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LOST IN THE COMPROMISE: FREE SPEECH, CRIMINAL JUSTICE, AND ATTORNEY PRETRIAL PUBLICITY

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INTRODUCTION

Statements by Special Prosecutor Angela Corey in her April 2012 press conference regarding the decision to charge George Zimmerman with Second Degree Murder raised questions anew about the appropriate limitations on pretrial publicity by attorneys, particularly prosecutors.[1] After George Zimmerman's acquittal in July 2013, the prosecutors, in turn, publicly questioned the propriety of publicity from his defense attorneys, stating: "We . . . did not have media interviews every day like they did . . . . It was obvious they were trying to influence potential jurors."[2]

1. *See, e.g.*, Hillary Cohn Aizenman, *Pretrial Publicity in a Post-Trayvon Martin World*, CRIM. JUST., Fall 2012, at 13 (noting that the pretrial publicity associated with the Zimmerman case may have limited Zimmerman's access to a fair trial); Monroe H. Freedman & Jennifer Gundlach, *Unethical Pretrial Publicity by Zimmerman (Trayvon Martin) Prosecutor*, AALS PROF. RESP. SEC. NEWSLETTER (The AALS Professional Responsibility Section), Spring 2012, at 28–29.

2. Matt Gutman & Seni Tienabeso, *George Zimmerman Prosecutor 'Prayed' for Him to Testify*, ABC NEWS (July 15, 2013), http://abcnews.go.com/US/george-zimmerman-prosecutor-prayed testify/story?id=19666346&singlePage=true (quoting prosecutor Bernie De la Rionda).

Indeed, beginning soon after charges were brought, Zimmerman's defense attorneys "launched a website, Facebook page, and Twitter account devoted to the case."[3]

The appropriate scope of First Amendment protection for attorney pretrial publicity has long fostered debate and divergent viewpoints. For the media, the United States Supreme Court has recognized robust First Amendment protection for pretrial press coverage.[4] However, in its fractured *Gentile v. State Bar of Nevada* opinion, the Court approved as constitutional the less-protective standard found in Model Rule of Professional Conduct (MRPC) 3.6, which forbids attorneys from engaging in publicity that creates "a substantial likelihood of materially prejudicing an adjudicative proceeding."[5] The *Gentile* Court, like the Model Rules drafters and many scholars,[6] viewed restrictions on attorney pretrial publicity as a compromise between competing constitutional mandates: "the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[7] Further, the Court emphasized the importance of creating a rule that was viewpoint neutral and applied equally to attorneys on opposing sides of a case.[8] Importantly, MRPC 3.6 applies to all categories of lawyers, including defense attorneys, prosecutors, and civil litigators.[9]

Prior to *Gentile*, Professor Monroe H. Freedman and Attorney Janet Starwood had argued that a compromise was unnecessary because the free speech rights of defense attorneys aligned with the defendant's Sixth Amendment rights to a fair trial—thus, defense attorneys should have strong First Amendment rights.[10] On the other hand, they argued that prosecutors generally lacked free speech rights to engage in pretrial

3. Adam Hochberg, *George Zimmerman's Lawyers Hope to Win Trial By Social Media in Trayvon Martin Case*, POYNTER (May 7, 2012, 10:43 AM), http://www.poynter.org/latest-news/making-sense-of-news/172840/george-zimmermans-lawyers-hope-to-win-trial-by-social-media-in-trayvon-martin-case/.

4. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 565, 570 (1976) (noting that the pretrial publicity represents a confrontation of constitutional guarantees and that "pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to unfair trial").

5. Gentile v. State Bar of Nev., 501 U.S. 1030, 1033, 1057–58 (1991).

6. *See infra* Section I.B.

7. *Gentile*, 501 U.S. at 1075.

8. *See id.* at 1076.

9. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2014) (providing that "[a] lawyer who is participating or has participated in the investigation or litigation of a matter" is subject to the rule). The appropriate scope of First Amendment protection for pretrial publicity by civil litigators—which involves different representational interests, constitutional mandates, and incentives—will be addressed in a subsequent paper.

