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Why it's not Free Speech Versus Fair Trial

David A. Strauss†

It is common to say that criminal defense lawyers today, at least in highly publicized cases, have to represent their clients not just in the courtroom but outside the courtroom too. Their audience is not just the jury but the press and, through the press, the public at large.[1] There is also a debate about whether it is a good idea to allow criminal defense lawyers to engage in this kind of public advocacy. Usually the debate is characterized by the phrase "free speech versus fair trial."[2] That is, the issue is said to be a choice between the values of free speech — informing the public about matters of public importance — and the need to ensure that trial proceedings are not unduly affected by pretrial publicity.[3]

So far as speech by defense lawyers is concerned, this way of characterizing the issue is mistaken. Out-of-court advocacy by criminal defense lawyers should be restricted to some degree, or so I will suggest. But the issue is not "free speech versus fair trial." The speech in question is not likely to be very valuable; to that extent, the "free speech" side of the supposed dilemma is overstated. By the same token, the threat to the fairness of trials is probably not that great, at least if that threat is thought to arise because jurors will be biased by defense attorneys' out-of-court statements. The real problems lie elsewhere.

The best reason to limit defense attorneys' ability to argue their cases outside of court is that such limits promote the long-term interests of criminal defendants as a class. A system in which it is thought that an important part of a defense lawyer's job is to be an out-of-court advocate is not a good system for

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[1] See, for example, *Gentile v State Bar of Nevada*, 501 US 1030, 1043 (1991) (opinion of Kennedy) ("An attorney's duties do not begin inside the courtroom door . . . A defense attorney may pursue lawful strategies to obtain dismissal of an indictment or reduction of charges, including an attempt to demonstrate in a court of public opinion that the client does not deserve to be tried.").

[2] See, for example, *ABA Standards for Criminal Justice, Fair Trial and Free Press* (1968); Edward v Hudon, *Freedom of the Press versus Fair Trial: The Remedy Lies with the Courts*, 1 Val U L Rev 8 (1966).

[3] See, for example, *Nebraska Press Assn v Stuart*, 427 US 539, 551, 561 (1976).

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criminal defendants. This is because out-of-court statements are very likely to involve a degree of personal vouching for the defendant by the defense lawyer. Many attorneys who would be willing, or even eager, to defend criminal suspects in court — who consider that to be an honorable aspect of their calling — will not be willing to make out-of-court statements that align their own reputations with their client's. They will represent criminal defendants only if it is understood that making such statements is not part of their job — that their responsibility is limited to being the defendant's advocate in the courtroom.

So long as out-of-court advocacy is common, a lawyer who refuses to speak outside the courtroom will risk damaging her client's interests by appearing not to believe in the client fully. If out-of-court statements are allowed, an attorney's refusal to engage in an out-of-court public relations campaign may be taken to suggest a lack of enthusiasm for the client's case. Similarly, so long as out-of-court advocacy is considered a permissible and even desirable part of representing a criminal client, many defendants in high-profile cases will not want to hire an attorney who is unwilling to speak to the press — or who speaks carefully, in a way that shows that the attorney is not vouching for the defendant. This will not be true across the board; some accomplished criminal defense lawyers may develop a reputation for being highly effective even though they do not talk to the press. But so long as talking to the press is a recognized and usual part of a criminal defense lawyer's job, many outstanding lawyers who are not criminal defense specialists may be unwilling to appear to lend their personal reputation and credibility (or that of members of that firm) to the client's cause.

For these reasons, lawyers who want to confine their representation to the courtroom can have an active criminal defense practice only if out-of-court advocacy by criminal defense lawyers is restricted. Only such restrictions can make the practice of criminal law attractive to large segments of the bar, and can make those attorneys available to criminal defendants. Since, as I will argue, out-of-court advocacy is unlikely to be very valuable either to society or to criminal defendants, there is a case to be made — even from the point of view of criminal defendants alone — for limitations on out-of-court advocacy by defense attorneys.

