. BAR ASS'N 2015); see also *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006).

108. See, e.g., Green & Roiphe, *supra* note 46, at 471 (discussing personal interests as a conflict of interest prosecutors may have, which would undermine their necessary disinterestedness in their role).

109. See *supra* note 106 and accompanying text.

110. See *supra* note 50 and accompanying text.

of speech that can unfairly sway, either positively or negatively, the public's attitude toward either the victim or perpetrator of certain crimes and could therefore be prohibited.

*C. Hiring and Firing of a Prosecutor  
Based on the Individual's Viewpoints*

State Attorney Jeff Ashton believed that he was not able to fire ASA Kenneth Lewis for Lewis's initial posts about mothers due to the First Amendment.<sup>111</sup> Instead, Ashton implemented a social media policy in the office and later used that policy as ground for ASA Lewis's termination.<sup>112</sup> However, it is unclear whether Ashton needed to implement a social media policy in order to fire ASA Lewis. Kenneth Lewis was a prosecutor, and prosecutors are expected to possess a certain requisite character that ensures the ability to pursue justice.<sup>113</sup> Ashton could have fired ASA Lewis for not possessing the requisite character demanded of a prosecutor. In fact, the Illinois State Bar has even considered an applicant's expressions of his personal views in denying him admission.<sup>114</sup> Thus, it follows logically that prosecutors, who are held to a higher standard of professional responsibility than ordinary lawyers,<sup>115</sup> should be terminated for failing to meet such standards. Part III.C.1 examines the aforementioned case to demonstrate how the Illinois State Bar Committee found an applicant to be unfit for the practice of law based on the applicant's expressions of his personal views. Part III.C.2 then explains how prosecutors may be terminated for their personal expressions due to the unique nature of a prosecutor's role in society.

1. Looking to an Individual's Expressed Bias in Determining  
Character and Fitness for Admission to the Bar

Matthew Hale sought to be admitted to the Illinois State Bar but was denied admission.<sup>116</sup> Although he had passed the written examination, the Bar Committee found Hale to be "unfit to practice law" due to his history of being "a public advocate of white supremacy and the leader of an organization . . . dedicated to racism and anti-Semitism."<sup>117</sup> Hale had expressed that his

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111. Bleier, *supra* note 4 ("I am not going to punish someone for what is clearly political speech . . .").

112. Knowles, *supra* note 4 ("As a result, he was forced to attend sensitivity training and his office created a social media policy, one that he has now violated."); *cf.* BARBARA S. MAGILL & WORKLAW NETWORK, WORKPLACE PRIVACY: REAL ANSWERS AND PRACTICAL SOLUTIONS 124 (Burton J. Fishman ed., 2d ed. 2007) ("The First Amendment's prohibition against governmental restriction of free speech does not prevent private employers from taking disciplinary action against employees based on the content of their [social media postings].").

113. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.2(a) (AM. BAR ASS'N 2015); Jackson, *supra* note 16.

114. *See, e.g.,* Hale v. Comm. on Character & Fitness, 335 F.3d 678, 679 (7th Cir. 2003).

115. *See supra* note 15 and accompanying text.

116. Hale, 335 F.3d at 679.

117. *Id.* The Committee also considered Hale's prior arrests in its evaluation of his character and fitness. *Id.* at 680–81.

“mission in life is to bring about the hegemony of the white race, the legal abolition of equal protection, and the deportation of non-white Americans.”<sup>118</sup> In response, the Committee determined that Hale’s mission demonstrated that he had a propensity to act in ways “that were inconsistent with membership in the bar,” whose lawyers “have a special responsibility to uphold the rule of law *for all persons*.”<sup>119</sup> The Committee found that Hale’s “distasteful views” were not protected under the First Amendment for the purposes of admission to the bar and further characterized Hale as a bigot with a “gross deficiency in moral character” under “any civilized standards of decency.”<sup>120</sup> Despite testimony from multiple witnesses asserting that Hale was fit to practice law as well as Hale’s assertion that he would comply with the bar’s standards during the hours he worked as an attorney, Hale was denied admission.<sup>121</sup>

