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Prosecutors in the Court of Public Opinion

Bruce A. Green

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Prosecutors in the Court of Public Opinion

*Bruce A. Green**

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I. INTRODUCTION

Some prosecutors have been criticized for discussing their cases in the public media,¹ but not Special Counsel Robert Mueller. Following his appointment to probe the connection between Russia and the Trump presidential campaign,² he gave no interviews. His office's web page on the Department of Justice website, linking to public filings, was unilluminating.³ He did not hold press conferences following indictments after defendants were convicted or sentenced, or after submitting his final report to the Attorney General.⁴ Nor does it appear that Mueller's office "leak[ed]" information by speaking to reporters off the record.⁵

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1. See *infra* notes 27-36 and accompanying text.

2. Appointment of Special Counsel to Investigate Russian Interference with the 2016 Presidential Election and Related Matters, Order No. 3915-201742 (Op. Att'y Gen., May 17, 2017).

3. See *Special Counsel's Office*, U.S. DEP'T JUST., <https://www.justice.gov/sco> (last visited Feb. 26, 2018). The webpage lists cases where charges were brought and provides links to court filings in those cases, a link to the Order appointing Mueller, and a link to Statements of Expenditures. *Id.*

4. If not routine, prosecutors' press conferences following indictments and convictions in high-profile cases are certainly common. See Bennett Gershman, *The Prosecutor's Duty of Silence*, 79 ALB. L. REV. 1183, 1193 (2016) ("The press conference has become . . . a fixture in the criminal justice system . . .").

5. See, e.g., Dan Janison, *At the Trump-term Midpoint, Another Volatile Year Awaits*, NEWSDAY (Dec. 30, 2018, 6:00 AM), <https://www.newsday.com/long-island/columnists/dan->

Mueller was described in the *Washington Post* as “a man who seldom speaks and is rarely seen . . . omnipresent and absent, inescapable but elusive.”⁶ His reputation for keeping a low profile as Special Counsel spread internationally. Before his team tried Paul Manafort in mid-2018, an English-language newspaper in Armenia described Mueller as “Sphinx-like” and observed: “The only public voice he has had so far is through its court filings. In fact, he has been so scarce in the public’s view that most media outlets are running the same series of photographs taken as he walked the halls of the US Capitol back in June 2017.”⁷

One might wonder whether Mueller was reticent to a fault. Former Independent Counsel Ken Starr, who investigated President Clinton, seemed to think so. Commenting on Mueller’s investigation, Starr expressed the view that federal prosecutors’ obligation of accountability to the public ordinarily calls on them to speak more freely about their work.⁸

Using Special Counsel Mueller’s investigation as a case study—indeed, as a study in contrast—this essay considers prosecutors’ relationship with the media. It identifies some law enforcement-related reasons why, in limited circumstances, prosecutors’ offices might discuss their investigations and prosecutions outside of judicial proceedings. But this essay challenges the idea that prosecutors’ duty of accountability requires them generally to discuss ongoing cases in the public media.⁹

janison/janison-trump-2019-1.25111666 (observing “[t]he famously leakproof Russia investigation by special counsel Robert Mueller generates the most suspense”); see also Nicholas Fandos & Noah Weiland, *As a Rapt City Holds its Breath for Mueller, Spin Machines Whir*, N.Y. TIMES, Mar. 13, 2019, at A1 (“Real information—actually, any information at all from Mr. Mueller’s astonishingly leak-free team—is almost nonexistent.”).

6. Roxanne Roberts, *The Elusive, Inescapable Mueller*, WASH. POST, Dec. 17, 2018, at C01.

7. Anthony Zurcher, *Sparks Fly in FBI Agent’s Trump Testimony*, YEREPOUNI NEWS (July 13, 2018), <https://www.yerepouni-news.com/2018/07/13/sparks-fly-in-fbi-agents-trump-testimony/>.

8. Roberts, *supra* note 6 (quoting Starr: “A federal prosecutor wields important powers and thus should always be held accountable by the American people. That accountability carries with it, in my view, a role for providing public information . . . without transgressing important limitations—especially the protection of grand jury secrecy.”); see also Bernard Shaw et al., *Impeachment Hearings: Clinton Attorney Kendall Questions Ken Starr; David Schippers Paints Starr in a Favorable Light* (CNN Live Event/Special broadcast Nov. 19, 1998, 8:30 PM) (quoting Starr: “I think it is the duty of the prosecutor to combat the dissemination of misinformation as long as the prosecutor can do that without violating his or her obligations under rule 6(e). And that’s the position . . . of the Justice Department.”).

9. The focus of this essay is prosecutors’ recourse to the public media in their official capacity. It does not address whether, in their personal capacity, individual prosecutors have legitimate reasons to discuss their or their offices’ work. With respect to prosecutors speaking extrajudicially on their own behalf, see Emily Anne Vance, Note, *Should Prosecutors Blog, Post, or Tweet?: The Need for New Restraints in Light of Social Media*, 84 FORDHAM L. REV. 367 (2015).

II. THE RUSSIA INVESTIGATION AS A STUDY IN CONTRAST

Mueller's approach was a throwback to the days when it was considered unprofessional to try one's case in the press.¹⁰ Although contemporary rules of professional conduct restrict what trial lawyers may say about their cases outside formal judicial filings and proceedings,¹¹ the rules now leave considerable room for advocates to try to exploit the public media to their clients' advantage. One provision, Model Rule of Professional Conduct 3.6, forbids advocates from making public statements that "will have a substantial likelihood of materially prejudicing" a trial,¹² but recognizes that many public statements will not taint a jury.¹³ Another provision, Rule 3.8(f), admonishes prosecutors in particular not to make "extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."¹⁴ But the rule does not address prosecutors' public comments that do *not* add to the defendant's embarrassment—including comments that vilify uncharged third parties. The rule also includes an exception allowing prosecutors to vilify a defendant if the prosecutors are discussing the nature and extent of their own actions and their comments serve "a

10. See CANONS OF PROF'L ETHICS Canon 20 (AM. BAR ASS'N 1908) (stating: "Newspaper publications by a lawyer as to pending or anticipated litigation may interfere with a fair trial in the Courts and otherwise prejudice the due administration of justice. Generally they are to be condemned."); see also GLEASON L. ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 200 (1910) ("If a lawyer, either through a desire for personal notoriety, or with an intent to injure the adverse party, gives out facts or allegations of facts that should properly be reserved until the trial day, he is guilty of improper conduct."); see generally Lonnie T. Brown, Jr., "May it Please the Camera, . . . I Mean the Court"—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 95 (2004) (describing ABA's position in the early 20th century "that lawyer commentary regarding cases should be limited to the confines of the courtroom only").

11. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 3.6, 3.8(f) (AM. BAR ASS'N 2018); see also generally Brown, *supra* note 10; Kevin Cole & Fred C. Zacharias, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1638-39 (1996); Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1030-32 (2010); Abigail H. Lipman, Note, *Extrajudicial Comments and the Special Responsibilities of Prosecutors: Failings of the Model Rules in Today's Media Age*, 47 AM. CRIM. L. REV. 1513, 1525-26 (2010); Peter Andrew Malanchuk, *The Court of Public Opinion: Did Former Attorney General John Ashcroft Violate Ethics Rules Regarding Extrajudicial Statements and If So, Why Was He Not Sanctioned?*, 32 J. LEGAL PROF. 237, 239-42 (2008); Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 875-77 (1990); Vance, *supra* note 9, at 375-76.