HeinOnline -- 1998 U. Chi. Legal F. 110 1998

I. GENTILE V STATE BAR OF NEVADA

The Supreme Court, in *Gentile v State Bar of Nevada*,[4] approved a state bar rule that restricted out-of-court advocacy by a lawyer who represented a criminal defendant.[5] *Gentile* involved a criminal prosecution that attracted a great deal of media attention in the local area (in this case, Las Vegas).[6] In that sense it was a high-profile trial, but not the kind of extraordinary case that attracts nationwide publicity. It would be a mistake to try to use such an extraordinary "trial of the century" as the model when thinking about the rules that should govern attorneys' out-of-court statements; rules should be designed with a more typical case in mind. But trials that attract a great deal of local publicity are reasonably common. Cases involving political figures, other locally prominent individuals, or particularly notorious crimes are likely to fall into this category. Out-of-court advocacy by defense attorneys is likely to be common in cases in this category.

Gentile, a criminal defense lawyer, was disciplined by the state bar for making an out-of-court statement on behalf of his client immediately after his client was indicted.[7] The indictment alleged that the client had stolen cocaine and cash from a safety deposit vault that was being used by undercover police agents. At a press conference, Gentile said that the evidence demonstrated his client's innocence; that the likely thief was a police detective, whom Gentile named (and whom Gentile strongly suggested was a user of cocaine); and that persons who had offered evidence against Gentile's client were not credible because they had been pressured by the police.[8] Gentile's client was acquitted. The state bar then imposed sanctions on Gentile for violating a rule modeled on the American Bar Association Rule of Professional Conduct 3.6,[9] which stated that "[a] lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceed-

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[4] 501 US 1030, 1037 (1991).

[5] Id at 1033.

[6] Id.

[7] Id at 1042, 1045.

[8] 501 US at 1042, 1045.

[9] Id at 1033. The ABA rule was amended in response to *Gentile* to make it clear that the prohibition applies to any "lawyer who is participating or has participated in the investigation or litigation of a matter." Model Rules of Professional Conduct Rule 3.6(a) (ABA Center for Professional Responsibility 1994).

HeinOnline -- 1998 U. Chi. Legal F. 111 1998

ing."[10] The rule also gave examples of prohibited statements, and it contained a "safe harbor" provision that described statements a lawyer could make without fear of violating the rule.[11]

The Supreme Court overturned the sanctions but approved the provision of the rule that forbade extrajudicial statements that have a "substantial likelihood of materially prejudicing an adjudicative proceeding."[12] A majority of the Court concluded that the safe harbor provision of the Nevada rule was void for vagueness, at least as applied to Gentile.[13] The Court noted that Gentile appeared to have made a conscientious effort to conform his remarks to the requirements of the rule.[14] But a different majority also held that "the 'substantial likelihood of material prejudice' standard applied by Nevada and most other States satisfies the First Amendment."[15] The Court stated that the *press* may not be prohibited from publishing information that will allegedly prejudice a trial unless it can be shown that there is a "'clear and present danger' that a malfunction in the criminal justice system will be caused."[16] But the Court ruled that the speech of lawyers, at least during the pendency of a criminal prosecution, does not receive the same level of protection as speech by the press, because the lawyer has "a fiduciary responsibility not to engage in public debate . . . that will obstruct the fair administration of justice."[17]

Justice Kennedy, writing for four Justices, disagreed with this aspect of the Court's ruling. He emphasized that speech like Gentile's is "classic political speech."[18] "[S]peech critical of the exercise of the State's power lies at the very center of the First Amendment," he explained.[19] For that reason, he was willing to

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[10] 501 US at 1060.

[11] Id at 1061–62.

[12] Id at 1063.

[13] Id at 1048–51. The court concluded that the rule was void for vagueness because an exception providing that a lawyer could "state without elaboration . . . the general nature of the defense" misled Gentile into believing reasonably that he could comment on the character, credibility, reputation, or criminal record of witnesses without incurring the risk of discipline. Id at 1048.

[14] 501 US at 1051.

[15] Id at 1063.

[16] Id at 1070–71, citing, among other cases, *Nebraska Press Assn v Stuart*, 427 US 539 (1976), and *Bridges v California*, 314 US 252 (1941).

[17] *Gentile*, 501 US at 1074 ("[T]he speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press in *Nebraska Press Assn v Stuart* . . . and the cases which preceded it.") (quoting *Nebraska Press*, 427 US at 601).