The First Amendment clearly protects political speech,<sup>122</sup> but Hale was denied admission to the bar for his dedication to racism and anti-Semitism.<sup>123</sup> On its face, it seems that Illinois’s refusal to admit Hale to the bar was due to his political views of white supremacy and anti-Semitism. The Illinois Bar Committee justified its decision “by drawing a distinction between Hale’s First Amendment right to express ideas and his right to become a member of the Illinois bar.”<sup>124</sup> While Hale may be free to express such views under the First Amendment, his freedom to do so as a citizen does not require a finding that he “possesses the requisite character and fitness . . . for the practice of law.”<sup>125</sup> At which point, however, does an examination of a candidate’s personal views constitute discrimination based on an individual’s political views?<sup>126</sup>

It seems as if the Committee in *Hale*, by characterizing Hale as grossly immoral and indecent, denied Hale admission because his discriminatory views were not simply political preferences but rather evinced *animosity* toward certain groups of people. However, the exact standard as to “how to categorize and assess animus has become a recurring and unresolved question in equal protection law.”<sup>127</sup> In the situation with ASA Lewis, State Attorney

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118. *Id.*

119. *Id.* at 680 (emphasis added).

120. *Id.*

121. *Id.* Although Hale had filed petitions all the way to the Supreme Court, the Committee’s decision was not overturned. Malika Simmons, Case Note, *Hale v. Comm. on Character & Fitness*, 335 F.3d 678 (7th Cir. 2003), 10 WASH. & LEE RACE & ETHNIC ANC. L.J. 199, 200 (2004).

122. Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 144 (2010).

123. *Hale*, 335 F.3d at 679.

124. *Id.* at 680.

125. *Id.*

126. *Id.* at 681 (“Hale’s complaint squarely raised the claim that the Committee had violated the First and Fourteenth Amendments when it arbitrarily denied his bar application, because it based its decision not on any conduct in which Hale may have engaged, but instead solely on its *speculation* about his likely future conduct and its distaste for his political and religious beliefs.” (emphasis added)).

127. Nan D. Hunter, *Animus Thick and Thin: The Broader Impact of the Ninth Circuit Decision in Perry v. Brown*, 64 STAN. L. REV. ONLINE 111, 112 (2012).

Ashton believed the line between political speech and animus is identified based on a person's actions.<sup>128</sup> Justice Scalia described animosity as “hat[red] [toward] any human being or class of human beings” but distinguished it from “moral disapproval” of such people or their conduct.<sup>129</sup> Still, the First Amendment protects “the speech rights of anarchists, syndicalists, communists, civil rights marchers, Maoist flag burners, and other marginal, dissident, or unorthodox speakers” in the interest of political liberty of the people from the government.<sup>130</sup> This protection is the result of the Court's broad construction of the definition of “political.” Generally, political speech concerns “all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.”<sup>131</sup>

## 2. Terminating Prosecutors as Policymakers Under Stricter Standards of Loyalty

What remains consistent in each discussion of the qualifications and exceptions to the protections of the First Amendment is the notion of “adverse effect” to the government employer or public institution. *Connick* held that the questionnaire was not protected because it was adverse to the office's functions and did not meaningfully contribute to the public discussion.<sup>132</sup> *Garcetti* emphasized that the government may regulate speech made pursuant to an employee's duties because such speech affects the office's functions.<sup>133</sup> *Pickering* held the teacher's speech to be protected because it addressed an unfavorable process in the schools and served to improve the education system.<sup>134</sup> The Committee in *Hale* was concerned about Hale's future propensity for discrimination as a member of the bar and found that propensity to be adverse to the interests of the bar.<sup>135</sup> It follows that, when a certain character is required of individuals who seek to become prosecutors, a demonstrated lack of such character by a prosecutor should be ground for termination when there is an apparent adverse effect on the office's functions by such viewpoints.

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128. Bleier, *supra* note 4 (“I’ve never had a victim come to us and say this man is not treating us with respect . . . I am not going to punish someone for what is clearly political speech.” (alteration in original)); Weiner, *supra* note 4.

129. *Romer v. Evans*, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting).

130. Sullivan, *supra* note 122, at 144. Still, the Court has limited the scope of political speech to exclude fighting words. *See, e.g.,* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (holding that speech may be banned when the words, “by their very utterance[,] inflict injury or tend to incite an immediate breach of the peace”). For a further discussion of the limitations on free speech, see generally Chip Hutzler, *A Paradoxical Approach to the First Amendment and Hate-Speech*, 4 MD. J. CONTEMP. LEGAL ISSUES 205 (1993).