10. *See* Monroe H. Freedman & Janet Starwood, *Prior Restraints on Freedom of Expression by Defendants and Defense Attorneys:* Ratio Decidendi v. Obiter Dictum, 29 STAN. L. REV. 607, 612 (1977).

publicity.[11] Notably, the *Gentile* Court's constitutional emphasis on the equal regulation of defense and prosecutor pretrial publicity undermined Freedman and Starwood's approach.[12]

Even among commentators embracing the idea of a compromise between free speech and fair trials, the appropriate outcome of that compromise is anything but obvious.[13] Moreover, post-*Gentile*, Professor Erwin Chemerinsky forcefully argued that all lawyers should be allowed to engage in pretrial publicity freely,[14] while Professor Peter Margulies has recently argued for extremely limited First Amendment protection for all attorneys.[15]

In the face of such divergent viewpoints, several articles that advocate new regulations on attorney pretrial publicity simply ignore the First Amendment, by arguing that proposed regulations would constitute prudent policy, but declining to address whether they are constitutional.[16] This highlights that the First Amendment issue is problematic.[17] Under

11. *See id.* at 617–18 (noting the limitations on prosecutors' extrajudicial speech); *accord* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS, 306 n.99 (4th ed. 2010) (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

12. In fact, the Restatement (Third) of the Law Governing Lawyers acknowledges the appeal of Freedman and Starwood's double standard, but states that the "*Gentile* decision removes the constitutional basis for such arguments." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109 reporter's note (2000).

13. *See infra* Section I.B.

14. *See* Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 862–67 (1998) (arguing that "lawyer speech must be subjected to strict scrutiny . . . . because government restrictions [on pretrial publicity] are content-based limits on political speech").

15. *See* Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319, 324 (2012) (describing his normative "structural signaling" paradigm for lawyer speech, which holds that courts should limit lawyer speech to protect the integrity of the legal profession from a theoretical "race to the bottom").

16. *See infra* Section I.E.

17. Some commentators argue that, despite MRPC 3.6, prosecutors are still saying too much that harms criminal defendants. *See, e.g.*, 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, 116, 123–130 (2004) (explaining that the language of MRPC 3.8(f) and 3.6 "is readily subject to strained interpretations and skillful manipulation that can enable prosecutors to speak about cases in great detail and in self-serving ways"); Laurie L. Levenson, *Prosecutorial Sound Bites: When Do They Cross the Line?*, 44 GA. L. REV. 1021, 1034–52 (2010) (warning of the perils of prosecutorial pretrial comments and discussing particular contexts in which criminal defendants may be prejudiced by prosecutorial comments); Judith L. Maute, *"In Pursuit of Justice" in High Profile Criminal Matters*, 70 FORDHAM L. REV. 1745, 1746, 1755–58 (2002) (urging prosecutors and defense counsel in criminal matters to refrain from *all* extrajudicial statements about the case and arguing for lawyers involved in criminal cases not to try those cases in the media). Other commentators contend that defense attorneys should be saying more to protect their clients' interests. *See* Robert Gordon, S*uccessfully Trying Your Case in the Court of Public Opinion*, FOR THE DEFENSE, March 2004 (arguing that the defense attorney should speak publicly on behalf of the

normal First Amendment doctrines, Chemerinsky is right: MRPC 3.6 and other attorney pretrial publicity limitations are content-based restrictions on political speech that impose a prior restraint.[18] That equals one thing: strict scrutiny and free speech for attorney pretrial publicity.[19] Yet the scholarly community and regulators have not rallied around Chemerinsky's arguments. In the wake of cases like the Duke Lacrosse prosecution[20]—where District Attorney Michael Nifong gave over fifty press interviews making accusations of race-based gang rape within a week of learning of the allegations[21]—regulators are not looking to expand the free speech rights of prosecutors to the apparent detriment of the lives and liberties of criminal defendants.

The true source of this free speech quandary extends beyond the constitutionality of pretrial publicity rules. The fundamental problem is the lack of a workable First Amendment methodology for examining restrictions on attorney speech in general. Traditional First Amendment doctrines fail to properly identify attorney speech that should be protected or that should be restricted.[22] This Article advocates using the access-to-justice theory of the First Amendment, which offers a framework for examining attorney speech issues by attuning First Amendment protection to the lawyer's role in the system of justice.[23]

This approach alleviates the problem of First Amendment protection for attorney pretrial publicity. Rather than viewing attorney pretrial publicity as a compromise between incompatible rights to a fair trial and lawyer free speech, the lawyer's speech right is keyed to the lawyer's role in the justice system. Such an approach does not eliminate the free speech side of the

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client to ensure that "truthful reporting will actually occur, and to counter any effects of a negative press campaign being waged against the client").