[18] 501 US at 1034 (opinion of Kennedy).

[19] Id.

HeinOnline -- 1998 U. Chi. Legal F. 112 1998

uphold the Nevada rule only if it were interpreted to be essentially equivalent to the "clear and present danger" standard used in reviewing measures that restrict the press.[20]

II. THE VALUE OF DEFENSE ATTORNEYS' OUT-OF-COURT ADVOCACY

Gentile, following the pattern common to this subject, portrayed the issue of defense attorneys' out-of-court advocacy as one that presents a conflict between the values of free speech and the need to ensure fair trials. Gentile was sanctioned by the state bar on the ground that his speech created a "substantial likelihood of materially prejudicing" the trial.[21] Justice Kennedy defended Gentile's speech on the ground that it was highly valuable speech.[22] In fact, speech like Gentile's probably does not pose much of a threat at all to the fairness of trials — but it's also not all that valuable.

At first glance, there seems to be much to be said for Justice Kennedy's position. Gentile engaged in truthful speech about a matter of significant public concern. Beyond that, his speech was critical of government officials, and it brought to light arguments and information that the public otherwise might not have heard. Ordinarily speech of this kind would be entitled to the highest degree of protection under the First Amendment; as Justice Kennedy said, "speech critical of the exercise of the State's power lies at the very center of the First Amendment,"[23] and "[p]ublic awareness and criticism have even greater importance where, as here, they concern allegations of police misconduct . . . or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor."[24]

In principle what Justice Kennedy says seems right, but in practice there is reason to doubt how much value a defense attorney's speech on behalf of his client will really add to the public debate. Any restriction on a defense attorney's out-of-court speech would be limited to the time during which the attorney was actively representing the client in an ongoing proceeding.[25]

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[20] Id at 1036.

[21] 501 US 1030, 1033.

[22] Id at 1034.

[23] Id.

[24] Id at 1035–36.

[25] See *Patterson v Colorado*, 205 US 454, 463 (1907) (Holmes writing for the Court) ("When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interference with the course of justice by premature

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After a case is concluded, or even after the lawyer is no longer associated with it, the lawyer would be free to speak as she wished (except of course to the extent she was disclosing privileged information or breaching some other well-recognized rule).[26] She could at that time reveal as much as she wished. Her speech would probably be taken more seriously by the public, because she would no longer be seen as a hired spokesperson for someone trying to escape punishment. It is only speech during the time when a case is pending, and the attorney is representing the defendant, that presents the danger that I have suggested — the danger that lawyers will feel compelled to vouch implicitly or explicitly for their clients. The "value" that is lost is only the value of that narrowly-defined category of speech.

It is useful to try to spell out exactly the circumstances that would have to exist for that limited category of out-of-court advocacy by a defense attorney to prove valuable to the larger public debate. First, the situation would have to be one in which there was some form of government abuse that needed to be exposed. It is, of course, impossible to know with precision just how common such abuses are. Surely they happen sometimes; surely they do not happen in every case; between those polar positions, it is difficult to do more than speculate.

Beyond that, though, out-of-court advocacy by defense attorneys will be valuable in exposing government misconduct only to the extent that that misconduct would not have been uncovered in a reasonable time through the judicial process. A formal judicial finding of police or prosecutorial misconduct is likely to have a far greater impact on public consciousness than speech by a lawyer who is the hired spokesperson for a criminal defendant, especially because criminal defendants usually have every interest in claiming abuses where none exist. So a prerequisite to concluding that out-of-court defense advocacy is valuable is that there has been a major failure of the judicial process — that is, that there is some abuse that will not come to light, or will not come to light until after much damage has been done, unless the defense attorney speaks about it outside of court.

Second, out-of-court speech by defense attorneys will have the kind of effect Justice Kennedy envisions only if the climate of

statement, argument or intimidation hardly can be denied.").

[26] See *Gentile*, 501 US at 1076 (noting that a ban on out-of-court advocacy only postpones attorney comments until after the trial); Model Rules of Professional Conduct Rule 1.6 (cited in note 9) (protecting client confidences).