12. MODEL RULES OF PROF'L CONDUCT r. 3.6(a).

13. See *id.* at r. 3.6(b); see also *id.* at r. 3.6 cmt. 4.

14. *Id.* at r. 3.8(f).

legitimate law enforcement purpose.”¹⁵ Courts sanction prosecutors infrequently for violating these rules.¹⁶

Advocates do not generally discuss their cases publicly, because the public usually would not be interested and, in any event, the pitfalls often outweigh the benefits to the client. But in high-profile cases, lawyers sometimes exploit the leeway afforded by the Model Rules of Professional Conduct to speak in the press and social media.¹⁷ If a lawyer lacks the skill to do so effectively, the lawyer can hire a public relations specialist to provide assistance.¹⁸

Mueller’s example offers an interesting case study in which to consider why prosecutors resort to the public media and, in particular, to consider Starr’s view that commenting on ongoing cases is necessary as a matter of prosecutorial accountability.¹⁹ As a case study, Mueller’s investigation serves as a study in contrast in at least the following five respects.

First, and most obvious, is the stark contrast with the exuberant use of public media by both the subjects and the targets of Mueller’s investigation, as well as their lawyers. President Trump, in particular, used both social media and traditional media to attack Mueller and discredit his investigation. Trump maintained a steady barrage of tweets, asserting, for example, that the investigation is “[t]he single greatest Witch Hunt in American History,”²⁰ and that “Mueller is a conflicted prosecutor gone rogue.”²¹ One of Trump’s lawyers, Rudolph Giuliani, went on the air to disassociate Trump from the crimes for which Trump’s former aides were convicted, and to join in his client’s attacks on the legitimacy of

15. *Id.*

16. *See generally, e.g.*, In re Brizzi, 962 N.E.2d 1240, 1249 (Ind. 2012); Att’y Grievance Comm’n v. Gansler, 835 A.2d 548, 574-75 (Md. 2003); Lawyer Disciplinary Bd. v. Sims, 574 S.E.2d 795, 801 (W. Va. 2002).

17. *See Brown, supra* note 10, at 86 (“There can be no question that high-profile cases are almost routinely tried in the media . . .”).

18. *See, e.g.*, In re Grand Jury Subpoenas Dated March 24, 2003, 265 F. Supp. 2d 321, 323 (S.D.N.Y. 2003).

19. *See Roberts, supra* note 6.

20. William Goldschlag & Dan Janison, *Will Trump Have Answers for Mueller’s Questions? We’ll See.*, NEWSDAY (Jan. 11, 2018, 8:19 AM), <https://www.newsday.com/long-island/trump-russia-mueller-daca-iran-1.16075371> (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 10, 2018), 7:14 AM), <https://twitter.com/realdonaldtrump/status/951109942685126656?lang=en>).

21. *See David Jackson & Kevin Johnson, President Calls Mueller ‘Rogue’ Prosecutor in Manafort Case*, POST-CRESCENT, Nov. 28, 2018, at B2 (quoting Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2018, 4:30 AM), <https://twitter.com/realdonaldtrump/status/1067395266511347713?lang=en>).

Mueller's work.²² His acknowledged objective was to sway the public against the possibility of impeachment.²³

Second, Mueller's approach stood in a marked contrast to how some other federal prosecutors have publicly discussed their high-profile cases at early stages when the defendant was still entitled to a trial at which he will be presumed innocent. For example, during the investigation of President Clinton, Starr and his office spoke with reporters on the record and, some alleged at the time, off the record, by way of "leaking" information about the investigation's progress.²⁴ In cases of public interest, it is not unusual for prosecutors to issue press releases and conduct press conferences announcing an indictment, in order to explain the public filing in a way that is more accessible to the public and to provide quotable sound bites or a visual for the televised news.²⁵ At later stages, prosecutors sometimes comment on significant events that occurred in the course of the proceedings.²⁶

As a United States Attorney in the 1980s, Rudolph Giuliani was criticized for his and his office's accessibility to the press.²⁷ Giuliani

22. For example, Giuliani accused Mueller's office of unethical conduct. *See, e.g.*, Sheetal Sukhija, *Rudy's Rudimentary Rant: Masking Fears with Mueller-Bashing*, BIG NEWS NETWORK (Dec. 5, 2018), <https://www.bignewsnetwork.com/news/258494813/rudys-rudimentary-rant-masking-fears-with-mueller-bashing> (quoting Giuliani: "This isn't a search for the truth. It's a witch hunt. This is what is wrong with these special prosecutors and independent counsels. They think they are God. They seemed to want to prosecute people at any cost, including the cost of ethical behaviour [sic] and the rights of people"). For a view that Giuliani himself acted unethically in his public commentary, *see* Ellen C. Brotman, *Advice for the President's New Lawyer: There's a Rule for That*, LEGAL INTELLIGENCER, June 15, 2018 (asserting that Giuliani's claim that Mueller is trying to "frame" the President is legally and factually baseless, and observing: "Giuliani's statements accusing a high-ranking Department of Justice official implicate at least two Rules of Professional Conduct: Rule 4.1(a), which prohibits making a false statement of material fact to a third person and Rule 8.4 (d) [sic], which prohibits conduct that is prejudicial to the administration of justice.").

23. Charles M. Blow, *Trump Reeks of Fear*, N.Y. TIMES, July 9, 2018, at A21 (quoting Giuliani's statement to CNN interviewer Dana Bash: "Of course, we have to do it in defending the president [sic]. We are defending—to a large extent, remember, Dana, we are defending here, it is for public opinion, because eventually the decision here is going to be impeach, not impeach. Members of Congress, Democrat and Republican, are going to be informed a lot by their constituents. So, our jury is the American—as it should be—is the American people.").

24. *See, e.g.*, Judy Woodruff & John King, *White House Accuses Starr of Abuse of Power* (CNN Worldview broadcast Feb. 24, 1998, 6:23 PM) (quoting public statement issued by Starr's office regarding its investigation).

25. *See* Gershman, *supra* note 4, at 1193-96.

26. *See id.* at 1194.

27. *See, e.g.*, Nancy Blodgett, *Press-sensitive: Prosecutors' Use of Media Hit*, 71 A.B.A. J. 17, 17 (1985) (quoting judicial administrator: "Giuliani is a classic illustration of a prosecutor who has disregarded the rules . . . He's developed it into a new art form, revealing all sorts of things he should not and treating indictments like convictions."); Alexander Stille, *A Dynamic Prosecutor Captures the Headlines*, NAT'L L.J., June 17, 1985, at 2. ("Recently, prominent members of the New York bar have begun to criticize Mr. Giuliani sharply for conducting trial by press conference. The local bar association responded to the criticisms by opening an investigation into the abuse of pretrial publicity."). Giuliani's controversial use of the

used his position as U.S. Attorney as a springboard to become a candidate for the New York City mayoralty. His exploitation of the media became a model for later prosecutors with higher ambitions. The criticisms underscored the difficulty of determining a prosecutor's motivation for speaking in the public media—and, in particular, whether the motivation is to serve a law enforcement interest or primarily to advance the prosecutor's own reputation and career.