18. *See* Chemerinsky, *supra* note 14, at 862–67.

19. *See id.* at 862 (arguing that government restrictions on lawyer speech are content-based limits on political speech and therefore warrant strict scrutiny review).

20. *See generally* Susan Hanley Duncan, *Pretrial Publicity in High Profile Trials: An Integrated Approach to Protecting the Right to a Fair Trial and the Right to Privacy*, 34 OHIO N.U. L. REV. 755, 759–764 (2008) (discussing the Duke Lacrosse case to demonstrate the effects of media coverage in high-profile cases); Levenson, *supra* note 17, at 1022–23 (discussing how the prosecutor in the Duke Lacrosse case "crossed the line" between fair and foul advocacy with his "intemperate remarks" about the case); Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice,"* 76 FORDHAM L. REV. 1337, 1337–41 (2007) (detailing the Duke Lacrosse prosecution, including the pretrial publicity and its impact on the accused).

21. *See* Mosteller, *supra* note 20, at 1349–52.

22. *See generally* Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 44–57, 95–100 (2011) (discussing the lack of workable theory to examine attorney speech restrictions and proposing a new approach, the access-to-justice theory, under which First Amendment protection for attorney speech is keyed to the attorney's role in the system of justice of invoking and avoiding government power to protect client life, liberty, and property).

23. *Id*. at 61.

traditional compromise. In fact, restricting certain pretrial publicity can frustrate the attorney's role in protecting a client's life, liberty, and property.[24]

Prior approaches to examining attorney speech rights have failed to address pretrial publicity in a manner that protects the criminal justice system and the essential roles of the prosecutor and defense attorney therein, as discussed in Part I. Yet the access-to-justice theory, as discussed in Part II, attunes attorney speech rights to the role of the attorney in the proper and constitutional functioning of the justice system. As discussed in Part III, the very nature of the criminal justice system imposes vastly differing obligations and duties on the prosecution and defense and their respective attorney–client relationships. In Part IV, this Article employs the access-to-justice theory to determine the appropriate scope of free speech rights for defense attorneys and prosecutors by examining their respective roles in the criminal justice system and the effects of pretrial publicity from each on the integrity of that system.

As revealed through this analysis, what is lost in the traditional compromise is the protection of both the robust free speech rights of defense attorneys and the integrity of criminal processes. Contrary to the Supreme Court's *Gentile* decision, such a compromise was unnecessary to achieve viewpoint neutrality and to recognize the essential, but limited, First Amendment rights of prosecutors to engage in speech necessary for the investigation and prosecution of crime and for responding to defense-initiated publicity. By attuning the speech rights of the attorneys to the proper functioning of the criminal justice system, both free speech and criminal justice are safeguarded rather than compromised.

I. PREVIOUS APPROACHES

Scholars and courts have sharply disagreed about how to determine satisfactorily the appropriate scope of First Amendment protection for attorney pretrial publicity—particularly in the criminal context where a defendant's life or liberty is at stake. The views expressed by the Justices in the fractured *Gentile* decision addressing the issue are illustrative of the wide range of views: from full First Amendment protection to no protection. Additionally, scholars advocate various other approaches seeking to find a middle ground between those two extremes.

A. *The Supreme Court and Attorney Pretrial Publicity*

In February 1988, Dominic Gentile, a criminal defense attorney, held a press conference in which he asserted both the innocence of his client,

24. *See id.* at 40–42 (arguing that the lawyer's role as the securer of a client's "life, liberty, and property" requires protection from governmental regulation that would undermine that role).