HeinOnline -- 1998 U. Chi. Legal F. 114 1998

opinion is such that the public at large will believe a defense attorney's claims of abuse. Out-of-court advocacy is of limited value if it fails to persuade the public. Moreover, if out-of-court statements are permitted at all, they are likely to be common; it will often come to be seen as part of a criminal defense attorney's job, at least in a highly publicized case, to represent her client in the press. The more common such statements are, the more extreme they are likely to become, as lawyers try to set their clients apart in the public mind from other criminal defendants who protested their innocence and claimed that they were victims of government abuses. So Justice Kennedy's defense of out-of-court advocacy supposes that even in a climate in which defense attorneys' claims of abuse are common, there is a great enough chance that an attorney could convince the public that an abuse occurred — even though the attorney cannot prove it in court (or cannot prove it until it is too late). This is not a wholly implausible scenario, but it is not likely to occur very often.

Third, in order for out-of-court advocacy to be valuable, it will have to add something to the public debate. That is, the situation will have to be one in which no one else — such as the press — discovers the government abuse on its own. It is true that defense attorneys will have especially good access to information. If the government is engaging in certain kinds of grievous abuses — if, for example, the government is fabricating evidence to frame the defendant — the defense lawyers may be in an especially good position to know about it, and it may not be easy for the press to find out about it without help.

Sometimes, though, the press will be almost as able as defense counsel to uncover evidence of abuses. Justice Kennedy made essentially this point in the course of explaining why Gentile's statements did not present a serious threat to the jury's impartiality: he noted that "[m]uch of the information provided by [Gentile] had been published in one form or another . . . [and t]he remainder . . . [was] available to any journalist willing to do a little bit of investigative work."[27]

More important, even if out-of-court advocacy is restricted in some way, a defense lawyer's ability to bring government abuses to light might not, in fact, be much impaired. The principal problem with out-of-court advocacy by defense attorneys, as I've said, is not that the jury will be unduly influenced but rather that attorneys will be put in the position of having to vouch for their

[27] 501 US at 1046.

HeinOnline -- 1998 U. Chi. Legal F. 115 1998

clients. An attorney who speaks off the record, or who releases information (perhaps on condition that it not be published but instead be used only for purposes of further investigation)[28] will not be in the position of vouching. If rules could be designed to permit those forms of communication with the press, while not placing attorneys in a position where they are expected to wage a public relations campaign for their clients, then the press's ability to uncover government abuses is likely to be impaired hardly at all.

Alternatively it might be possible to fashion a "whistle-blower" exception to rules forbidding out-of-court advocacy for cases in which the attorney has raised a plausible charge of serious unlawful conduct by the government. The more specific the defense attorney's allegation is, the less likely it is that she will be thought to be vouching for her client's innocence. For that reason, out-of-court advocacy by defense attorneys might be limited in such a way that does not entirely deprive the public of the valuable speech that attorney had to offer.

In fact, here again it will be very useful — both to criminal defendants as a class, and to the public's interest in finding out about wrongful government conduct — if the general practice is not for defense attorneys routinely to allege, in public statements, the worst kinds of misconduct by the government. So long as out-of-court advocacy is the norm, the tendency will be for attorneys to escalate the claims of government wrongdoing, so as to get attention. The more consistently extravagant the claims of government abuses, the less likely the press and public are to take them seriously. The interests that out-of-court advocacy is supposed to protect — here, the public's interest in learning about misconduct in the criminal justice system — may be best served by limiting such advocacy.

III. IS OUT-OF-COURT ADVOCACY NEEDED TO COUNTER SPEECH BY THE GOVERNMENT?

While out-of-court statements by defense attorneys may have the incidental benefit of helping to inform the public about government abuses, attorneys have no professional obligation to inform the public. They do have a professional obligation to protect their clients' interests. This obligation might lead them to make

[28] Of course, if the information is privileged or otherwise confidential, an attorney could be barred from releasing it. See *Seattle Times Co v Rhinehart*, 467 US 20 (1984).