Although the Model Rules of Professional Conduct leave prosecutors room to speak extra-judicially, some prosecutors have skirted, if not crossed, the lines drawn by the rules. One noted example was Attorney General John Ashcroft's public assertion in September 2001 that three men who had been arrested in Detroit on terrorist-related charges were suspected of having advanced knowledge of the September 11, 2001 terrorist attacks.²⁸ Ashcroft's statement contravened a judicial gag order and had no factual basis.²⁹ Although Ashcroft later withdrew his statement, he was undeterred; his later, similar transgressions led to a contempt motion and a judicial admonition.³⁰ And, notably, the arrested men's convictions were eventually set aside.³¹ Another prominent example of overreaching was U.S. Attorney Patrick Fitzgerald's 2008 press confer-

media was not limited to his and his prosecutors' press conferences. He was also criticized for arranging so-called "perp walks" in which journalists were tipped off to defendants' arrests so that they could take and publish photographs or videos. Ryan Hagglund, *Constitutional Protections Against the Harms to Suspects in Custody Stemming from Perp Walks*, 7 MISS. L.J. 1757, 1766 (2012). Giuliani's office was accused of leaking information to the press through off-the-record communications. Joanne Armstrong Brandwood, Note, *You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials*, 75 N.Y.U. L. REV. 1412, 1449 (2000) (discussing defendants' accusation that the office "use[d] publicity as a prosecutorial weapon, carefully timing the disclosures to 'pressure' defendants, witnesses, and those under investigation") (quoting Memorandum of Law in Support of Motion of Michael R. Milken and Lowell J. Milken for Contempt Sanctions and Other Relief Based upon the Government's Numerous Unlawful Leaks to the Press at 2, *United States v. Milken*, 759 F. Supp. 109 (S.D.N.Y. 1990) (No. S 89 Cr. 41 (KMW)) (on file with the New York University Law Review)).

28. See *United States v. Koubriti*, 305 F. Supp. 2d 723, 744 (E.D. Mich. 2003).

29. *Id.* at 745; Peter Margulies, *Above Contempt?: Regulating Government Overreaching in Terrorism Cases*, 34 SW. U. L. REV. 449, 481-83 (2005).

30. *Koubriti*, 305 F. Supp. 2d at 757-66.

31. See *United States v. Koubriti*, 336 F. Supp. 2d 676, 681-82 (E.D. Mich. 2004); Bennett L. Gershman, *How Juries Get it Wrong—Anatomy of the Detroit Terror Case*, 44 WASHBURN L.J. 327, 330 (2005); see also Malanchuk, *supra* note 11, at 246-48; Jeffrey Rosen, *John Ashcroft's Permanent Campaign*, ATLANTIC (Apr. 2004), <https://www.theatlantic.com/magazine/archive/2004/04/john-ashcroft-s-permanent-campaign/302926/>. Ashcroft was also criticized for public comments regarding the then-pending terrorist prosecution of John Walker Lind. See Brown, *supra* note 10, at 127-28.

ence announcing the indictment of Illinois Governor Rod Blagojevich, at which Fitzgerald remarked that “Lincoln [would] roll over in his grave.”³²

More recently, U.S. Attorney Preet Bharara drew criticism for his statements in a press conference, a press release, a news interview, tweets, and a law school speech relating to a corruption case against the Speaker of the New York State Assembly.³³ In the district court’s characterization, Bharara “bundle[d] together unproven allegations . . . with broader commentary on corruption and a lack of transparency in certain aspects of New York State politics.”³⁴ Professor Bennett Gershman charged that Bharara’s vilification of the defendant’s character and proclamation of his guilt—such as Bharara’s assertion that the defendant “corruptly profit[ed] from [the] tremendous personal fortune he amassed through the abuse of his political power”—prejudiced the fairness of the upcoming trial.³⁵ While not going so far, the district judge in *Silver* found the prosecutor’s statements to be “of concern” and “problematic,” rejected the prosecutor’s defense of some as “pure sophistry,” and “cautioned that this case is to be tried in the courtroom and not in the press.”³⁶

Third, the Mueller case study offers a contrast between Mueller’s extra-judicial silence and his intra-judicial words and deeds. Both his team’s work product and the manner in which they produce it spoke volumes, and their significance was amplified by the public media. Mueller’s office had little need to offer explanations of filings and actions that might be opaque, or to provide sound bites in order to attract public interest, because the investigation attracted ample public discussion and analysis in response to every public aspect of its work—often in response to the prosecutors’ momentary quiescence. Legally trained commentators appearing in various public media eagerly explicated and analyzed Mueller’s every move.

Although Mueller’s office’s judicial filings and appearances did not afford an opportunity to respond expressly and immediately to every public criticism or misconception, his office’s work offered many implicit responses. For example, Mueller’s office answered

32. Levenson, *supra* note 11, at 1023-24 (quoting *Ill. Governor Arrested on Corruption Charges*, NPR (Dec. 9, 2008, 4:00 PM), <https://www.npr.org/templates/story/story.php?storyId=98046264>). Fitzgerald later expressed regret for the remark. *Fitzgerald Regrets ‘Lincoln’ Blagojevich Comment*, ASSOCIATED PRESS, May 24, 2012.

33. *United States v. Silver*, 103 F. Supp. 3d 370, 373-75 (S.D.N.Y. 2015).

34. *Id.* at 378-79.

35. Bennett L. Gershman, *Mouthing Off*, SLATE (Mar. 2, 2015, 1:39 PM), <https://slate.com/news-and-politics/2015/03/preet-bharara-on-sheldon-silver-the-prosecutor-could-prejudice-a-jury.html>.

36. *Silver*, 103 F. Supp. 3d at 379, 379 n.8, 382.

broad accusations that it was engaged in a “witch hunt” by amassing indictments and convictions, including convictions of powerful men who had been Trump aides: Trump’s former national security advisor, Michael Flynn; Trump’s personal lawyer, Michael Cohen; Trump’s campaign consultant, Paul Manafort; and Trump’s foreign policy advisor, George Papadopoulos.³⁷ The guilty pleas and, in Manafort’s case, jury verdict, showed that Mueller’s investigation was uprooting crimes, not fabricating them.

Mueller’s office has also responded implicitly to assertions that it was partisan or, in Trump’s word, “conflicted.”³⁸ Although Mueller is himself a Republican, his team was said to be comprised principally of Democrats working to advance their partisan political preferences.³⁹ By staying out of the spotlight, Mueller and his team avoided the impression that they were over-zealous, expressing their own personal preferences, or acting to promote their own perceived interests; they implicitly conveyed that, to the contrary, they were professionals, conducting their work in accordance with professional norms—that, like conventional prosecutors, they were simply “following the evidence” and the law.

Mueller’s judicial filings also provided an opportunity to respond to some of his critics’ more specific claims. Most significantly, Trump and his supporters asserted repeatedly as the investigation progressed that his associates’ crimes had nothing to do with *him*.⁴⁰ That claim was implicitly answered by Mueller’s filings in Michael Cohen’s case.⁴¹ The charging instrument (a criminal “information” rather than an indictment), to which Cohen pleaded guilty, alleged that Cohen lied to Congress about the proposed development of Trump properties in Moscow, including about the timing and extent of Trump’s involvement in the project.⁴² He did so, the document said, in order to “minimize [the] links between the Moscow Project and [Trump]”—to whom the document referred as “Individual 1”—

37. See *Special Counsel’s Office*, *supra* note 3.

38. Gabriella Muñoz, *Trump: Robert Mueller is a ‘Conflicted Prosecutor Gone Rogue’*, WASH. TIMES (Nov. 27, 2018), <https://www.washingtontimes.com/news/2018/nov/27/donald-trump-robert-mueller-is-a-conflicted-prosec/>.

