

# PERP WALKS AND PROSECUTORIAL ETHICS

Ernest F. Lidge III\*

*“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talks or public print.” –  
Justice Oliver Wendell Holmes<sup>1</sup>*

## I. INTRODUCTION

The perp walk has been defined as: “[t]he deliberate escorting of an arrested suspect by police in front of the news media, especially as a means of pressuring or humiliating the suspect.”<sup>2</sup> Law enforcement personnel have been using perp walks for many years,<sup>3</sup> and the procedure has been used in some high-profile cases in recent decades.<sup>4</sup> The perp walk has two potential effects:

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\* Professor of Law, The University of Memphis Cecil C. Humphreys School of Law; B.S. Ed., Northern Illinois University, DeKalb, Illinois, 1976; M.A., University of Illinois, Chicago, Illinois, 1981; J.D., University of Illinois, Champaign, Illinois, 1984. I would like to thank my research assistant David Calfee. I would also like to thank the University of Memphis School of Law for providing a grant that supported the research for this Article.

<sup>1</sup> *Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

<sup>2</sup> *THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE* (4th ed. 2000).

<sup>3</sup> A New York Times article notes:

The term [perp walk] has been used for at least five decades by New York police and photographers and some experts point to images of protowalks captured long before photography. In paintings of the expulsion from Eden, Adam and Eve are modestly trying to cover their bodies from public view, and the sword-wielding angel’s stern expression anticipates the look on a homicide detective walking an accused cop-killer. Other paintings – of Achilles ceremonially dragging Hector behind his chariot, of the Stations of the Cross, of French aristocrats being carted to the guillotine – display elements of the perp walk, although the spectators appear far more polite than the New York press corps is.

John Tierney, *Walking the Walk*, N.Y. TIMES MAG., Oct. 30, 1994, at 30. See also Dave Krajicek, *The Crime Beat: Perp Walks*, in *COVERING CRIME AND JUSTICE* (Criminal Justice Journalists eds. 2003), [http://www.justicejournalism.org/crimeguide/chapter01/sidebars/chap01\\_xside5.html](http://www.justicejournalism.org/crimeguide/chapter01/sidebars/chap01_xside5.html) (stating that “[f]ederal authorities have been fond of perp walks since the early years of the FBI’s J. Edgar Hoover, who understood the priceless public relations value of an image that showed a cuffed bad guy in the grasp of a federal agent”).

<sup>4</sup> See Krajicek, *supra* note 3 (stating that Timothy McVeigh, the Oklahoma City bomber, “was subjected to a perp walk nearly three hours before he was officially arrested”); Joel Cohen, *No More ‘Perp Walks,’* NAT’L L.J., Aug. 5, 2002, at A25 (describing then-U.S. Attorney Rudolph Guiliani’s 1987 arrest of three Wall Street Bankers who were “handcuffed and arrested at their desk” and noting the “recent front-page arrests of ImClones’s Sam Waksal and Adelphia’s John Rigas . . . although voluntary surrenders were urged by their lawyers in meeting with prosecutors”); Editorial, *‘Perp Walks’ and Watchdogs can Thwart Corporate Crime*, USA TODAY, July 9, 2004, at 10 (stating that Enron’s Kenneth Lay was perp walked in handcuffs).

shaming the accused and generating publicity for law enforcement. The perp walk has been criticized,<sup>5</sup> but constitutional challenges to perp walks have met with very limited success.<sup>6</sup>

This Article examines another possible challenge to perp walks – prosecutorial ethics, namely Model Rules 3.6 and 3.8 of the American Bar Association Model Rules of Professional Conduct (“Model Rules”). Model Rule 3.8(f) requires prosecutors to “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused” unless the comments are “necessary to inform the public of the nature and extent of the prosecutor’s action and . . . serve a legitimate law enforcement purpose.”<sup>7</sup> Similarly, Model Rule 3.6 bars a lawyer who is involved “in the investigation or litigation of a matter” from making “an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>8</sup>

This Article discusses the application of Model Rules 3.6 and 3.8 to perp walks. Part II of the Article examines a threshold issue. Rules 3.6 (a) and 3.8 (f) apply to “statements” or “comments.” Is a perp walk a statement or comment? Part II concludes that a perp walk arranged with the media by law enforcement should be considered a statement or comment for purposes of discipline under the ethical rules.

Part III of the Article discusses Model Rules 3.6 and 3.8’s limitations on prosecutorial extrajudicial statements. This part concludes that, under many circumstances, a perp walk can violate Model Rules 3.6 and 3.8 by having “a substantial likelihood of materially prejudicing [the criminal trial]”<sup>9</sup> and by having “a substantial likelihood of heightening public condemnation of the accused.”<sup>10</sup>

Both Model Rule 3.6 and Model Rule 3.8 authorize certain extrajudicial statements. For example, Model Rule 3.6(b)(5) allows a lawyer to make “a

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Another example is Lee and Andrew Fastow of Enron Corporation fame, who alleged that the government refused to allow them to surrender voluntarily, instead conducting a perp walk. *See United States v. Fastow*, 292 F. Supp. 2d 914, 918 (S.D. Tex. 2003).

<sup>5</sup> *See e.g.*, Cohen, *supra* note 4, Kyle J. Kaiser, Note, *Twenty-First Century Stocks and Pillory: Perp Walks as Pre-Trial Punishment*, 88 IOWA L. REV. 1205 (2003). One wag has described the effects of perp walks in the following manner:

Q: Why have some companies canceled casual Fridays?

A: So people will always have jackets to cover the handcuffs.

Randy Myers, *Lessons of the Scandal Trials*, CORP. BOARD MEMBER MAG., Special Legal Issue 2004, available at [http://www.boardmember.com/issues/archive.pl?article\\_id=11973](http://www.boardmember.com/issues/archive.pl?article_id=11973).

<sup>6</sup> In *Lauro v. Charles*, 219 F.3d 202 (2d Cir. 2000), a 42 U.S.C. § 1983 (2000) action, the court held that a perp walk staged by police violated an arrestee’s Fourth Amendment rights but that the police officer was entitled to qualified immunity. Prior to *Lauro* no court imposed constitutional liability based on a perp walk. *See Hannah Shay Chanoine*, Note, *Clarifying the Joint Action Test for Media Actors When Law Enforcement Violates the Fourth Amendment*, 104 COL. L. REV. 1356, 1357 n. 9 (2004) (listing cases).