131. *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940). *See generally* W. Robert Gray, *Public and Private Speech: Toward a Practice of Pluralistic Convergence in Free-Speech Values*, 1 TEX. WESLEYAN L. REV. 1 (1994).

132. *Connick v. Myers*, 461 U.S. 138, 148 (1983).

133. *Garcetti v. Ceballos*, 547 U.S. 410, 418–19 (2006).

134. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

135. *Hale v. Comm. on Character & Fitness*, 335 F.3d 678, 681 (7th Cir. 2003).

State Attorney Ashton's determination that ASA Lewis's speech was political because it did not adversely affect his treatment of victims is intelligible.<sup>136</sup> What Ashton failed to emphasize immediately,<sup>137</sup> though, is that Lewis's speech constitutes animus rather than political speech,<sup>138</sup> and such speech may have an adverse effect on the public perception and trust in the effective functioning of the prosecutor's office.<sup>139</sup> However, it is unclear whether the First Amendment already precluded such speech from the scope of its protections and thereby gave Ashton sufficient ground to terminate Lewis.

Some jurisdictions adopt a bright-line rule that holds prosecutors to a stricter standard of loyalty to their employers.<sup>140</sup> Under this bright-line rule, employers may terminate prosecutors at any time for any political differences—whether expressed or merely held—that may undermine an employer's confidence in a prosecutor's loyalty to the office.<sup>141</sup> The Supreme Court has also noted that, to terminate a public employee for his or her political views, the employer must “demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.”<sup>142</sup>

In *Marsilio v. Viglucci*,<sup>143</sup> Tommie Jo Marsilio, a county prosecutor, ran for election as a county judge. In preparation for her campaign, she circulated a proposed campaign advertisement within her committee that accused her opponent of being corrupt.<sup>144</sup> Victor Viglucci, her employer, told Marsilio that she would have to either cease the circulation of the advertisement and apologize to her political opponent or be terminated from her position as an assistant county prosecutor.<sup>145</sup> When Marsilio did not comply, Viglucci terminated her, and Marsilio subsequently filed a suit alleging wrongful termination on the ground of protected political speech.<sup>146</sup>

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136. *See supra* note 128 and accompanying text.

137. Fieldstadt, *supra* note 9 (describing how State Attorney Ashton realized the extremity of Lewis's speech but still “fought calls to fire Lewis” and implemented a social media policy instead).

138. Kenneth Lewis's posts demonstrated hatred toward gay people and mothers rather than mere moral disapproval of their actions, and his posts did not convey any information that would be useful for public debate. *See supra* notes 127–31 and accompanying text.

139. *Garcetti*, 547 U.S. at 419 (“When [public employees] speak out, they can express views that contravene governmental policies or impair the proper performance of governmental functions.”).

140. *See, e.g., infra* notes 152–56 and accompanying text.

141. *Simasko v. County of St. Clair*, 417 F.3d 559, 563 (6th Cir. 2005) (“[T]he mere fact that an employee is affiliated with an opposing political party, however quietly, can cause the employer not to trust the employee to implement fully the employer's practices.”); *see also Dimmig v. Wahl*, 983 F.2d 86 (7th Cir. 1993) (holding that a deputy sheriff's political inactivity could hinder his effective performance, thereby permitting his employer to terminate him).

142. *Branti v. Finkel*, 445 U.S. 507, 518 (1980).

143. 924 F. Supp. 2d 837 (N.D. Ohio 2013).

144. *Id.* at 844 (“The advertisement stated, ‘The “Good Old Boys” Say elect Kevin Poland . . . Real People Say Elect Tommie Jo Marsilio . . . She is *not* a member of the *Ravenna “Good Old Boys” corruption club.*’” (alterations in original)).

145. *Id.*

146. *Id.* at 845.