39. See Louis Jacobson, *Fact-Checking Donald Trump’s Claims About Democrats on Robert Mueller’s Team*, POLITIFACT (Mar. 21, 2018, 5:03 PM), <https://www.politifact.com/truth-o-meter/statements/2018/mar/21/donald-trump/fact-checking-donald-trumps-claims-about-mueller/>.

40. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 30, 2017, 7:25 AM), <https://twitter.com/realDonaldTrump/status/925005659569041409> (Trump tweeted that Paul Manafort was indicted for acts predating his campaign).

41. See *Information, United States v. Cohen*, No. 18 Cr. 850 (S.D.N.Y. Nov. 29, 2018), <https://www.justice.gov/file/1115596/download>.

42. *Id.*

and to “give the false impression that the Moscow Project ended before ‘the Iowa caucus.’”⁴³ By lying, it was alleged, Cohen “hope[d] [to] limit[] the ongoing Russia investigations.”⁴⁴

Fourth, there is a contrast between the amount of information that Mueller’s office publicly revealed in court, little by little and case by case, and the far greater amount it evidently amassed over the course of its investigation, out of the public eye and under the cloak of grand jury secrecy.⁴⁵ To the extent that Mueller’s office obtained grand jury testimony and documentary evidence pursuant to grand jury subpoena, criminal procedure rules generally required the office to protect witnesses’ privacy by keeping the evidence secret until it is to be used in judicial proceedings.⁴⁶ Even to the extent that the law does not tie prosecutors’ hands, the public interest in the effectiveness of ongoing criminal investigations, as well as fairness to witnesses and others, ordinarily impels prosecutors to preserve secrecy.⁴⁷

Staying out of the public media is consistent with Department of Justice regulation and policy, even if not compelled by it. Under the Department’s regulations, when Mueller completed his work as Special Counsel, he was required to submit to the Attorney General a confidential report explaining his decisions to prosecute or not prosecute cases.⁴⁸ In the interim, he was required to provide the Attorney General annual budget requests⁴⁹ and notify the Attorney

43. *Id.*

44. *Id.* Later, implicitly responding to the suggestion that investigators had tricked or pressured Michael Flynn into lying to them, Mueller’s sentencing memo made clear that Flynn had no excuse for lying to the investigators, as Flynn was then forced to concede in court. See Eric Tucker & Chad Day, *Judge Scolds Former Trump Aide; Flynn’s Sentencing for Lying to the FBI Delayed Until March*, CHI. TRIB., Dec. 19, 2018, at C11.

45. See Jennifer Rubin, *Distinguished Person of 2018: His Results Speak for Themselves*, WASH. POST (Dec. 30, 2018), https://www.washingtonpost.com/opinions/2018/12/30/distinguished-person-his-results-speak-themselves/?utm_term=.93d1b0377949 (observing: “[Mueller] has operated without fanfare or leaks. His court filings have repeatedly surprised on-lookers, reminding us we know a fraction of what Mueller and his prosecutors have uncovered.”).

46. FED. R. CRIM. P. 6(e)(2).

47. Prosecutors customarily cite these public interests in opposing the expansion of criminal defendants’ rights to broader discovery in criminal cases. See Bruce A. Green, *Federal Criminal Discovery Reform: A Legislative Approach*, 64 MERCER L. REV. 639, 649 (2013) (noting that in arguing against expanding discovery, “[t]he government typically relies [on] . . . primarily, the need to protect public safety and prevent obstruction of justice”). It might seem hard for prosecutors to defend disclosures of non-public information in the public media while maintaining the need to keep non-public information out of the hands of indicted defendants who may need to information to defend themselves at trial or to make informed decisions regarding whether to plead guilty.

48. 28 C.F.R. § 600.8(c) (2019).

49. *Id.* § 600.8(a)(2).

General of significant events.⁵⁰ But no regulation or policy requires reporting directly to the public through press releases, interviews, or other means. There is a regulation concerning a Special Counsel's "conduct and accountability," but it does not presuppose that "accountability" requires public transparency.⁵¹ Rather, the regulation focuses on the Special Counsel's accountability to the Attorney General: it requires the Special Counsel to comply with the Department's "rules, regulations, procedures, practices and policies," obligates the Special Counsel to answer the Attorney General's questions about investigative and prosecutorial decisions, and subjects the Special Counsel to discipline or removal by the Attorney General.⁵²

There is nothing to suggest that Mueller's investigation and prosecutions, or that the public interest in general, were disadvantaged by his unwillingness to discuss his cases in the public media.⁵³ His supporters seemed to admire his restraint, and even his critics did not complain about it. Although prosecutors sometimes assume that a strong public presence will encourage witnesses to come forward, or that a fearsome public presence will encourage reluctant witnesses to cooperate, Mueller's office appeared to have more effective tools to identify potential witnesses and secure their cooperation. These included FBI investigators, grand jury subpoenas, and access to search warrants and immunity and compulsion orders. To the extent that there is a public interest in keeping criminal investigations and prosecutions in the public consciousness in order to deter future wrongdoing, that interest also seemed to be served without press conferences and interviews by Mueller and his staff. No one could suggest that, by keeping its own counsel, Mueller's office kept its work out of the media. Public discussion of the ongoing Russia investigation was virtually continuous. If anything, his office's secrecy fueled public discussion, allowing commentators to speculate exhaustively and without any contradiction from Mueller about what his office may have learned, may be doing, and may be likely to do next.

50. *Id.* § 600.8(b). Regarding this obligation, see UNITED STATES ATTORNEYS' MANUAL § 1-7.700 (U.S. DEP'T OF JUSTICE 1988).

51. 28 C.F.R. § 600.7.

52. *Id.*

53. See David Zurawik, *Trump vs. Mueller: Our National Cliffhanger*, BALT. SUN, Dec. 23, 2018, at E1 ("Mueller, without saying a word on cable TV or firing off a single tweet, now has a starring role equal to Trump's. It's tempting to think Trump is fighting a media war while Mueller is quietly doing his job, but the special counsel has proved to possess an uncanny sense of timing in the way he speaks through indictments and court filings.").