<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2005).

<sup>8</sup> *Id.* R. 3.6(a).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* R. 3.8(f).

request for assistance in obtaining evidence and information.”<sup>11</sup> It has been argued that perp walks may assist in the gathering of evidence and information.<sup>12</sup> Similarly, Model Rule 3.8(f) allows prosecutors to make statements that are “necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose.”<sup>13</sup> It has been argued that perp walks may serve legitimate law enforcement purposes. Part III addresses these arguments.

Although prosecutors themselves are sometimes involved in arranging a perp walk, at other times police officers may conduct a perp walk without a prosecutor’s involvement. Model Rule 3.8(f) requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”<sup>14</sup> Part IV of this Article discusses a prosecutor’s duty to exercise reasonable care to prevent law enforcement personnel from making prejudicial extrajudicial statements, including perp walks.

In Part V the Article concludes that perp walks often violate a prosecutor’s ethical duties. Other less prejudicial alternatives exist to meet legitimate law enforcement goals. In most circumstances, therefore, prosecutors have an ethical duty to avoid conducting perp walks. Prosecutors must also try to prevent law enforcement personnel from conducting perp walks, or, failing that, prosecutors must take steps to ameliorate the harm, including publicly condemning law enforcement personnel who conduct perp walks.

## II. IS A PERP WALK A “STATEMENT” OR “COMMENT”?

Both Model Rules 3.6 and 3.8(f) proscribe certain extrajudicial “statements” or “comments.” Does a perp walk constitute a “statement” or “comment”?<sup>15</sup> One dictionary defines the word “statement” to mean “the act of stating or declaring.”<sup>16</sup> The same dictionary also defines the word “statement” to include “an overall impression or mood intended to be communicated, especially by means other than words . . . .”<sup>17</sup> One of the definitions in WordNet is “a nonverbal message.”<sup>18</sup> The hearsay rules also include nonverbal communications as statements. The Federal Rules of Evidence define a “statement” as,

<sup>11</sup> *Id.* R. 3.6(b)(5).

<sup>12</sup> See Chanonine, *supra* note 6, at 1368 (discussing possible justifications for perp walks including that they “may encourage unknown witnesses to step forward with information”).

<sup>13</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2005).

<sup>14</sup> *Id.*

<sup>15</sup> Rules 3.6 and 3.8(f) appear to use the terms “statements” and “comments” interchangeably. Rule 3.8(f) states “except for *statements* that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [a prosecutor shall] refrain from making extrajudicial *comments* that have a substantial likelihood of heightening public condemnation of the accused . . . .” *Id.* at R. 3.8(f) (emphasis added). Model Rule 3.6 uses the term “statement(s)” throughout the Rule and accompanying comments (*see id.* R. 3.6(a); R. 3.6(c); R. 3.6 cmts. 3, 4, 7, and 8) and also uses the terms “commentary” (R. 3.6 cmt. 3) and “comments” (R. 3.6 cmt. 6).

<sup>16</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1694 (4th ed. 2000).

<sup>17</sup> *Id.*

<sup>18</sup> WordNet, <http://www.answers.com/topic/statement> (last visited Sept. 22, 2006).

“(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”<sup>19</sup>

A perp walk easily falls within the definition of a “statement.” The prosecutor, by contacting the media, intends to communicate something. At the very least, the prosecutor intends to communicate to the public that the accused has been arrested and is in custody. Other possible ideas communicated may include: (1) the police and prosecutors are doing a great job in protecting the public; (2) the accused is “guilty, guilty, guilty”;<sup>20</sup> or (3) the accused is being treated as he deserves – in a humiliating fashion.

Common sense tells us that the proscriptions of Model Rules 3.6 and 3.8 should not be limited to verbal statements. For example, Comment 5(1) to Model Rule 3.6 states that among the “subjects that are more likely than not to have a material prejudicial effect on a proceeding” include the “criminal record of a . . . suspect in a criminal investigation . . . .”<sup>21</sup> If, at a press conference about the arrest of a suspect, a reporter asked the prosecutor whether the suspect had a criminal record, the proper response should be “no comment.” If the prosecutor nodded his head up and down, instead of saying “yes,” the mere fact that the prosecutor gave a nonverbal response should not bar discipline.

If a prosecutor arranges a perp walk with the media, the fact that the prosecutor initiated the telephone call meets the requirement of Model Rule 3.6(a) that the “lawyer knows or reasonably should know [the statement] will be disseminated by means of public communication”<sup>22</sup> and/or the requirement of Rule 3.8(f) that the statement “have a substantial likelihood of heightening public condemnation of the accused . . . .”<sup>23</sup>

Arguably, even the phone call to the media itself could fall within the proscriptions of Model Rule 3.8(f). The call to the media that the defendant will be taken into custody at a certain time and place is itself a “statement” that has “a substantial likelihood of heightening public condemnation of the accused.”<sup>24</sup>

### III. MODEL RULES 3.6(A) AND 3.8(F) AND PERP WALKS

Model Rule 3.6(a) bans a lawyer who is involved in “the investigation or litigation of a matter” from “mak[ing] an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.”<sup>25</sup> Comment 5 to Model Rule 3.6 lists a number of subjects “that are more likely than not to have a material prejudicial effect on a proceeding,” including “the character, credibility [or]

<sup>19</sup> FED. R. EVID. 801. See also BLACK’S LAW DICTIONARY 1444 (8th ed. 2004) (defining statement as “[a] verbal assertion or nonverbal conduct intended as an assertion”).

<sup>20</sup> Janine Jackson, “Perp Walks” and Ride-Alongs, EXTRA!, JULY/AUG. 1999, available at <http://www.fair.org/index.php?page=1469> (quoting Ray Suarez, *But What if the ‘Perp’ Walks?*, N.Y. TIMES, Mar. 13, 1999).

<sup>21</sup> MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. 5(1) (2005).

<sup>22</sup> *Id.* R. 3.6(a).