The District Court for the Northern District of Ohio held that Marsilio's position as an assistant county prosecutor denied her any First Amendment protections for speech related to her political views<sup>147</sup> because her position was one of policymaking.<sup>148</sup> This holding is consistent with First Amendment jurisprudence because, although the parties agreed that Marsilio's speech may be protected by the First Amendment for addressing a matter of public concern,<sup>149</sup> the court found that Marsilio's "free speech interests [did not] outweigh the efficiency interests of her government employer."<sup>150</sup> In rendering its decision, the court referenced a line of cases in which the Supreme Court emphasized that "a public employer may terminate a public employee in a policymaking or confidential position . . . because of [the employee's] political affiliation without violating the First Amendment" when such affiliations would hinder the effectiveness and efficiency of the office.<sup>151</sup> Furthermore, the court held that, because

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147. *Branti*, 445 U.S. at 515 (noting that the First Amendment typically protects citizens from being terminated for personal speech and, therefore, beliefs).

148. *Id.* at 852. The Sixth Circuit articulated four categories of public employees who are to be considered policymaking or confidential employees:

- (1) positions specifically named in relevant law to which discretionary authority in carrying out law enforcement or political policy is granted; (2) positions to which a significant amount of category-one authority has been delegated, or positions not specifically named by law but inherently possessing category-one type authority; (3) confidential advisors to category-one position-holders; or (4) positions that are part of a group of positions filled by balancing out political party representation or by balancing out selections made by different government bodies.

*Id.* at 850–51 (citing *Silberstein v. Dayton*, 440 F.3d 306, 319 (6th Cir. 2006)); *see id.* (describing the Sixth Circuit holding that prosecutors fall within this policymaking or confidential-employee exception, therefore allowing the government to terminate prosecutors for political speech without violating the First Amendment); *see also* *Latham v. Office of Attorney Gen.*, 395 F.3d 261, 269 (6th Cir. 2005) ("[W]here the inherent duties of the employee are broad and limited primarily by the discretion of the policymaker, it is likely that the employee is herself a confidential or policymaking employee under *Elrod*."); *Monks v. Marlinga*, 923 F.2d 423, 426 (6th Cir. 1991) ("Because Michigan law statutorily imposes the inherent policy-making responsibilities of the prosecutor on the assistant prosecutor, we hold that the job of assistant prosecutor is a policy-making position.").

149. *Marsilio*, 924 F. Supp. 2d at 849; *see supra* Part III.B.

150. *Marsilio*, 924 F. Supp. 2d at 849.

151. *Id.* (citing *Rose v. Stephens*, 291 F.3d 917, 921 (6th Cir. 2002)); *see also* *Branti v. Finkel*, 445 U.S. 507, 517 (1980) ("Thus, if an employee's private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the State's vital interest in maintaining governmental effectiveness and efficiency." (citing *Elrod v. Burns*, 427 U.S. 347, 366 (1976))). Circuit courts apply this doctrine in various ways. Many circuits treat the *Pickering* balancing test as separate from identifying whether a public employee has a policymaking position under *Elrod* and *Branti*, whereas the Ninth Circuit holds that a finding that a public employee has a policymaking position automatically precludes any *Pickering* analysis. *Compare* *Rose*, 291 F.3d at 922 ("We adopt an approach similar to that of the First, Seventh and Tenth Circuits, and hold that where an employee is in a policymaking or confidential position and is terminated for speech related to his political or policy views, the *Pickering* balance favors the government as a matter of law."), *and* *Lewis v. Cowen*, 165 F.3d 154, 162 (2d Cir. 1999) ("[A] policymaking employee may be discharged on the basis of political affiliation such as membership (or lack of membership) in a particular political party . . . [when] the *Pickering* balancing test favors the government employer."), *with* *Biggs v. Best, Best & Krieger*, 189 F.3d 989, 994–95 (9th Cir. 1999) ("[A]n employee's status as a policymaking or confidential employee would be dispositive of any First Amendment retaliation claim."), *and* *Fazio v. City & County of San Francisco*, 125 F.3d 1328,

prosecutors need to show loyalty to their employer,<sup>152</sup> their political views and expressions constitute speech within the scope of their employment.<sup>153</sup> Ultimately, the court held that Marsilio's political speech was sufficient to undermine the employer's trust in Marsilio's performance<sup>154</sup> and was therefore a valid ground for termination.<sup>155</sup> This very loose standard allows an employer to terminate prosecutors whom the employer believes *might* be disloyal due to their political views or affiliations.<sup>156</sup>