Fifth, there is a marked contrast between Mueller's ordinary daily reticence and his office's rare public disclosure. In January 2019, an online news outlet, *Buzzfeed*, reported that, according to unidentified government officials, Mueller's office had obtained witness statements and documentary evidence corroborating Michael Cohen's assertion that President Trump had told him to lie to Congress.⁵⁴ The report elicited a strong public reaction, including from some members of Congress, because, if true, the Special Counsel now possessed compelling evidence of obstruction of justice by the President himself.⁵⁵ The following day, however, disavowing *Buzzfeed*'s account, Mueller's spokesman issued a statement: "Buzzfeed's description of specific statements to the special counsel's office, and characterization of documents and testimony obtained by this office, regarding Michael Cohen's congressional testimony are not accurate."⁵⁶ Media accounts noted the exceptional nature of the Special Counsel's Office's departure from its practice of not commenting publicly on its investigative progress.⁵⁷

Perhaps just as notable is how unforthcoming the disclosure was. The Office did not say in what ways, or to what extent, *Buzzfeed*'s report was inaccurate—for example, whether *Buzzfeed* mischaracterized Cohen's account; whether Cohen did say that Trump directed him to lie to Congress but his account was contradicted by other evidence and, as the White House claimed, "categorically false;" or whether Cohen implicated Trump but the corroborative testimony and evidence obtained by investigators was simply less compelling than *Buzzfeed*'s report conveyed.⁵⁸ Nor did the Office's statement explain why, on this particular occasion, it elected to make a public statement, however terse, about the progress of its investigation in response to a media report⁵⁹—for example, whether its objective was to mitigate the political or reputational harm to the President caused by unwarranted speculation, or whether it was motivated to redress an improper "leak" by a public official. Nor did the Office indicate when, in the future, some significance

54. Jason Leopold & Anthony Cormier, *President Trump Directed His Attorney Michael Cohen To Lie To Congress About The Moscow Tower Project*, BUZZFEED NEWS (Jan. 18, 2019, 7:23 PM), <https://www.buzzfeednews.com/article/jasonleopold/trump-russia-cohen-moscow-tower-mueller-investigation>.

55. Mark Mazzetti & Sharon LaFraniere, *Mueller Statement Disputes Report That Trump Directed Cohen to Lie*, N.Y. TIMES (Jan. 18, 2019), <https://www.nytimes.com/2019/01/18/us/politics/buzzfeed-cohen-russia-tower.html> (quoting Representatives Castro and Schiff).

56. *Id.* (quoting spokesman Peter Carr).

57. *See, e.g., id.* (referring to the Office's "rare public statement").

58. *See id.* (quoting White House press secretary Sarah Huckabee Sanders).

59. *See id.*

can and cannot fairly be read into its nonresponse to public claims about its investigation.⁶⁰

III. WHY SHOULD PROSECUTORS EVER DISCUSS THEIR CASES IN THE PUBLIC MEDIA?

Given Mueller's example, one might naturally wonder what legitimate reasons prosecutors *ever* have to hold press conferences, give interviews and speeches, blog or tweet about the work, or otherwise discuss their cases in the public media? The professional literature assumes that there are sometimes legitimate reasons for lawyers, including prosecutors, to speak extra-judicially. For prosecutors in particular, the justifications are not well-elaborated.

The Model Rules of Professional Conduct themselves do not say much about when lawyers generally, and prosecutors particularly, should discuss their cases in the media. The rules are designed to be enforced by attorney disciplinary authorities, so the rules focus on circumstances in which lawyers may *not* speak extra-judicially.⁶¹ To a significant extent, the rules' line-drawing is influenced by the First Amendment right to free speech, which requires a state to have a substantial justification before restricting public discussion of legal proceedings and to define the area of forbidden speech with sufficient particularity to avoid chilling speech that is constitutionally protected.⁶² The Model Rules of Professional Conduct allow lawyers considerable room to comment publicly on their cases, because doing so does not necessarily threaten the fairness of criminal proceedings or otherwise risk serious harm, and because it is hard to draft with precision in order to capture the situations where lawyers' public comments are prejudicial while avoiding the possibility of chilling protected speech. The rule drafters did not mean to encourage lawyers to speak whenever the rules allow them to do so.⁶³

To the extent that the professional literature identifies legitimate reasons for private lawyers to speak in the public media, those ra-

60. *See id.*

61. *See* MODEL RULES OF PROF'L CONDUCT r. 3.6, 3.8(f) (AM. BAR ASS'N 2018); *see also generally* Brown, *supra* note 10, at 108-12 (discussing "permissible areas of comment" under Rule 3.6).

62. *See* Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 847-52 (1996) (discussing *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991), and the ABA's amendment of Rule 3.6 in its aftermath).

63. *See, e.g., Gentile*, 501 U.S. at 1058 ("A profession which takes just pride in these traditions may consider them disserved if lawyers use their skills and insight to make untested allegations in the press instead of in the courtroom. But constraints of professional responsibility and societal disapproval will act as sufficient safeguards in most cases.").

tionales do not necessarily apply equally to prosecutors. In particular, criminal defense lawyers might legitimately speak in the media to counterbalance the negative portrayal and public discussion of a defendant resulting from an indictment. The objective is to offset the jury venire's unfair preconceptions and to redress the diminution of the client's reputation in the community. This was the defense lawyer's reason for discussing his client's case in *Gentile v. State Bar of Nevada*, where the Court struck down Nevada's rule restricting lawyers from discussing their pending cases.⁶⁴ In his plurality opinion, Justice Kennedy acknowledged that "in some circumstances press comment is necessary to protect the rights of the client and prevent abuse of the courts."⁶⁵ This rationale is inapplicable to prosecutors, who do not have a client whose reputation is at stake and do not have to contend with any publicity that may undermine the presumption of innocence. For prosecutors, discussing a pending case is more likely to enhance unfair prejudice than to counter it.⁶⁶

The rule drafters nevertheless assumed that it is sometimes useful for prosecutors to discuss their work. As noted, Model Rule of Professional Conduct Rule 3.8(f) expressly allows the possibility that a prosecutor, even if heightening public condemnation of the accused, will nevertheless be serving "a legitimate law enforcement purpose."⁶⁷ But the rule leaves it to prosecutors to decide what a "law enforcement purpose" is and when one is "legitimate."⁶⁸ A Comment to Model Rule of Professional Conduct Rule 3.6, the rule restricting prejudicial extra-judicial speech, specifically identifies only a rare occasion when it may be necessary for prosecutors to discuss a case in the media.⁶⁹ That is when there is a need to let the public know that their safety is at risk—for example, that there is a killer on the loose—and what law enforcement authorities are doing about the problem.⁷⁰

The recently updated ABA Criminal Justice Standards on Fair Trial and Public Discourse offer an equally narrow view.⁷¹ These

64. *Id.*

65. *Id.*

66. *See, e.g.*, Matheson, *supra* note 11, at 889 (condemning prosecutors' speech to gain a tactical advantage).

67. MODEL RULES OF PROF'L CONDUCT r. 3.8(f) (AM. BAR ASS'N 2018).

68. *See* Brown, *supra* note 10, at 114-15 (discussing the vagueness of the phrase "legitimate law enforcement purpose" in Model Rule of Professional Conduct 3.8(f)).

69. MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1.

70. *Id.* ("The public has a right to know about threats to its safety and measures aimed at assuring its security.")

71. *See generally* CRIMINAL JUSTICE STANDARDS, FAIR TRIAL AND PUBLIC DISCOURSE (AM. BAR ASS'N 2013).

standards identify only two kinds of statements by prosecutors “that serve a legitimate law enforcement purpose,” namely, “statements reasonably necessary to warn the public of any ongoing dangers that may exist or to quell public fears” and “statements reasonably necessary to obtain public assistance in solving a crime, obtaining evidence, or apprehending a suspect or fugitive.”⁷² The list of two is not meant to be exclusive.⁷³ But it is hard to see how these two considerations or others like them might have impelled Mueller, or other prosecutors in white-collar criminal cases, to hold a press conference or post on social media.