<sup>23</sup> *Id.* R. 3.8(f).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* R. 3.6(a).

reputation . . . of a party”;<sup>26</sup> “any opinion as to the guilt or innocence of a defendant or suspect in a criminal case”;<sup>27</sup> “information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial;”<sup>28</sup> and “the fact that the defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.”<sup>29</sup>

The extrajudicial statements of prosecutors have a great potential for prejudice. As stated by Professor Charles Wolfram, since “prosecutor statements are typically more likely to influence prospective jurors, Rule 3.6 . . . can be violated more readily by prosecutors in criminal cases than by defense lawyers or by lawyers in any other setting.”<sup>30</sup>

Because of the unique responsibilities of prosecutors,<sup>31</sup> there is a special rule that applies only to them, Model Rule 3.8. Section (f) of Model Rule 3.8 provides that “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [prosecutors must] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . .”<sup>32</sup> Comment 5 of Rule 3.8 refers back to Rule 3.6, stating that:

Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor’s extrajudicial statement can create the additional problem of increasing public condemnation of the accused. Although the announcement of an indictment, for example, will necessarily have severe consequences for the accused, a prosecutor can, and should, avoid comments which have no legitimate law enforcement purpose and have a substantial likelihood of increasing opprobrium of the accused. Nothing in this Comment is intended to restrict the statement in which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).<sup>33</sup>

These ethical rules carry out the policy expressed by Chief Justice Rehnquist in *Gentile v. State Bar of Nevada*:<sup>34</sup>

The outcome of a criminal trial is to be decided by impartial jurors, who know as little as possible of the case, based on material admitted into evidence before them in a court proceeding. Extrajudicial comments on, or discussion of, evidence which

<sup>26</sup> *Id.* R. 3.6 cmt. 5(1).

<sup>27</sup> *Id.* R. 3.6 cmt. 5(4).

<sup>28</sup> *Id.* R. 3.6 cmt. 5(5).

<sup>29</sup> *Id.* R. 3.6 cmt. 5(6).

<sup>30</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS ‘ 12.2, at 635 (1986). *See also* Attorney Grievance Cmm’n of Md. v. Gansler, 835 A.2d 548, 559 (Md. 2003) (noting that “[c]omments by prosecuting attorneys, in particular, have the inherent authority of the government and are more likely to influence the public”).

<sup>31</sup> *See infra* note 49 and accompanying text.

<sup>32</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2005).

<sup>33</sup> *Id.* R. 3.8 cmt. 5.

<sup>34</sup> 501 U.S. 1030 (1991).

might never be admitted at trial and ex parte statements by counsel giving their version of the facts obviously threaten to undermine this basic tenet.<sup>35</sup>

Perp walks violate Model Rules 3.6 and 3.8. A perp walk, showing the accused being marched away by police in handcuffs, seen by numerous viewers could easily “have a substantial likelihood of materially prejudicing” the trial. Potential jury members will see the accused looking guilty. In *Lauro v. Charles*,<sup>36</sup> the court noted that the perp walk displays the accused “to the world, against his will, in handcuffs, and in a posture connoting guilt.”<sup>37</sup> As stated by National Public Radio host Ray Suarez in a New York Times op-ed column, even if the journalists use “all the right words – ‘accused’ and ‘alleged’ and ‘according to police,’” the photographs say “guilty, guilty, guilty.”<sup>38</sup>

One court, in rejecting a § 1983 challenge to a perp walk and defending the use of the device, unintentionally demonstrated the taint of guilt caused by perp walks. In *Caldarola v. County of Westchester*,<sup>39</sup> the court said that perp walks “serve[d] the . . . serious purpose of educating the public about law enforcement efforts. The image of the accused being led away to contend with the justice system powerfully communicates government efforts to thwart the *criminal element*, and it may deter others from attempting *similar crimes*.”<sup>40</sup> The court seemed to imply that the accused was part of “the criminal element” and had committed crimes. But not all perp walked defendants are guilty. Not all arrestees subject to perp walks have been convicted, and the accused individuals are entitled to the presumption of innocence under our criminal justice system.<sup>41</sup>

Perp walks, as discussed by one commentator, are a type of pre-trial punishment.<sup>42</sup> The commentator noted that even without being perp walked, an arrestee could suffer “long-term harm”:

Although he was never perp walked, Richard Jewell was branded a terrorist and tormented even after his charges were dismissed. Suspects displayed on “John TV,” where the police directly broadcast arrest information on public access television, are at risk of being ostracized from their families and their communities before being convicted. Especially for those who are acquitted, the mental image created in the

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<sup>35</sup> *Id.* at 1070.

<sup>36</sup> 219 F.3d 202 (2d Cir. 2000).

<sup>37</sup> *Id.* at 212 n.7.

<sup>38</sup> Jackson, *supra* note 20.

<sup>39</sup> 343 F.3d 570 (2d Cir. 2003).

<sup>40</sup> *Id.* at 572-73 (emphasis added).

<sup>41</sup> The most notorious example is, of course, Michael Jackson, who was paraded in front of the media as he was arrested and was subsequently acquitted. There are other examples. A former prosecutor discussed the use of perp walks by one of our country’s foremost politicians:

In 1987, at the height of then-U.S. Attorney Rudolph Giuliani’s insider trading war, he had three Wall Street investment bankers handcuffed and arrested at their desks. When one demanded an immediate trial, Giuliani had the case dismissed (without prejudice) to avoid a speedy trial violation, since the government wasn’t ready for trial. Much later, two pleaded guilty to relatively minor charges. The third case was never pursued, but a reputation was ruined. This abusive exercise of the arrest power is still remembered.

Cohen, *supra* note 4.

<sup>42</sup> See Kaiser, *supra* note 5.

public eye is no less than that which would occur from a few hours in the pillory or from a paddling handed down by a judge. These examples demonstrate how publicity can affect the view of a suspect's guilt. The effects would be magnified exponentially when the police would intend such an effect through a staged or choreographed perp walk.<sup>43</sup>

Several of the factors contained in Comment 5 to Model Rule 3.6 also support the idea that perp walks violate the Rule. Comment 5 states that there are "certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to . . . a criminal matter . . ." <sup>44</sup> Included are "subjects [that] relate to . . . the character, credibility [or] reputation . . . of a . . . suspect in a criminal investigation . . ." <sup>45</sup> Showing the suspect carried off in handcuffs and surrounded by police certainly "relates to" that suspect's "character, credibility [or] reputation." Another category of subjects listed in Comment 5 "relate to . . . any opinion as to the guilt or innocence of a defendant or suspect in a criminal case . . ." <sup>46</sup> Handcuffing the defendant and parading him before the news media certainly relates to law enforcement personnel's "opinion as to the guilt or innocence of [the] defendant." In addition, the appearance of the defendant in handcuffs, surrounded by police, is "information . . . likely to be inadmissible as evidence . . .," <sup>47</sup> another prejudicial subject listed in Comment 5.