Despite this authority granted to employers who perceive disloyalty, the question of a prosecutor's speech affecting the *community's* trust in the office remains unanswered. *Marsilio*, by addressing the issue of loyalty, is concerned with working relationships *within* the office between the employer and employee rather than the public's perception of the employee.<sup>157</sup> Similarly, in ASA Lewis's situation, State Attorney Ashton expressly stated that he felt ASA Lewis was performing perfectly well despite his "offensive and dehumanizing" speech and therefore did not initially terminate Lewis for his speech.<sup>158</sup> Yet, the law does nothing to punish a prosecutor whose animosity does not create a concern of loyalty to the chief prosecutor, even where such speech might nonetheless destroy the community's trust in the prosecutor and the office.

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1334 (9th Cir. 1997) ("Because we hold that [plaintiff's] position . . . was a policymaking one, we do not address [plaintiff's] claim that under the *Pickering* balancing test his interest in free speech outweighs the [employer's] interest in running an efficient office.").

152. This duty of loyalty stems from the notion that assistant prosecuting attorneys are statutory agents of the elected prosecutor who are authorized to act on behalf of the elected prosecutor. *Marsilio*, 924 F. Supp. 2d at 851–52.

153. *Id.* at 853–54.

154. *Simasko v. County of St. Clair*, 417 F.3d 559, 563 (6th Cir. 2005) ("[T]he mere fact that an employee is affiliated with an opposing political party, however quietly, can cause the employer not to trust the employee to implement fully the employer's practices."); *Latham v. Office of Attorney Gen.*, 395 F.3d 261, 267 (6th Cir. 2005) (holding that, when a confidential or policymaking employee's speech might cause the employer to be unable to trust the employee to implement the employer's policies fully, his "conduct in speaking out against the central enforcement policies of [the] department . . . [is] sufficiently insubordinate to overcome any First Amendment bar to [his] termination").

155. *Marsilio*, 924 F. Supp. 2d at 853–54; *see also Rose*, 291 F.3d at 923 ("In other words, the government's interest in appointing politically loyal employees to certain positions converges with its interest in operating an efficient workplace when dealing with policymaking employees because loyalty by those employees is an essential requirement for the efficient functioning of the workplace.").

156. *Marsilio*, 924 F. Supp. 2d at 854 ("The determination for the Court, therefore, is . . . whether [the employee's] speech *could* lead the employer not to trust the employee to *loyally* implement the employer's practices." (first emphasis added)).

157. *See id.* at 852.

158. Bleier, *supra* note 4 ("Despite calling his subordinate's remarks 'offensive and dehumanizing,' State Attorney Jeff Ashton said Lewis will not be reprimanded.").



IV. THE NEED FOR LIMITED FIRST AMENDMENT PROTECTION  
OF PROSECUTORIAL SPEECH THAT HAS  
NO ADVERSE IMPACT ON PERFORMANCE

Prosecutors are citizens and deserve some First Amendment protections.<sup>159</sup> The law is clear that the First Amendment does not protect a prosecutor's speech that directly interferes with the office's functions.<sup>160</sup> Some circuits even allow prosecutors to be terminated for political speech if the chief prosecutor believes the subordinate may be disloyal.<sup>161</sup> However, it is evident that this method of holding prosecutors accountable for their speech is insufficient and inadequate to protect the People's interest in being adequately represented by prosecutors in criminal proceedings.<sup>162</sup>

A prosecutor's duty is to serve the public<sup>163</sup> and to uphold the public interest.<sup>164</sup> Although the chief prosecutor has the authority to determine what the public interest is,<sup>165</sup> the chief prosecutor, like every other prosecutor in the office, is also obligated to serve the public.<sup>166</sup> Therefore, in a broader sense, the employer of any given prosecutor is the community that the prosecutor serves.<sup>167</sup> Under this view, a prosecutor should be terminated not only when he or she undermines the office's functions or the chief prosecutor's trust but also when the prosecutor undermines the community's trust. Part IV.A consolidates the principles surrounding prosecutorial speech and proposes that the public may be considered an employer of all prosecutors and should therefore also have a means of terminating a prosecutor who undermines the community's trust. Part IV.B then discusses some outstanding considerations of the proposed standard and concludes with an illustration of how the new standard fits within the story of ASA Lewis's termination.