Like the ABA’s rules and standards, the Department of Justice regulations and internal policies governing federal prosecutors’ communications with the press focus on impermissible communications.⁷⁴ The Department has articulated only a vague view of when it is advisable for prosecutors to discuss their ongoing cases in the public media. The internal policy says that “[t]here are circumstances when media contact may be appropriate after indictment or other formal charge, but before conviction,”⁷⁵ and allows prosecutors to assist the news media “[i]n order to promote the aims of law enforcement, including the deterrence of criminal conduct and the enhancement of public confidence.”⁷⁶ But the policy is not specific about the “appropriate” circumstances or about when extrajudicial speech furthers law enforcement aims.⁷⁷

The Department of Justice policy strictly limits the range of permissible extrajudicial speech.⁷⁸ It allows press conferences “only for significant newsworthy actions, or if an important law enforcement purpose would be served,”⁷⁹ and even then, “communications with the media should be limited to the information contained in publicly available material, such as an indictment or other public pleadings.”⁸⁰ Most significantly, the effect of this policy is to bar federal prosecutors from explaining their decisions not to take investigative or prosecutorial action and, in particular, their decision not to bring criminal charges. FBI Director Jim Comey, acting under the authority delegated by Attorney General Loretta Lynch, was criticized

72. *Id.* at Standard 8-2.2(b)(ii).

73. Rather, the two categories are meant merely to be examples. *See id.* (endorsing “statements that serve a legitimate law enforcement purpose, such as” the two kinds listed).

74. *See, e.g.*, 28 C.F.R. § 50.2(a)(2) (2019) (“[T]he release of information for the purpose of influencing a trial is, of course, always improper.”).

75. UNITED STATES ATTORNEYS’ MANUAL § 1-7.700(B) (U.S. DEP’T OF JUSTICE 1988).

76. *Id.* § 1-7.710(B).

77. *See generally id.* §§ 1-7.000-7.900.

78. *See generally id.*

79. *Id.* § 1-7.700(A).

80. *Id.* § 1-7.700(B).

for contravening this policy when, in the lead-up to the 2016 presidential election, he discussed the decision not to prosecute Hillary Clinton in connection with her use of a private e-mail server.⁸¹

Tellingly, neither the organized bar's model rules and standards nor federal prosecutors' internal regulations and rules discuss "accountability" to the public; neither endorses the view that, as a matter of accountability, prosecutors should or must speak publicly, outside the judicial setting, about their ongoing work.⁸² The comments to the Model Rules of Professional Conduct acknowledge the public's interest in learning about judicial proceedings in order to engage in public debate and deliberation regarding the law and legal processes, but they do not encourage or endorse prosecutors' extra-judicial speech to promote these interests.⁸³ Similarly, the Department of Justice acknowledges that its internal policy on confidentiality and media contacts gives weight to "the right of the public to have access to information about the Department of Justice."⁸⁴ But nothing suggests that federal prosecutors should, or must, resort to the public media out of respect for this right. At most, the public's "right to know" restricts prosecutors from placing impediments in the public media's path.⁸⁵ And, as noted, when it comes to a Special Counsel in particular, the Department of Justice regulations focus on "accountability" to the Attorney General, not the public directly.⁸⁶ On the contrary, the regulation requires the Special Counsel to deliver a final report *in confidence* to the Attorney General, who may elect to keep the report confidential.⁸⁷ The arguable implication is that the Special Counsel may *not* be accountable to the public directly.

81. See, e.g., Memorandum from Rod J. Rosenstein, Deputy Attorney General, to the Attorney General re: "Restoring Public Confidence in the FBI" (May 9, 2017) (<https://www.justice.gov/oip/foia-library/moss/download>) ("Compounding the error, the Director ignored another longstanding principle: we do not hold press conferences to release derogatory information about the subject of a declined criminal investigation. Derogatory information sometimes is disclosed in the course of criminal investigations and prosecutions, but we never release it gratuitously.").

82. See 28 C.F.R. § 50.2 (2019); UNITED STATES ATTORNEYS' MANUAL §§ 1-7.000-7.900.

83. See MODEL RULES OF PROF'L CONDUCT r. 3.6 cmt. 1 (AM. BAR ASS'N 2018) ("[T]here are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves," and the public "has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.").

84. UNITED STATES ATTORNEYS' MANUAL § 1-7.001.

85. See *id.* § 1-7.710(A) ("DOJ personnel shall not prevent lawful efforts by the news media to record or report about a matter, unless by reason of a court order.").

86. See *supra* notes 48-52 and accompanying text.

87. 28 C.F.R. § 600.8(c) (2019).

IV. DOES PROSECUTORS' ACCOUNTABILITY REQUIRE THEM TO DISCUSS THEIR CASES IN THE PUBLIC MEDIA?

Do prosecutors have a duty of public accountability that calls on them to discuss their work in the public media, not just in court? Ken Starr is not the only one to suggest as much.⁸⁸ But prosecutors themselves do not appear to think so: they do not routinely discuss their cases in the media, and there is no public demand for them to do so. Prosecutors might plausibly justify their extra-judicial discussions of cases by citing law enforcement interests such as deterrence, the discovery of evidence, and public safety. Prosecutors might also cite the need to promote public understanding. But they rarely assert that they have a general duty to hold themselves accountable to the public by updating the public about their work.

It is important to note that “accountability” has no fixed meaning in this context. Much of the discussion of prosecutors’ “accountability” focuses on whether prosecutors are complying with their legal and disciplinary obligations, whether they are otherwise abusing their power, and whether there are adequate disciplinary processes and other procedural mechanisms for holding prosecutors accountable for illegal or abusive conduct.⁸⁹ But the claim that prosecutors must tell the public what they are doing and why rests on a broader understanding of accountability—an idea of political accountability. The assumption is that prosecutors—especially elected prosecutors—must be politically accountable to the public, and that political accountability presupposes public transparency.⁹⁰

If one assumes that a prosecutor’s job is to exercise authority in accordance with public preferences, then political accountability might presuppose much greater public transparency than is currently the norm.⁹¹ Prosecutors might be expected to explain their

88. See, e.g., Brown, *supra* note 10, at 125 (“Prosecutors have an obligation as public officials to keep the citizenry reasonably informed regarding criminal matters.”).

89. See, e.g., Bruce Green & Ellen Yaroshefsky, *Prosecutorial Accountability 2.0*, 92 NOTRE DAME L. REV. 51, 51 (2016) (“Given prosecutors’ extraordinary power, it is important that they be effectively regulated and held accountable for misconduct.”) (footnote omitted); Bidish Sarma, *Using Deterrence Theory to Promote Prosecutorial Accountability*, 21 LEWIS & CLARK L. REV. 573, 579-82 (2017).

90. See Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 397 (2001) (“In most cases, the mechanisms that purport to give the general public the ability to hold prosecutors accountable are ineffective and meaningless. Most citizens know very little about the practices and policies of their local prosecutor.”).

91. See, e.g., Daniel Epps, *Adversarial Asymmetry in the Criminal Process*, 91 N.Y.U. L. REV. 762, 822 (2016) (“[I]f our system of broad prosecutorial discretion is in theory supposed to produce results that accord with the public’s preferences, in practice it has two significant and related accountability deficits. First, prosecutors’ broad discretion gives them a tremendous amount of power, and some of the ways they exercise that power are troubling. Second,

public actions—for example, why they initiated an investigation, used a particular investigative technique, initiated charges, or accepted a plea bargain. They might also be expected to identify and explain roads not taken—for example, why they declined to investigate, eschewed particular investigative measures, or closed an investigation without bringing charges. Prosecutors rarely explain their decisions, and they rarely even disclose the fact that they have decided not to act in particular ways. But without knowing what prosecutors decided to do, or not to do, and why, the public could not hold prosecutors politically accountable for implementing popular preferences.