Finally, the Comment lists as a prejudicial subject "the fact that the defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty." A perp walk is a statement that "the defendant has been charged with a crime," but it is unlikely that prosecutors conscientiously follow perp walks with a statement that the defendant is presumed innocent. Even if prosecutors made such a comment, the statement could not overcome the prejudicial effects of the television pictures.

Comment 6 to Model Rule 3.6 also warns that of all types of proceedings, "[c]riminal jury trials will be most sensitive to extrajudicial speech." <sup>48</sup> Thus prosecutors have a duty to take *extra* care to guard against extrajudicial prejudicial speech. Prosecutors have special ethical responsibilities in our system of justice. As the Model Rules state, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility car-

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<sup>43</sup> *Id.* at 1237-38.

<sup>44</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 5 (2005). Previously these factors had been part of the text of the rule itself. See MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (1983); *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1033, 1061 (1991). After *Gentile*, the ABA moved this text to the Comment. See Sebrina A. Mason, Comment, *Policing the Police: How Far Must a Prosecutor Go to Keep Officers Quiet?*, 26 S. ILL U. L.J. 317, 318 n.9 (2002) (citing MODEL RULES OF PROF'L CONDUCT R. 3.6 annot. (1999) where it is noted that in 1994, "Model Rule 3.6 was substantially amended . . . to address the Supreme Court's holding in *Gentile*.").

<sup>45</sup> MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. 5(1).

<sup>46</sup> *Id.* R. 3.6 cmt. 5(4).

<sup>47</sup> *Id.* R. 3.6 cmt. 5(5).

<sup>48</sup> *Id.* R. 3.6 cmt. 6.

ries with its specific obligations to see that the defendant is accorded procedural justice . . . .”<sup>49</sup>

In addition to Model Rule 3.6, Model Rule 3.8(f) seems designed for perp walks. This Rule says that “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [prosecutors must] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused . . . .”<sup>50</sup> There probably is almost nothing that will heighten public condemnation of the accused more than a perp walk. As discussed below,<sup>51</sup> perp walks are rarely *necessary* to provide information to the public and, in most cases, there are much less prejudicial alternatives to satisfy legitimate law enforcement purposes.

Prosecutors have been disciplined for making statements that create the taint of guilt. In *Attorney Grievance Committee v. Gansler*,<sup>52</sup> prosecutor Douglas Gansler was reprimanded for a number of extrajudicial statements. Some of these statements included discussing Gansler’s personal opinion as to the defendant’s guilt. For example, Gansler announced a plea offer and a deadline for its acceptance. In other cases, Gansler indicated that the authorities had “apprehended the person who committed the crimes.”<sup>53</sup> Maryland’s version of Model Rule 3.6 “specifically address[ed] attorney comments discussing ‘any opinion as to the guilt or innocence of a defendant.’”<sup>54</sup> The court said that Gansler’s statements “blatantly expressed” his “opinion of the guilt of the [defendant].”<sup>55</sup> The prejudicial effects of the statements were aggravated by the fact that Gansler was a prosecutor. As the court pointed out, prosecutors play a unique role in our criminal justice system and are therefore held to a higher standard. In addition, “a prosecutor’s opinion of guilt is much more likely to create prejudice, given that his or her words carry the authority of the government and are especially persuasive in the public’s eye.”<sup>56</sup> Prosecutors, therefore, have to “be even more cautious [than other attorneys] to avoid making potentially prejudicial extrajudicial statements.”<sup>57</sup> The court found that “Gansler knew or should have known that his public opinions of [the defendant’s] guilt would have a substantial likelihood of material prejudice,” and therefore found that the statements violated Maryland’s version of Model Rule 3.6.<sup>58</sup>

<sup>49</sup> *Id.* R. 3.8 cmt. 1. See also *Berger v. United States*, 295 U.S. 78, 88 (1935) (stating that the prosecutor’s interest “is not that it shall win a case, but that justice shall be done” and that while the prosecutor may strike “hard blows,” he is “not at liberty to strike foul ones”); *Walker v. State*, 818 A.2d 1078, 1098 (Md. 2003) (stating that “[p]rosecutors are held to even higher standards of conduct than other attorneys due to their unique role as both advocate and minister of justice”).

<sup>50</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2005).

<sup>51</sup> See *infra* notes 100-106 and accompanying text.

<sup>52</sup> 835 A.2d 548 (2003).

<sup>53</sup> *Id.* at 571.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 572.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 573.

<sup>58</sup> *Id.* The text of Model Rule 3.6 is slightly different from Maryland’s Rule 3.6 at issue in *Gansler*. Model Rule 3.6 does not contain an express reference to “any opinion as to the



The court noted that the limits on extrajudicial statements are grounded in the Sixth Amendment guarantee of the right to a fair trial.<sup>59</sup> A criminal defendant can be “deprived of a fair trial if circumstances occurring outside the courtroom taint the proceedings.”<sup>60</sup> The court noted that attorneys have a unique role in the criminal justice system and have more knowledge and understanding about what is going on in a particular case. Therefore, their speech has a “degree of credibility . . . that an ordinary citizen’s speech may not usually possess.”<sup>61</sup> This is particularly true of prosecutors because they have the inherent authority of the government and are more likely to influence the public. Therefore, the defendant’s right to a fair trial can be harmed by a prosecutor’s extrajudicial speech.<sup>62</sup>

Another case dealing with a prosecutor’s extrajudicial statements was *In re Sims*.<sup>63</sup> In *Sims*, a number of elected officials and county residents petitioned to remove a prosecutor, John Sims, from office. Along with many other acts and omissions, Sims had made a number of improper public statements about current and prospective cases.<sup>64</sup> Regarding certain subjects of an investigation, Sims told a newspaper that “the reason they don’t trust me is that they can’t control me *and most criminals don’t trust prosecutors.*”<sup>65</sup> After Sims filed a criminal complaint against one of the petitioners and that complaint had been dismissed, Sims told a newspaper editor that he planned to charge the petitioner with a crime. After filing the charges, Sims gave extensive interviews to newspapers and television reporters – statements that the court found violated West Virginia’s version of Model Rules 3.6 and 3.8.<sup>66</sup>