*A. Community Trust as Another Standard  
for Permissible Prosecutorial Speech*

Even if the chief prosecutor does not terminate a prosecutor for problematic speech, the People should be able to terminate the prosecutor as his or her employer when it has reason to believe that the prosecutor cannot

159. *See supra* note 77 and accompanying text.

160. *See supra* Part III.A.

161. *See supra* notes 140–56 and accompanying text.

162. *See* Fieldstadt, *supra* note 9 (“Ashton pointed out that he fought calls to fire Lewis in 2014 . . .”).

163. CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2015).

164. *Id.* § 3-1.2(b).

165. *Id.* § 3-1.3 (“The public's interests and views . . . should be determined by the chief prosecutor and designated assistants in the jurisdiction.”).

166. *Id.* §§ 3-1.1(a), 3-1.2(b). The standards note that the role of any prosecutor, “regardless of . . . title,” *id.* § 3-1.1(a), is to “serve[] the public interest,” *id.* § 3-1.2(b).

167. *Cf.* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (“[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses . . .” (emphases added)).

effectively serve his or her function of pursuing the community's interest.<sup>168</sup> In determining the extent of the First Amendment's protections for prosecutorial speech that undermines community trust, it is important to note that an overly strict approach, such as the bright-line rule that some jurisdictions have adopted,<sup>169</sup> entails a risk of hindering the public's already minimal insight into prosecutorial discretion.<sup>170</sup> Drastically limiting protections for problematic prosecutorial speech could deter prosecutors from communicating with the public in fear of expressing their biases and thereby further shroud the considerations prosecutors make in exercising discretion. What follows is that the lack of First Amendment protections could function as yet another veil that blinds the public from the internal process of prosecutorial discretion.<sup>171</sup> Excessively limiting the protections for prosecutors could also deter even passionate and motivated attorneys from becoming prosecutors. Therefore, giving the public too much transparency into prosecutors' work could hinder the efficiency of the prosecutorial office as such transparency may lead to frequent public outcries for the removal of every prosecutor who expresses any unpopular opinions.<sup>172</sup>

Furthermore, although some circuits adopt a bright-line rule allowing the chief prosecutor to fire a prosecutor for holding or expressing different political views,<sup>173</sup> it would be impractical to give the People the same level of authority over firing prosecutors. Nonetheless, these circuits are correct to have strict limitations on prosecutorial speech because prosecutors are the only representatives of the People who, in turn, should be able to trust their prosecutors to represent the interests of the community.

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168. The ABA also recognizes a need for the regulation of prosecutorial conduct and notes that reports of prosecutorial misconduct that occur should be addressed. *See* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7(j). *But see* H. Mitchell Caldwell, *The Prosecutor Prince: Misconduct, Accountability, and a Modest Proposal*, 63 CATH. U. L. REV. 51, 55 (2013) (noting that disciplinary actions are grossly inadequate for prosecutors despite the need for more severe accountability of prosecutors); Angela J. Davis, *The Legal Profession's Failure to Discipline Unethical Prosecutors*, 36 HOFSTRA L. REV. 275, 277 (2007) (noting that disciplinary processes have not actually disciplined prosecutors abusing their power and discretion); David Keenan et al., *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 YALE L.J. ONLINE 203, 203-04 (2011) (explaining how current professional responsibility measures do not adequately police prosecutorial misconduct). The ABA standard as well as these articles that discuss prosecutorial misconduct are concerned with prosecutorial misconduct that directly violates rules of professional conduct. This Note, however, proposes to expand the scope of such regulation to focus not only on prosecutorial misconduct as defined by the ABA but also on prosecutorial speech that undermines the community's trust in and the integrity of the criminal justice system as a whole.

169. *See supra* notes 140-56 and accompanying text.

170. *See supra* note 37.

171. *See* Green & Roiphe, *supra* note 46, at 467 (“[P]rosecutors should be more deliberate and transparent in how they execute decisions.”).

172. *See supra* notes 47-49 and accompanying text; *see also* CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-1.7(j) (recognizing that frivolous complaints of prosecutorial misconduct exist but can be dismissed).

173. *See supra* note 151.