HeinOnline -- 1998 U. Chi. Legal F. 116 1998

out-of-court statements precisely for the reason that the disciplinary rules forbid: to try to influence the people who will end up on the jury.[29] This was one of the acknowledged purposes of the speech in *Gentile*.[30]

The chance to influence potential jurors might make speech valuable to the defendant, but it is not clear that it makes the speech valuable to society. If anything, such speech may have negative value because it can pervert the judicial process. The idea of a trial, or any on-the-record hearing, is to make a decision on the basis of evidence that is subject to careful standards of reliability in an atmosphere that promotes rational deliberation. Encouraging public debate on issues of guilt or innocence is unlikely, in the aggregate, to improve that process. As Justice Black wrote in the leading decision upholding the right to comment on the judicial process: "The very word 'trial' connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[31]

The best argument for allowing speech by defense lawyers in this situation, however, is that they are trying not to distort the judicial proceedings but instead to undo a distortion caused by the speech of the government's representatives. In *Gentile*, for example, there apparently had been a stream of information from government sources, beginning long before the indictment, suggesting that Gentile's client was guilty of the offense.[32] According to Justice Kennedy, Gentile "explained to the disciplinary board [that] his primary motivation was the concern that, unless some of the weaknesses in the State's case were made public, a potential jury venire would be poisoned by repetition in the press of information being released by the police and prosecutors."[33]

In this situation, it might be argued that out-of-court advocacy by a defense lawyer is valuable even if — indeed just because — it is directed to potential jurors. The value is not that it contributes to society or democratic government generally, but precisely that it enhances the chances that the trial will be fair. This is an inversion of the usual "free speech vs. fair trial" formulation: the claim is that out-of-court speech is valuable, not for

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[29] See Model Rules of Professional Conduct Rule 6.3 comment at 70–71 (cited in note 9).

[30] See 501 US 1030, 1064 (1991).

[31] *Bridges v California*, 314 US 252, 271 (1941).

[32] 501 US at 1039–41, 1043.

[33] Id at 1042.

HeinOnline -- 1998 U. Chi. Legal F. 117 1998

the reasons that speech is usually valuable, but just because it will help bring about a fair trial; the alternative to allowing speech, on this account, is a less fair trial.

While this argument has a realistic ring to it, it also encounters a number of difficulties. The first is that the argument assumes that out-of-court speech is likely to affect jurors: the government's speech will bias them one way; defense counsel's speech is needed to undo the bias. But the underlying assumption is doubtful at best. Available studies on the subject suggest that jurors are able to put aside what they have learned outside of court and decide the case based on the evidence presented at trial.[34] Indeed, that is one of the arguments frequently advanced by those who defend attorneys' rights to engage in out-of-court advocacy: that such speech, however strongly phrased and however intended, in fact seldom affects jurors and therefore poses no real danger to the integrity of the trial.[35] It is difficult — not impossible, perhaps, but surely difficult — to argue simultaneously that (i) out-of-court advocacy is in general so unlikely to be influential that it is not a problem; (ii) nonetheless, out-of-court statements by the government will be sufficiently influential to create a problem that speech by defense attorneys is needed to counteract; and (iii) out-of-court speech by defense attorneys will be sufficiently influential to counteract the government's speech.

There is, however, a more basic problem with the argument that out-of-court speech by defense attorneys is needed to counteract speech by government sources. It is very unlikely that a free-for-all in the arena of public relations — in which both the government and the defense try as hard as they can to influence potential jurors — will produce good results. Indeed, given the government's advantages — it usually has more information, more credibility, and a better chance to win the public's sympathy; it usually is able to begin publicizing its views before the defense; and it generally has more resources to devote to the effort — an overt public relations battle, if it affects potential jurors at all, is more likely to benefit the government. In any event, surely

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[34] See, for example, Rita J. Simon, *Does the Court's Decision in* Nebraska Press Association *Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 Stan L Rev 515 (1977); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 BU L Rev 1003, 1031–49 (1984); Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-Legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 Hofstra L Rev 1, 11–36 (1989). See also Erwin Chemerinsky, *Lawyers Have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are Almost Always Unconstitutional*, 17 Loy LA Ent L J 311, 312 (1997).

[35] See 501 US at 1053 (Kennedy writing for a plurality).

HeinOnline -- 1998 U. Chi. Legal F. 118 1998

no one would deny that the better solution is to have neither side seek to predispose jurors. Not only is it in the interests of society as a whole to have the case decided by what occurs inside the courtroom and on the record; most of the time, it is in the criminal defendant's interest as well. Occasionally, popular sentiment will support a criminal defendant. But it seems safe to say that, in the great majority of cases, exposure to public opinion is the last thing a criminal defendant needs.