In another incident, Sims told a newspaper that he could not comment on a case before the grand jury. However, he named an individual and then said that the individual “had a personal interest, albeit indirectly . . . .”<sup>67</sup> The court found this comment to violate West Virginia’s version of Model Rule 3.6.<sup>68</sup> Sims also violated Rule 3.6 when, before the start of jury selection for a murder trial, he made the following public statement: “We have tried two men involved with these murders already. This will be a very similar trial with similar witnesses testifying. We anticipate a similar guilty verdict.”<sup>69</sup>

The statements made by Sims tended to suggest that individuals were guilty of a crime. Therefore, the statements violated West Virginia’s version of Model Rules 3.6 and 3.8. The court found that Sims had “used pre-hearing

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guilt or innocence of a defendant.” Instead, the reference is contained in Comment 5 as one of the subjects “that are more likely than not to have a material prejudicial effect on the proceeding.” MODEL RULES OF PROF’L CONDUCT R. 3.6 cmt. 5 (2005). *See also supra* note 44 (discussing the evolution of Model Rule 3.6).

<sup>59</sup> *Gansler*, 835 A.2d at 558.

<sup>60</sup> *Id.* at 559.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *In re Sims*, 523 S.E.2d 273 (W. Va. 1999).

<sup>64</sup> *Id.* at 275-76.

<sup>65</sup> *Id.* at 276 (emphasis in the original).

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

publicity to prejudice adjudicative proceedings” and this constituted official misconduct and malfeasance.<sup>70</sup> Because of these statements, and a great deal of other misconduct, the court ordered that Sims be immediately removed from the office of prosecuting attorney.<sup>71</sup>

*Gansler* and *Sims* demonstrate that statements tending to suggest guilt on the part of a suspect or arrestee are the kind of statements that violate Model Rule 3.6(a) because the statements “have a substantial likelihood of materially prejudicing” a trial. A perp walk suggests guilt in even more graphic terms than a verbal statement.

In a situation analogous to perp walks, the United States Supreme Court has recognized that a defendant’s appearance in handcuffs before juries can erode the presumption of innocence. In *Deck v. Missouri*,<sup>72</sup> Carmen Deck had been convicted of robbing, shooting, and killing an elderly couple.<sup>73</sup> At his sentencing hearing, Deck was placed in leg irons, handcuffs, and a belly chain. Deck’s counsel objected several times, but the trial court overruled the objections and, on appeal, the Missouri Supreme Court affirmed Deck’s sentence.<sup>74</sup> According to the Missouri Supreme Court, Deck had not shown the extent to which the jury had been aware of the restraints, Deck had not claimed that he had been prevented from participating in the sentencing hearing, and there was a risk that Deck might try to flee custody.<sup>75</sup>

In deciding whether visible restraints at the sentencing hearing may violate a defendant’s constitutional rights, the Supreme Court first considered whether a State could routinely shackle a defendant during the guilt phase. The Court stated: “The answer is clear: The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need.”<sup>76</sup> The Court noted that this rule was deeply rooted in the common law.<sup>77</sup> Already in the eighteenth century, Blackstone had said that it was an “ancient” principle that a defendant “must be brought to the bar without irons, or any manner of shackles or bonds; unless there be evident danger of an escape.”<sup>78</sup> The Court also cited several other eighteenth century sources, noting that American courts had long followed Blackstone’s rule that “trial courts may not shackle defendants routinely, but only if there is a particular reason to do so.”<sup>79</sup>

The Court reviewed some of its own cases dealing with the issue. These cases suggested that the due process guarantee of the Fifth and Fourteenth Amendments required that “trial courts . . . not shackle defendants routinely, but only if there [was] a particular reason to do so.”<sup>80</sup> In *Illinois v. Allen*,<sup>81</sup> the

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<sup>70</sup> *Id.* at 281.

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

<sup>72</sup> 544 U.S. 622 (2005).

<sup>73</sup> *Id.* at 624.

<sup>74</sup> *Id.* at 625.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 626.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quoting W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 317 (1769)).

<sup>79</sup> *Id.* at 627.

<sup>80</sup> *Id.*

<sup>81</sup> 397 U.S. 337 (1970).

Court had said that binding and gagging “an unusually obstreperous criminal defendant” might “be the fairest and most reasonable way” of managing him, but “even to contemplate such a technique . . . arouses a feeling that no person should be tried while shackled and gagged except as a last resort.”<sup>82</sup> In *Holbrook v. Flynn*,<sup>83</sup> the Court, in dicta, stated that shackling a defendant at trial was an “inherently prejudicial practice that . . . should be permitted only where justified by an essential state interest specific to each trial.”<sup>84</sup> In *Estelle v. Williams*,<sup>85</sup> the Court said that only an “essential state policy” would justify requiring a defendant to attend a trial in prison clothing because such an appearance threatened the trial’s fairness.<sup>86</sup>

In *Deck*, the Court held that the due process guarantees of the Fifth and Fourteenth amendments “prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of discretion, that they are justified by a State interest specific to a particular trial.”<sup>87</sup> The Court identified three “fundamental legal principles” that required the rule.<sup>88</sup> One of the principles, dealing with the defendant’s constitutional right to a meaningful defense, a right to counsel, and the ability to communicate with that counsel and participate in his own defense, is not particularly relevant to the perp walk problem. However, the other two principles are very relevant. The first reason the Court gave for restricting visible restraints is that “the criminal process presumes that the defendant is innocent until proven guilty.”<sup>89</sup> According to the Court, “visible shackling undermine[d] the presumption of innocence and the related fairness of the fact finding process” and “suggested to the jury that the justice system itself [saw] a ‘need to separate a defendant from the community at large.’”<sup>90</sup>

The other fundamental legal principle implicated by perp walks was that “judges must seek to maintain a judicial process that is a dignified process.”<sup>91</sup> The Court explained:

The courtroom’s formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual’s liberty through criminal punishment. And it reflects a seriousness of purpose that helps to explain the judicial system’s power to inspire the confidence and to affect the behavior of a general public whose demands for justice our courts seek to serve. The routine use of shackles in the presence of juries would undermine these symbolic yet concrete objectives.<sup>92</sup>

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<sup>82</sup> *Id.* at 342-44; see also *Deck v. Missouri*, 544 U.S. 622, 627-28 (2005).