As a result, although it is helpful to adopt the bright-line approach to allow an employer to terminate a prosecutor for a lack of loyalty, the employer's authority should be more constrained to avoid violating prosecutors' constitutional rights while also ensuring that the prosecutors' offices have enough flexibility to function effectively. Rather than allowing the People to terminate a prosecutor for any possible breach of loyalty, the People should be able to terminate a prosecutor only when there is a significant pushback on a prosecutor's reliability in representing the People's interests.<sup>174</sup> The foregoing discussion of the First Amendment's protection of speech repeatedly mentions the notion of "adverse effects."<sup>175</sup> Thus, it is reasonable to require some form of adverse effect on the community's trust in the criminal justice system as a baseline standard in evaluating prosecutorial speech. If the community's trust in the criminal justice system is substantially and negatively affected by the prosecutor's speech, that form of speech should be considered a valid ground for termination.

Because this Note proposes that prosecutors should be terminated for expressing animosity even before the prosecutor acts according to any such bias, requiring proof of adverse effect on performance would be difficult.<sup>176</sup> This Note's proposal requires only an adverse effect on the community's trust. In determining the standard of proof the public must satisfy to terminate a prosecutor, the court's analysis in *Hale* is instructive.<sup>177</sup> If the public can demonstrate to the disciplinary committee that a prosecutor's speech evidences a "gross deficiency in moral character" under "any civilized standards of decency,"<sup>178</sup> the disciplinary committee should reevaluate whether the prosecutor "possesse[s] the requisite character and fitness" to serve as a prosecutor.<sup>179</sup> This Note proposes a relatively high standard of "gross deficiency" because prosecutors must have some standard that bars nonmeritorious or frivolous complaints from being brought by the People to ensure that the functionality and efficiency of the prosecutorial office is not unnecessarily compromised.<sup>180</sup>

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174. Just as ASA Lewis was fired for his comments on a case to which he was not assigned, the People should be able to file complaints about a prosecutor's general lack of reliability as a representative of the People in a criminal trial. This Note does not address claims of prosecutorial misconduct in specific cases but is concerned about a prosecutor's character and fitness in serving the People's interest.

175. See *supra* notes 132–35 and accompanying text.

176. See *supra* notes 132–35 and accompanying text. Although adverse effects on performance may provide corroborating evidence that the public has reason to distrust a prosecutor for his or her bias, such evidence would be more aligned with civil claims of prosecutorial misconduct rather than the issue of trust with which this Note is concerned.

177. See *supra* notes 116–21 and accompanying text.

178. *Hale v. Comm. on Character & Fitness*, 335 F.3d 678, 680 (7th Cir. 2003).

179. *Id.*; see also Jackson, *supra* note 16 ("[Prosecutors] are thus required to win an expression of confidence in [their] character by both the legislative and the executive branches of the government before assuming the responsibilities of a . . . prosecutor.").

180. See *supra* note 172 and accompanying text.

*B. Considerations and Illustration of the Proposed Standard*

The implementation of this standard may, admittedly, be difficult for a few reasons. First, different people hold different views and may lose trust in a prosecutor for different reasons. Second, neither the victim nor any other member of the general public is directly represented by prosecutors in the criminal justice system,<sup>181</sup> but it will still be difficult to completely disregard the emotions of the individuals who allege misconduct or improper biases, especially if those allegations arise in response to a prosecutor's conduct or speech in investigating or trying a case. Nonetheless, in an effort to pursue justice, prosecutors are expected to "consider the interests of victims and witnesses[] and respect the constitutional and legal rights of all persons, including suspects and defendants."<sup>182</sup> Following this expectation, allowing any informed member of the public—such as potential victims, witnesses, suspects, or defendants—to file complaints about a prosecutor's bias would enable the People to remove the prosecutor from office and thereby prevent a prosecutor whose biases contravene the community's interest from representing the People in a criminal case.