The problem, of course, is that limiting speech by the government side may be quite difficult. "The police, the prosecution, other government officials, and the community at large hold innumerable avenues for the dissemination of information adverse to a criminal defendant, many of which are not within the scope of ABA Model Rule 3.6 or any other regulation."[36] A judge is unlikely to order dismissal of an indictment, thus possibly freeing a criminal, because of misconduct by the government attorney, unless the misconduct is extremely severe. In all likelihood, the remedy for out-of-court statements by government attorneys (or by law enforcement officers, to the extent that they can be effectively controlled by the lawyers) will have to be sanctions imposed on the attorneys directly. And that still leaves the possibility that government lawyers could speak anonymously, or others on the government side — notably the victims of the crime — might speak in ways calculated to affect the jurors. Or, of course, the press itself might attack a defendant without the government playing a role.

Even if restraints are imposed on all out-of-court advocacy, then, the defendant may be placed at a disadvantage. Nonetheless, a suspect is not completely defenseless in an out-of-court public relations contest. There may be individuals on the defendant's side — the defendant's family members or other supporters — whose speech is not controlled by bar rules or judges' orders.

Also, the press may be less interested in statements that do not come from the attorneys themselves. The public, and therefore the press, may be uninterested in a one-sided debate; or journalists may have qualms about allowing themselves to be used by only one side. Speech by both sides might precipitate more overall publicity and therefore more prejudice to the defense.

Again it may be useful to specify the conditions in which out-

[36] Id at 1056.

HeinOnline -- 1998 U. Chi. Legal F. 119 1998

of-court advocacy by a defense attorney is likely to be helpful in obtaining an impartial jury for the defendant. First, the situation would have to be one in which the government or the press has tried to influence the outcome of the trial through extrajudicial statements. Second, the situation would have to be one in which the defendant is less likely to win in court if he cannot counteract the influence of the government's speech outside of court; if the defendant will win the case in court anyway, no purpose is served by allowing defense counsel to engage in an unseemly out-of-court debate with her adversary. Third, the case would have to be one in which the defense attorney's out-of-court advocacy actually did counterbalance the other side's speech. If a free-for-all outside the courtroom is still going to leave the government on top, the defendant is better off trying to prevent it, rather than securing his attorney's right to enter into it. And finally, the case would have to be one in which the judge cannot stop the government from trying to influence the jury pool, since the ideal outcome is one in which neither side engages in such tactics.

Such cases may occur, but they seem unlikely to arise. The best prediction is that out-of-court statements by the two sides are simply unlikely to have any effect at all on the jury's verdict. Beyond that, if the defense cannot beat the government in a fair fight inside the courtroom, it seems unlikely that the defense will win an almost certainly unfair fight outside the courtroom. If the defense did prevail in a battle for the hearts and minds of potential jurors, it might do so only by appealing to prejudices and irrationality. There may be instances in which out-of-court advocacy by defense attorneys is valuable because of its effect on the venire, but they are likely to be quite unusual. It seems better to try to achieve a system in which out-of-court advocacy by both sides is forbidden.

IV. WHY A RESTRICTION ON OUT-OF-COURT ADVOCACY MIGHT HELP DEFENDANTS

The usual view, that the question whether to restrict out-of-court advocacy presents a painful dilemma between the freedom of speech and the right to a fair trial, is therefore both overstated and misconceived. Allowing lawyers to speak freely is not likely to jeopardize the fairness of a trial that often; but restricting speech, during the time when a lawyer is actively representing a party to criminal litigation, is not likely to remove much valuable speech from society. Everyone recognizes that lawyers' speech

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can be restricted while the speakers are in the courtroom.[37] No one would propose that the usual rules of public debate apply during a trial or other formal proceeding. And no one denies that lawyers can speak freely, so long as they observe well-established principles of confidentiality, once the case is over. All that is at stake is extending some elements of the approach that uncontroversially governs trial proceedings to public statements made during the pendency of the case.