<sup>83</sup> 475 U.S. 560 (1986).

<sup>84</sup> *Id.* at 568-69; see also *Deck*, 544 U.S. at 628.

<sup>85</sup> 425 U.S. 501 (1976).

<sup>86</sup> *Id.* at 505; see also *Deck*, 544 U.S. at 628.

<sup>87</sup> *Deck*, 544 U.S. at 629.

<sup>88</sup> *Id.* at 630.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 631.

<sup>92</sup> *Id.* (emphasis added).

The *Deck* Court concluded that using shackles at trial offended judicial dignity.<sup>93</sup> The Court held that these three considerations also applied during the penalty phase of a capital case, and therefore courts could not “routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding.”<sup>94</sup> The Court, however, said that such restraints could be allowed in special circumstances.<sup>95</sup>

The same considerations that concerned the *Deck* Court also apply to perp walks. Parading the accused, restrained by police or in shackles, before the cameras “undermines the presumption of innocence and the related fairness”<sup>96</sup> of the upcoming trial. The public, from whom the jury will be drawn, will see the defendant as a threat to the community. This kind of “statement,” undermining the presumption of innocence, is precisely the concern of Model Rules 3.6 and 3.8(f).

In addition, the perp walk undermines the dignity of the criminal justice system. Although a perp walk does not take place in the court room, the device ignores the *Deck* Court’s concern about “the respectful treatment of defendants.”<sup>97</sup> This disrespectful treatment of the defendant occurs before the public, including potential jurors, and undermines the “symbolic yet concrete objectives” enunciated by the *Deck* Court.<sup>98</sup>

Since law enforcement personnel cannot normally parade a criminal defendant before the jury in handcuffs, neither should law enforcement personnel parade a defendant before potential jurors in the public in handcuffs. As one commentator has noted:

Essentially, before, during, and after trial, a prosecutor should make no comments that may prejudice the defendant. The rules of evidence provide a helpful rule of thumb in deciding what a prosecutor can and cannot discuss with the press: If the evidentiary rules bar a matter from being raised at trial, then that same matter should not be aired before the press.<sup>99</sup>

The rules of evidence would not normally allow a prosecutor to show the jury a videotape of the defendant’s arrest. Neither should a prosecutor arrange to show the defendant’s arrest before the public.

On the other hand, commentators have identified some possible justifications for perp walks. First, perp walks may deter criminal conduct because “[t]he bold image of a bound defendant may scare others straight.”<sup>100</sup> Second, perp walks “arguably serve to soothe public outrage.”<sup>101</sup> Third, perp walks “encourage guilty pleas and cooperation in current investigations.”<sup>102</sup> Fourth,

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 633.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 630.

<sup>97</sup> *Id.* at 631.

<sup>98</sup> *Id.*

<sup>99</sup> Richard W. Holmes, Comment, *Prosecutorial Dealing With the Media: Duties, Remedies, and Liability*, 28 J. LEGAL PROF. 177, 179 (2003-2004).

<sup>100</sup> Chanoine, *supra* note 6, at 1368 (quoting Maro Robbins, *Some Call ‘Perp Walk’ an Inconsistent Ritual: Councilmen Were Paraded in Cuffs, but Not Ex-AG*, SAN ANTONIO EXPRESS-NEWS, Mar. 17, 2003, at 1A).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

they “may induce witnesses or victims to come forward” with information.<sup>103</sup> Fifth, they provide public access to the justice system, permitting “the public to witness a facet of how law enforcement administers justice on the public’s behalf.”<sup>104</sup> Sixth, perp walks expose “an arrested suspect’s physical condition, leading some observers to believe that police are less likely to beat a suspect who will be exposed to the media.”<sup>105</sup>

In most circumstances, these rationales will not justify a perp walk. Detering future criminal conduct is not a proper justification. Although it may be proper to show the incarceration of convicted criminals in order to deter others from committing similar criminal conduct, it is not proper to punish an accused, but not convicted, person who maintains the presumption of innocence. The same rationale could be used for denying bail to the accused or punishing him in other ways.

Similarly, conducting a perp walk to “soothe public outrage” is not a proper rationale. It is not law enforcement’s job to assuage public anger by humiliating a presumptively innocent individual and harming that individual’s chances for a fair trial.

Neither are the remaining rationales very compelling. Encouraging others to plead guilty and to cooperate in criminal investigations can be accomplished by simply announcing the arrest of the defendant. Again, it is not proper to harm a presumptively innocent individual to pressure others to plead guilty and cooperate. In addition, such pressure may cause innocent people to accept a plea agreement. In regard to encouraging unknown witnesses to come forward, if this is really necessary, a simple mug shot of the defendant would do the trick.

Finally, allowing the public to experience a “facet of how law enforcement administers justice,” is not much of a justification. Surely the public knows that a defendant has to be transported from place to place. Not much information is gained by the public, except in rare circumstances like the Lee Harvey Oswald case, where there was concern about the police abusing the arrestee.<sup>106</sup> The rare circumstance in which this is the case does not justify humiliating a defendant. There are surely other ways to reassure the public about prisoner safety. One could grant a lawyer access to the defendant, or if the defendant is unrepresented, the police could grant access to a reporter (minus his camera).

The costs and abuses of perp walks are manifest. As noted by one commentator, perp walks are seen by some as “serving publicity-hungry prosecutors eager to enhance their political careers” and “giv[ing] police officers a chance to get on television.”<sup>107</sup> Some criminal defense lawyers perceive perp walks as “an unethical attempt by police to skirt the Fifth Amendment’s protec-

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<sup>103</sup> *Id.* See also Nicholas E. Poser, *Perp Walk Decision Leaves Troubling Questions*, 19 COMM. LAW. 3, 7 (2001).

<sup>104</sup> Chanoine, *supra* note 6, at 1369.