Because this proposed standard involves a breach of the community's trust, unpublicized prosecutorial speech cannot be ground for termination. Whereas a chief prosecutor may terminate a subordinate prosecutor even for unpublicized speech when the speech undermines either the office's functions<sup>183</sup> or the employer's confidence in the prosecutor's loyalty,<sup>184</sup> it is impossible for the People to complain about speech that was never publicized. If the People are not aware of the speech and the chief prosecutor does not feel a need to terminate the subordinate prosecutor for a lack of loyalty,<sup>185</sup> there is no reason for the prosecutor to be terminated because the

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181. CRIMINAL JUSTICE STANDARDS FOR PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2015) ("The prosecutor generally serves the public and not any particular . . . witness or victim."). Because victims have no right in the criminal justice process, the criminal justice system is not concerned with whether the victims get justice but rather whether the integrity of the system is sufficiently preserved to grant justice to society at large. *See Mikhail v. Kahn*, 991 F. Supp. 2d 596, 637 (E.D. Pa. 2014) ("[E]ven when individuals are wronged in a manner cognizable under criminal law, they 'do not have a constitutional right to the prosecution of alleged criminals.'" (quoting *Capogrosso v. Supreme Court*, 588 F.3d 180, 184 (3d Cir. 2009) (per curiam))).

182. CRIMINAL JUSTICE STANDARDS FOR PROSECUTION FUNCTION § 3-1.2(b).

183. *Connick v. Myers*, 461 U.S. 138, 151 (1983); *Arnett v. Kennedy*, 416 U.S. 134, 168 (1974).

184. *See supra* notes 152–56 and accompanying text.

185. *Latham v. Office of Attorney Gen.*, 395 F.3d 261, 266 (6th Cir. 2005) ("Furthermore, in *Rose*, we focused on how the speech would affect the *employer's* ability to maintain a working relationship with his or her employees, rather than whether the speech was 'public' or 'intra-office.'" (emphasis added)); *Rose v. Stephens*, 291 F.3d 917, 923 (6th Cir. 2002) ("When such an employee speaks in a manner that undermines the trust and confidence that are central to his position, the balance definitively tips in the government's favor because an overt act of disloyalty necessarily causes significant disruption in the working relationship between a confidential employee and his *superiors*." (emphasis added)).

prosecutor did nothing to adversely impact the *community's* trust in the office and its functions.<sup>186</sup>

This proposed standard strives to maximize the protection of a prosecutor's First Amendment rights insofar as the public's interest in regulating its prosecutors is satisfied. Illustrating the application of this standard with ASA Lewis's situation demonstrates how and why Lewis should justifiably be terminated for his speech. Lewis claims that his derogatory comment towards mothers was "only meant for his inner circle of friends" despite his posting the statement on Facebook.<sup>187</sup> Under the proposed standard, the public would be able to remove Lewis from office for holding and expressing such views publicly. Besides, a prosecutor who expects a public Facebook post to be contained within his private sphere arguably meets a reasonable standard of untrustworthiness, and private speech that becomes publicized through such carelessness justifiably warrants a complaint from the public that questions the trustworthiness of the prosecutor. Furthermore, even if the chief prosecutor believes the biased prosecutor could exercise his duties in a professional manner,<sup>188</sup> this proposed standard affords the public an opportunity to remove a prosecutor who publicly expresses blatant animosity toward the community he has sworn to serve.

#### CONCLUSION

Despite the ethical rules governing prosecutorial conduct and the constitutional authority granted to chief prosecutors in terminating subordinate prosecutors for problematic speech under the First Amendment, current measures of regulating problematic prosecutorial speech are still, evidently, ineffective. To maintain the community's trust that the interests of the People will be adequately represented in the criminal justice system, prosecutors should be held accountable for speech that undermines such trust. Giving some power to the People—who are the employers of every prosecutor in the community under a broader, and arguably more technical, view—in terminating prosecutors who express problematic speech helps mitigate the extent to which community trust is undermined by prosecutors who do not demonstrate the requisite character to represent the interests of the People zealously. Setting community trust as the core standard in evaluating prosecutorial speech as it pertains to the community's trust in the criminal justice system allows prosecutors to enjoy the greatest extent of the constitutional protections afforded to them under the First Amendment while also subjecting them to the practical expectations of professional responsibility expected of the People's attorney—the prosecutor.

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186. The intention of this Note's proposed standard is not to *replace* the current method of employers holding prosecutors accountable for their speech but rather to *add* another method by which the People can hold prosecutors accountable for their speech.

187. Paschall-Brown, *supra* note 3.

188. Bleier, *supra* note 4 ("I've never had a victim come to us and say this man is not treating us with respect . . . ,” Ashton said.”).