The principal benefit of restricting out-of-court speech by defense attorneys is, as I have said, one that accrues to criminal defendants as a class. If a lawyer can represent her client effectively without embracing the client's cause outside of court, more good lawyers are likely to represent criminal defendants. It is generally recognized in our legal culture that a lawyer's vigorous defense of a client in the course of legal proceedings does not mean that the lawyer personally vouches for the client's innocence.[38] In principle, one could imagine a world in which out-of-court advocacy was also seen as just part of a lawyer's job that in no way reflected the lawyer's personal views. But that is not yet a widely-accepted feature of our culture. As a result, out-of-court advocacy by a defense attorney will often, implicitly or explicitly, align the attorney's reputation and credibility with the client's.

Again, *Gentile* provides an illustration. The attorney in *Gentile* planned his public relations strategy with great care. He sought to stay within the limits of existing ethics rules — that was ultimately one reason the Supreme Court concluded that those rules were vague — and, at his press conference, he carefully declined to answer questions that he thought would require him to go beyond what the rules permitted.[39] Even so, in response to questions, Gentile made the following statements:

> [B]ecause of the stigma that attaches to merely being accused — okay — I know I represent an innocent man . . . . The last time I had a conference with you, was with a client and I let him talk to you and I told you that that case

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[37] *Gentile*, 501 US 1030, 1071 (1991) ("It is unquestionable that in the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed. An attorney may not, by speech or other conduct, resist a ruling of the trial court beyond the point necessary to preserve a claim for appeal."). See also *Sacher v United States*, 343 US 1, 8 (1952) ("[T]he rights and immunities of accused persons would be exposed to serious and obvious abuse if the trial bench did not possess and frequently exert power to curb prejudicial and excessive zeal of prosecutors.").

[38] See Model Rules of Professional Conduct Rule 3.3 (cited in note 9).

[39] 501 US at 1049, 1049 n 2.

HeinOnline -- 1998 U. Chi. Legal F. 121 1998

> would be dismissed and it was. Okay? I don't take cheap shots like this. I represent an innocent guy. All right?[40]

What will happen if this attorney represents a client whom he does not believe to be innocent? Either he will have to avoid speaking for the client publicly, even in circumstances that would otherwise call for it — thus not representing that client as effectively as he had his earlier client — or he will have to misrepresent his views about the client's innocence if he is asked. (It is inconceivable that he would say that he did not believe his client to be innocent.) Theoretically, he could refuse to express an opinion about the client's innocence, and avoid giving any implicit indication that he personally believed his client to be innocent. But in a court of public relations — unlike a court of law — that sort of careful distinction between speaking for the client and vouching for the client is likely to be seen as reflecting a lack of belief in the client, thus undermining his case.

CONCLUSION

In short, so long as out-of-court advocacy is permitted, an attorney who does not engage in such advocacy — or who is perceived to be holding back in her willingness to endorse the client fully — will be seen as communicating a degree of disbelief in the client, thus prejudicing the client's case. Some lawyers, of course, will be willing to press every client's position unreservedly in the public domain. But other attorneys will not be willing to do that for every client. And if they cannot do it for every client, they are likely simply to stay away from the practice of criminal law (except perhaps for the truly exceptional case that does engage them personally). The alternative would be to put themselves in a position where their reticence about engaging in a public relations campaign on behalf of a client will be interpreted in a way that injures the client.

The result will be that criminal defense practice is simply too unattractive to many lawyers who do not want to be placed in this position. Thus the overall effect of allowing out-of-court advocacy on behalf of criminal defendants will be, ironically, to harm the interests of criminal defendants as a class. Criminal defendants — and the public interest in fair criminal trials — have been extremely well served by the principle that an attorney

[40] Id at 1064 (Rehnquist dissenting in part).

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can defend a suspect in court without in any way having to vouch for the suspect personally. Restricting out-of-court advocacy will reinforce that principle. It cannot be said that this is an enormously powerful argument for such a restriction; the value involved is not that great, and many of the empirical links in the chain of justification are a little speculative. But the stakes here are not large. The values of free speech (or fair trial) are not heavily implicated. In this situation, a restriction on out-of-court advocacy, adopted for this reason, may be the most reasonable way to proceed.

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