<sup>105</sup> *Id.* See also Poser, *supra* note 103, at 7 (noting that “the Dallas police intended for the press to photograph the transfer of Lee Harvey Oswald so that the public could see his physical condition”).

<sup>106</sup> It is of course a bit ironic that a perp walk designed to demonstrate that Lee Harvey Oswald was not being harmed culminated in Oswald’s murder by Jack Ruby.

<sup>107</sup> Chanoine, *supra* note 6, at 1369.

tion against self-incrimination.”<sup>108</sup> They would point out that, “[t]he physical humiliation and ‘onslaught of camera crews’ is conducive to triggering ‘excited utterances’ – statements qualifying as exceptions to the hearsay rule of evidence.”<sup>109</sup> In addition, the perp walk has been criticized “as a form of impermissible pretrial punishment by shaming.”<sup>110</sup> As discussed above,<sup>111</sup> perp walks “undermine the presumption of innocence.”<sup>112</sup> The device have also been criticized as a “tool of ‘crony-ism’ – where the prosecution offers politically connected individuals the opportunity to turn themselves in, while those lacking connections get ‘trussed up . . . like a trophy.’” Finally perp walks may “serve[ ] ‘a public desire for titillation,’”<sup>113</sup> hardly a noble goal. These harms caused by perp walks are manifest and clearly outweigh the purported justifications.

#### IV. A PROSECUTOR’S RESPONSIBILITIES WHEN THE POLICE CONDUCT A PERP WALK

Not all perp walks are orchestrated by prosecutors. Some perp walks are initiated by police. Model Rule 3.8(f) requires prosecutors to “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”<sup>114</sup> What are the responsibilities of prosecutors when the *police* orchestrate a perp walk?

There are two types of situations involving a police-instituted perp walk. First, there will be times when the prosecutor will have a direct role in the investigation and working closely with police. The second situation involves police-instituted perp walks in which the prosecutor is not involved. The prosecutor has ethical duties in both situations.

Prosecutors are getting more involved in criminal investigations.<sup>115</sup> If a prosecutor works with police officers, the mandates of Model Rule 5.3 may apply, as well as the requirements of Model Rule 3.8(f). Model Rule 5.3 applies “[w]ith respect to a nonlawyer employed or retained by *or associated with* a lawyer.”<sup>116</sup> Model Rule 5.3 on its face applies, not merely to employees

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<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

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

<sup>111</sup> See *supra* notes 33-90 and accompanying text.

<sup>112</sup> Chanoine, *supra* note 6, at 1369.

<sup>113</sup> *Id.*

<sup>114</sup> MODEL RULES OF PROF’L CONDUCT R. 3.8(f) (2005).

<sup>115</sup> See e.g., Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1271 (2004) (stating that “[e]specially in the federal system, prosecutors play a significant role in supervising proactive investigations”); Rory K. Little, *Proportionality as an Ethical Precept for Prosecutors in Their Investigative Role*, 68 FORDHAM L. REV. 723, 724, 728 (1999) (stating that prosecutors “have become increasingly involved in the investigative stages of criminal matters during the twentieth century” and “are centrally involved in proactive criminal investigations”).

<sup>116</sup> MODEL RULES OF PROF’L CONDUCT R. 5.3 (2005) (emphasis added).

of a law firm or a government agency,<sup>117</sup> but also to individuals “associated” with a lawyer. In regard to those individuals, a lawyer has a number of potential responsibilities. Model Rule 5.3 outlines the responsibilities of a lawyer regarding nonlawyer assistants.<sup>118</sup> This has a number of consequences for prosecutors working with police officers. First, under Model Rule 5.3(a), a prosecutor who possesses, either “individually or together” with other prosecutors “comparable managerial authority” to a law firm partner, has the duty to ensure that the prosecutor’s office “has in effect measures giving reasonable assurance” that the conduct of police personnel “is compatible with the professional obligations of the lawyer.”<sup>119</sup> Second, Model Rule 5.3(b) mandates that a prosecutor having “direct supervisory authority over” a police officer must “make reasonable efforts to ensure that the [police officer’s] conduct is compatible with the professional obligations of the [prosecutor].”<sup>120</sup> Third, Model Rule 5.3(c)(1) makes a prosecutor responsible for the unethical conduct of a police officer if the prosecutor “orders or, with the knowledge of the specific conduct, ratifies the conduct involved.”<sup>121</sup> Fourth, Model Rule 5.3(c)(2) makes a prosecutor responsible for a police officer’s conduct if the prosecutor has managerial authority in the prosecutor’s office or has “direct supervisory authority” over the police officer and the prosecutor “knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.”<sup>122</sup>

Finally, Model Rule 3.8(f) expands a prosecutor’s responsibility for the conduct of police officers even beyond the mandates of Model Rule 5.3. In addition to the requirement that prosecutors “refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemna-

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<sup>117</sup> The Model Rules define a “law firm” to include “the legal department of a corporation or other organization.” *Id.* R. 1.0(c). The legal department of an “organization” includes the legal department of a government agency. *Id.* R. 1.0 cmt. 3.

<sup>118</sup> See *id.* R. 5.3, entitled “Responsibilities Regarding Nonlawyer Assistants,” which states:

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possess comparable managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person’s conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

<sup>119</sup> *Id.* R. 5.3(a).

<sup>120</sup> *Id.* R. 5.3(b). Thus every prosecutor supervising a police officer during a criminal investigation must make reasonable efforts ensuring that the officer obeys the mandates of Rules 3.6 and 3.8(f).

<sup>121</sup> *Id.* R. 5.3(c)(1).

<sup>122</sup> *Id.* R. 5.3(c)(2).

tion of the accused,” Rule 3.8(f) requires that a prosecutor “exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”<sup>123</sup> The interplay between Model Rule 5.3 and Rule 3.8(f) is further elucidated by Comment 6 to Model Rule 3.8:

Like other lawyers, prosecutors are subject to Rules 5.1 and 5.3, which relate to responsibilities regarding lawyers and the nonlawyers who work for or are associated with the lawyer’s office. Paragraph (f) reminds the prosecutors of the importance of these obligations in connection with the unique dangers of improper extrajudicial statements in a criminal case. In addition, paragraph (f) requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statements, even when such persons are not under the direct supervision of the prosecutor. Ordinarily, the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions to law-enforcement personnel and other relevant individuals.<sup>124</sup>

Thus Model Rule 5.3 imposes duties on prosecutors who have managerial authority in the prosecutor’s office and prosecutors that have direct supervisory authority over police officers. Model Rule 3.8(f), on the other hand, imposes duties on every prosecutor working with police officers.