If prosecutors' job is not to carry out the public will in individual cases, but to act competently in accordance with the law and professional norms, then it is less obvious that prosecutors must discuss their work extra-judicially, rather than speaking only through their judicial filings and statements. To be politically accountable as a public official does not invariably require reporting to the public. National security officials and military leaders are accountable, but they are accountable to select high-ranking executive and legislative branch officials with high-level security clearance.⁹² The effectiveness of national security and military officials presupposes a high level of secrecy; public transparency would impede, if not destroy, their effectiveness. Likewise, judges—some of whom are elected—are expected to be accountable in general terms, but this does not mean following the public's preferences in individual cases nor does it require explaining their work extra-judicially in the public media.⁹³

Like national security officials, military officials, and judges, prosecutors engage in work that demands a high level of both con-

because the conception of the public interest that prosecutors are supposed to serve is fuzzy and amorphous, it is difficult for the public to effectively monitor and control prosecutorial behavior.”); *see also id.* at 792 (“[T]he current system of prosecutorial discretion and accountability produces behavior by prosecutors (the agents) that diverge from what the public (the principal) would desire, at least acting rationally.”); Ronald F. Wright & Marc L. Miller, *The Worldwide Accountability Deficit for Prosecutors*, 67 WASH. & LEE L. REV. 1587, 1589 (2010) (“A responsible exercise of power means judgments that are consistent with current public preferences and with fundamental, long-term legal principles. In short, the prosecutor must be accountable both to the people and to their laws.”).

92. *See generally, e.g.*, Gregory S. McNeal, *Targeted Killing and Accountability*, 102 GEO. L.J. 681 (2014).

93. *See* MODEL CODE OF JUDICIAL CONDUCT r. 2.10 (AM. BAR ASS'N 2010); Nancy Gertner, *To Speak or Not to Speak: Musings on Judicial Silence*, 32 HOFSTRA L. REV. 1147, 1152 (2004).

fidentiality and independence from political and popular preferences.⁹⁴ Robust public reporting of their internal decision-making and nonjudicial actions would undermine prosecutors' effectiveness and potentially subject them to popular pressure that would influence them to act unprofessionally. Public disclosure at times would also be contrary to the interests in respecting witnesses' privacy, in avoiding embarrassment of individuals who are entitled to a legal presumption of innocence, and in promoting fair criminal processes. Mueller's heavily redacted public filing in connection with Paul Manafort's sentencing vividly depicted the competing public interests in confidentiality and transparency: the public version of the sealed submission deleted the names of witnesses, the names of other third parties, and significant amounts of information on the subject of Manafort's alleged false statements to the prosecutors.⁹⁵ And, as Brett Kavanaugh observed twenty years ago, even the idea that a special appointed prosecutor's final report might be made public at the conclusion of a government corruption investigation is contrary to conventional federal prosecutorial practice and at odds with strong interests that favor confidentiality.⁹⁶

The idea of prosecutorial accountability is undeveloped both theoretically and legally in the United States. There is no clear understanding of (1) what it means for U.S. prosecutors to be accountable, (2) whether accountability presupposes accountability to the public, (3) if so, whether public accountability necessitates transparency, and (4) if so, to what extent.⁹⁷ While prosecutors may elect to discuss their work publicly (within limits), and the public may demand

94. See, e.g., Bruce A. Green & Rebecca Roiphe, *Can the President Control the Department of Justice?*, 70 ALA. L. REV. 1, 73-74 (2018) ("Preserving prosecutorial independence is one way to ensure the disinterested and even-handed application of criminal law."); Bruce A. Green & Alafair S. Burke, *The Community Prosecutor: Questions of Professional Discretion*, 47 WAKE FOREST L. REV. 285, 315-16 (2012) ("[I]n the context of much of prosecutors' traditional work—namely, the prosecution of individual cases—there are practical and ethical limits on the ability to make decision making transparent and respond to community input. Discretionary decision making is pervasive; prosecutors would not have time to become transparent and accountable in every individual case even if it were desirable and proper to do so. Prosecutors are limited by the interests in investigative secrecy and in fairness to the accused in their ability to discuss publicly the facts relevant to charging decisions and other discretionary decisions or the reasons for their decisions.").

95. See Greg Walters, *Mueller Just Released Nearly 200 Pages of Evidence Against Manafort. Read it Here*, VICE NEWS (Jan. 15, 2019), https://news.vice.com/en_us/article/gy7zd4/mueller-just-released-nearly-200-pages-of-evidence-against-manafort-read-it-here.

96. Brett M. Kavanaugh, *The President and the Independent Counsel*, 86 GEO. L.J. 2133, 2156 (1998) ("As a general proposition, a public report is a mistake. It violates the basic norm of secrecy in criminal investigations, it adds time and expense to the investigation, and it often is perceived as a political act. It also misconceives the goals of the criminal process.").

97. Prosecutors have some accountability to the courts, both because they are lawyers licensed by the courts and subject to discipline and because they appear as advocates before the courts subject to judicial oversight and sanction. As a legal matter, however, courts have

greater transparency, there is no professional or popular understanding, much less a legal understanding, that prosecutors must disclose any otherwise nonpublic aspects of their work. Certainly, nothing in the nature of prosecuting demands that prosecutors should explain their work directly to the public. The public undoubtedly has an interest in knowing what public prosecutors are doing, both in particular cases and in general, but the public has no legal “right to know” that implies a reciprocal legal obligation of disclosure by prosecutors. The constitutional commitment to open criminal proceedings does not imply a commitment to open prosecutors’ files. Although prosecutors’ visible work in public proceedings is only the tip of the iceberg, the successful implementation of criminal law does not require disclosing those aspects of prosecutors’ work that do not surface in public proceedings. Prosecutors outside the United States conduct their work successfully without generally accounting to the public,⁹⁸ and so can United States prosecutors.⁹⁹

Moreover, to the extent that prosecutors currently resort to the public media, they cannot fairly claim thereby to be holding themselves accountable. Prosecutors are too selective in their public communications,¹⁰⁰ which are unlikely to offset pervasive misinformation from other sources.¹⁰¹ And it is doubtful whether prosecutors’ public commentary could ever enable the public to make a well-

minimal oversight of prosecutors’ decisions regarding whether to investigate or prosecute particular cases and no oversight of prosecutors’ general charging policies and practices. *See generally* Bruce A. Green, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143 (2016). Courts have substantially more authority to establish standards governing prosecutors’ conduct in their advocacy role and to enforce the standards both through trial judges’ oversight of individual cases and through the disciplinary process. As a practical matter, judicial oversight of prosecutors’ advocacy is principally the work of trial judges. It is “conventional wisdom . . . that disciplinary authorities do not effectively regulate prosecutors,” *id.* at 144, although there have been recent signs of change. *See generally* Green & Yaroshefsky, *supra* note 89.

98. *See* Erik Luna & Marianne Wade, *Prosecutors as Judges*, 67 WASH. & LEE L. REV. 1413, 1475 (2010) (“Unlike their American counterparts, . . . European prosecutors have no immediate structural accountability to the general public. . . . Any political accountability is . . . indirect.”).