Applying the mandates of Model Rules 5.3 and 3.8(f) to perp walks allows an examination of the following question: under what circumstances will a prosecutor be responsible for a police-initiated perp walk, assuming the perp walk, if arranged by the prosecutor, would violate either Model Rule 3.6 or 3.8(f)? First, under Model Rule 5.3(a), a prosecutor possessing managerial authority must make “reasonable efforts to ensure” that the prosecutor’s office “has in effect measures giving reasonable assurance” that police officers do not engage in improper perp walks. Under Model Rule 5.3(b), prosecutors supervising police officers during an investigation must “make reasonable efforts to ensure” that the police officers do not conduct improper perp walks. Thus, prosecutors who are managers or supervise police officers have a duty to educate police officers working with the prosecutor’s office about the mandates of Model Rules 3.6 and 3.8(f).<sup>125</sup> Under Model Rule 5.3(c)(2), prosecutors with managerial authority or direct supervisory authority over a police officer have a duty to mitigate the effects of an improper perp walk committed by police officers under their authority. Finally, under Model Rule 3.8(f), prosecutors have a duty to “exercise reasonable care” to stop police officers from engaging in improper perp walks.

What reasonable measures must prosecutors take and what constitutes “reasonable care” to prevent police officers from engaging in improper perp walks? As Comment 6 to Model Rule 3.8 states, “ordinarily the reasonable care standard will be satisfied if the prosecutor issues the appropriate cautions

<sup>123</sup> *Id.* R. 3.8(f).

<sup>124</sup> *Id.* R. 3.8 cmt. 6.

<sup>125</sup> *See id.* R. 5.3 cmt. 1 (“A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment . . .”); *Id.* at R. 3.8 cmt. 6 (Rule 3.8(f) “requires a prosecutor to exercise reasonable care to prevent persons assisting or associated with the prosecutor from making improper extrajudicial statement, even when such persons are not under the direct supervision of the prosecutor”).



to law-enforcement personnel and other relevant individuals.”<sup>126</sup> Prosecutors should issue directives to police officers warning against improper perp walks.

However, what if the police department ignores the prosecutor’s directives? Suppose the police department has a practice of engaging in improper perp walks in high profile cases and ignores the prosecutor’s pleas. Do prosecutors owe any other duty? A concept from employment discrimination law can prove helpful.

In sexual harassment cases an employer will often be responsible for the actions of a supervisor or even a low-level employee.<sup>127</sup> Employers have duties to prevent sexual harassment in the workplace. If an employee sexually harasses another employee, the employer has a duty to “take steps reasonably likely to stop the harassment.”<sup>128</sup>

The same test should be applied in regard to a prosecutor’s duties under Model Rules 5.3, 3.8(f) and 3.6. If a prosecutor issues “the appropriate cautions” to police officers but they are ignored, then the prosecutor will have to take other measures. If the prosecutor has some kind of supervisory authority over police officers and has the authority to institute or recommend disciplinary measures, then the prosecutor should do so. However, suppose a prosecutor does not exercise supervisory authority over the police? Under those circumstances, good publicity can overcome bad publicity. If a police department is obstinate in its use of perp walks, the prosecutor should issue a public statement, perhaps at a press conference, in which the prosecutor condemns the actions of the police, reminds the public that the accused is innocent until proven guilty, and names the police officers involved in the improper conduct. Indeed, under the duty to mitigate contained in Model Rule 5.3(c)(2), a prose-

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<sup>126</sup> *Id.* R. 3.8 cmt. 6.

<sup>127</sup> Two U.S. Supreme Court cases, *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) established the principles governing employer liability for a supervisor’s sexual harassment of employees. Under those cases, if the supervisor commits sexual harassment culminating in a “tangible employment action” against the employee, the employer is vicariously liable. *Faragher*, 524 U.S. at 808. A tangible employment action involves “a significant change in employment status, such as hiring, firing failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” *Burlington Indus., Inc.*, 524 U.S. at 761. However, if the harassment does not involve a tangible employment action, the employer may establish an affirmative defense by proving: “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior[ ] and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” *Faragher*, 524 U.S. at 807.

<sup>128</sup> *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 536 (7th Cir. 1993). See also *Cerros v. Steel Technologies, Inc.*, 398 F.3d 944, 954 (7th Cir. 2005) (quoting *Williams v. Waste Mgmt. of Ill.*, 361 F.3d 1021, 1029 (7th Cir. 2004) stating that to avoid liability, the employer must take “prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring”); *Katz v. Dole*, 709 F.2d 251, 256 (4th Cir. 1983) (stating that employer may rebut employee’s showing of sexual harassment by “pointing to prompt remedial action reasonably calculated to end the harassment”); *Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir. 1990) (stating that employer acts unreasonably if the remedial action it takes “is not reasonably likely to prevent the misconduct from recurring”).

cutor arguably has a duty to hold such a press conference anytime there is an improper perp walk.<sup>129</sup>

## V. CONCLUSION

Perp walks are pernicious devices. They humiliate innocent defendants, taint the jury pool, and titillate the public. They are sometimes used by police officers and prosecutors to build careers. Although there is nothing to prevent the media from taking photos in a public place, prosecutors and police should not do anything to help them.<sup>130</sup> Prosecutorial ethics dictate that prosecutors should not orchestrate perp walks and should instruct law enforcement personnel to refrain from doing so. If the police are under the prosecutor's supervision, the prosecutor should do whatever it takes, including instituting disciplinary measures, to prevent the police from using the device. If the police are not under the prosecutor's supervision and the police ignore the prosecutor's directives to avoid perp walks, the prosecutor should publicly condemn their actions. If prosecutors fail to meet these ethical obligations, disciplinary authorities should hold them accountable.

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<sup>129</sup> This idea about countervailing publicity came from a colleague of mine, Professor Robert Banks, Jr., in a discussion during a very nice sushi dinner.

<sup>130</sup> Arguably, prosecutors should make reasonable efforts to protect defendants in custody from prejudicial pretrial publicity.