99. Indeed, in the UK, discussions in the public media by *anyone* about ongoing cases are sharply curtailed. *See generally* JUDICIAL COLLEGE, REPORTING RESTRICTIONS IN THE CRIMINAL COURTS (2016), <https://www.judiciary.uk/wp-content/uploads/2015/07/reporting-restrictions-guide-may-2016-2.pdf>.

100. *Cf.* Davis, *supra* note 90 (“In most cases, the mechanisms that purport to give the general public the ability to hold prosecutors accountable are ineffective and meaningless. Most citizens know very little about the practices and policies of their local prosecutor.”).

101. Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 983 (2009) (“Members of the public have sparse and unreliable information about how well prosecutors perform. Most public information about criminal justice

informed assessment of prosecutors' work. Professional rules and norms limit what prosecutors can say outside court about ongoing cases.¹⁰² But even if that were not true, prosecutors' self-interest would limit them, as would their role as advocates. Prosecutors do not now, and never will, provide an unselective, objective account of their current work. They and their offices' self-interests in winning public approval motivate them to discuss their successes and to advocate for the legitimacy of their decisions, not to discuss failures and self-doubts. Their interest as advocates in defending their conduct from legal challenges likewise militates against candor. Because prosecutors control the information held within their offices, so that the public cannot extract information beyond whatever prosecutors disclose on their own initiative, the public has no means to obtain a more complete and balanced account.¹⁰³ When prosecutors present their case in the court of public opinion, no one with inside knowledge can present the other side. Prosecutors' public speech is less likely to serve accountability than to distort public understanding by providing an incomplete, misleading and altogether too rosy perspective on their work.

Finally, insofar as one believes that, to be politically accountable, prosecutors must make their decision-making more transparent, it does not necessarily follow that prosecutors must discuss their work in the public media,¹⁰⁴ or that, in discussing their work in the media, they must discuss ongoing cases. Prosecutors can explain how

comes from crime dramas or novels, reality television shows, or sensational, unrepresentative news stories. As a result, the public suffers from chronic misperceptions about how the criminal justice system actually works.”).

102. See *supra* notes 11-16 and accompanying text (discussing Model Rules of Professional Conduct 3.6 and 3.8(f)).

103. See generally Stephanos Bibas, *Transparency and Participation in Criminal Procedure*, 81 N.Y.U. L. REV. 911, 923-31 (2006).

104. For example, as alternative means of promoting public accountability, Stephanos Bibas has discussed the possibilities of “[g]iving victims a greater role as stakeholders,” Bibas, *supra* note 101, at 993, and treating criminal defendants as stakeholders with a voice in the system, *id.* at 994-96. Others have discussed the utility of engaging the community in prosecutors' decisions—not about whether to investigate or prosecute particular cases, but about general problems and approaches, see, e.g., Green & Burke, *supra* note 94, at 291-92 (“Community prosecutors typically work with members of the community to identify recurring, ongoing criminal justice problems (drug dealing, graffiti, vagrancy) and then work in tandem with community representatives and agencies to address these problems through a project, policy, or strategy, often involving nontraditional methods.”), while at the same time cautioning about potential pitfalls to community engagement, see *id.* at 303-04 (“But to rely on community participation as a means of improving prosecutorial discretion is to assume that the community is sufficiently democratic, informed, and powerful to ensure that community prosecution policies serve the community interest, but not so powerful as to override other prosecutorial priorities. Without participation by representative, well-informed, and empowered stakeholders, there is a risk that law enforcement may co-opt the politically popular rhetoric of ‘community,’ simply to advance its own agenda. At the same time, trusting the community

they generally make decisions—for example, what decision-making principles they adopt, what deliberative processes they establish, and how they ensure that their principles and processes are actually employed.¹⁰⁵ Increased public discussions of prosecutors' work, even at a level of generality, would encourage better decision-making, if only by making prosecutors' offices more self-conscious.¹⁰⁶ In jurisdictions where prosecutors are elected, greater transparency would also enhance the public's ability to make informed decisions in the electoral process.¹⁰⁷ Although such discussions might not allow the public to judge whether prosecutors are honestly applying the standards that they claim to apply, prosecutors will likely never disclose their internal processes in individual cases completely and candidly enough to allow the public to sit as judges over prosecutors' decision making. Prosecutors, like judges, can be transparent only to a degree. They can never be as forthcoming with the public as private lawyers are expected to be in communicating with individual and entity clients.

V. CONCLUSION

Prosecutors, as public officials, are expected to be accountable to the public. One might take the view that prosecutors' accountability presupposes transparency, which, in turn, includes an obligation to disclose and explain their investigative and prosecutorial decisions to the public as they are being implemented. By that standard, Special Counsel Robert Mueller would appear to have been among the least accountable prosecutors, given his unwillingness to comment about his work in the public media.

to oversee the exercise of prosecutorial discretion creates a risk that community-based voices will co-opt prosecutorial values.”).

105. Green & Burke, *supra* note 94, at 315 (“[T]raditional prosecution—even applying retributive, retributive models of punishment—might benefit from engagement with voices outside the prosecutor’s office. As scholars have previously noted, prosecutorial transparency increases public confidence in prosecutors and courts and enhances the legitimacy of the criminal justice system.”); Wright & Miller, *supra* note 91, at 1600 (“An accountable prosecutor’s office can keep citizens informed about its progress in reaching goals such as rough equality across cases and transparency in decision-making. Ultimately, an accountable prosecutor does more than prevent misconduct: Accountability creates faith and trust in the workings of prosecutors, courts, and government more generally.”).

106. *Cf.* Bibas, *supra* note 101; Bruce A. Green & Rebecca Roiphe, *Rethinking Prosecutors’ Conflicts of Interest*, 58 B.C. L. Rev. 463, 537 (2017) (arguing that prosecutors should be taught to deliberate more self-consciously in negotiating the tension between the roles as advocate and minister of justice).

107. *See, e.g.*, Green & Burke, *supra* note 94, at 315 (“Public elections of prosecutors would be more reliable if the public were better informed about prosecutorial policies and discretionary decision making.”).

In truth, Mueller was among the most accountable prosecutors, however. To the extent Mueller worked outside public scrutiny, he collaborated with a team of experienced government lawyers and investigators who presumably justified their decisions to each other. To the extent his work resulted in public filings and appearances and other publicly visible actions in the context of judicial proceedings, his work was heavily scrutinized and analyzed in the public media. Mueller made periodic reports to the Attorney General, who had the authority to remove him for cause. And when his work ended, Mueller was required to explain his decisions in a report to the Attorney General, who could make the report public.

As Mueller's example shows, prosecutors can be accountable without speaking to reporters or posting on social media about their ongoing work. At the same time, to the extent that other prosecutors, taking a different approach, discuss their own ongoing work, they are rarely doing so to promote accountability; their public comments rarely advance the public's ability to influence prosecutors' work based on enhanced public understanding. Further, given disciplinary restrictions on prosecutors' extra-judicial speech, countervailing law enforcement interests in preserving secrecy, and prosecutors' own self-interest, prosecutors' public discussions of pending cases could never significantly advance accountability.

Of course, Mueller's example is anomalous. Prosecutors' work rarely, if ever, evokes comparable public interest. And prosecutors do not ordinarily have to report up, much less so extensively. That means that prosecutors must find other, perhaps more creative, ways to advance public understanding of their work, and that the public must be more assertive in holding prosecutors accountable by other means.