Grady Sanders, and the culpability of police officers in the disappearance of four kilograms of cocaine and approximately $300,000 in traveler's checks from a safe-deposit vault used in an undercover police operation at Western Vault Corporation, a company Sanders owned.[25] Prior to charging Sanders, the police and prosecution engaged in extensive publicity, "clearing" the police officers with access to the vault, implicating Sanders, and announcing that other vault renters had lost their money.[26] In reaction to the publicity, customers terminated their rentals with Western Vault, which went out of business.[27] Gentile, upon learning that Sanders would be indicted, decided "for the first time in his career" to call a press conference regarding a client he was confident was innocent.[28] Gentile told the press:

> When this case goes to trial, and as it develops, you're going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money . . . is Detective Steve Scholl.[29]

Gentile also asserted that the other alleged "victims" were "known drug dealers and convicted money launderers."[30] Gentile said he couldn't elaborate, but reaffirmed, "I represent an innocent guy. All right?"[31]

At first blush Gentile's statements seem over-the-top, and Chief Justice William H. Rehnquist and the Nevada Supreme Court characterized them as "highly inflammatory" in that "they portrayed prospective government witnesses as drug users and dealers, and as money launderers."[32] Yet six months later a jury acquitted Sanders, and the government's witnesses were shown to be drug users (including Detective Scholl[33]), drug dealers, and money launderers.[34] Moreover, the foreman of the jury stated that if the jury had "had a verdict form before them with respect to the guilt of [Detective] Scholl they would have found the man proven guilty beyond a reasonable doubt."[35] As summarized by Justice Anthony M. Kennedy, "[a]t trial, all material information disseminated during [Gentile's] press

25. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1039–40, 1059–1060 (1991).

26. *Id.* at 1040–41 (Kennedy, J.).

27. *Id.* at 1040; *see also id.* at 1043 (noting Sanders also lost his lease on Atlantic City property).

28. *Id.* at 1042.

29. *Id.* at 1063 (Rehnquist, C.J., opinion of the court) (internal quotation marks omitted).

30. *Id.* at 1059 (Kennedy, J., appendix to opinion).

31. *Id.* at 1064 (Rehnquist, C.J., opinion of the court) (internal quotation marks omitted).

32. *Id.* at 1079 (Rehnquist, C.J., dissenting).

33. *Id.* at 1047 (Kennedy, J., opinion of the court) (noting, however, that Detective Scholl testified that he ingested drugs "to gain the confidence of suspects").

34. *Id.* at 1041 (Kennedy, J.), 1047–48 (Kennedy, J., opinion of the court).

35. *Id.* at 1048 (Kennedy, J., opinion of the court) (internal quotation marks omitted).

conference was admitted in evidence before the jury,"[36] and the jury apparently found it credible.

The Nevada State Bar disciplined Gentile for violating the Nevada Supreme Court Rule governing pretrial publicity, which was almost identical to MRPC 3.6.[37] The U. S. Supreme Court reversed the discipline five to four in fractured opinions that found part of Nevada's rule unconstitutionally vague. Justice Kennedy, for four justices, advocated full First Amendment protection for attorney pretrial publicity to the same extent as the press.[38] Chief Justice Rehnquist, in striking contrast and also for four justices, appeared to want no First Amendment protection for attorney pretrial publicity.[39]

Justice Sandra Day O'Connor provided the fifth vote, joining part of each opinion.[40] It is important to note that Chief Justice Rehnquist modified his argument that lawyers lack First Amendment rights in the portion of his opinion joined by Justice O'Connor. Thus, a majority of the Court adopted a middle position holding that "speech of lawyers representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press" under normal First Amendment doctrines.[41] The Court upheld the "substantial likelihood of material prejudice standard" from MRPC 3.6 as "a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."[42] In explaining why the standard was constitutional, the Court said:

> The regulation of attorneys' speech is limited—it applies only to speech that is substantially likely to have a materially prejudicial effect; *it is neutral as to points of view, applying equally to all attorneys participating in a pending case*; and it merely postpones the attorneys' comments until after the trial.[43]

Thus, according to the majority, for the rule to be constitutional it had to apply equally to defense attorneys and to prosecutors, which this Article refers to throughout as *Gentile*'s equality principle.

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36. *Id.* at 1047.

37. *Id.* at 1033 (Kennedy, J.).

38. *See id.* at 1054–56 (Kennedy, J.) ("At the very least, our cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives *even when* the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." (emphasis added)).

39. *See id.* at 1081 (Rehnquist, C.J., dissenting) (noting that Gentile, upon being admitted to the practice of law, affirmatively recited an oath to abide by the Nevada rules of professional conduct, and arguing that "[t]he First Amendment does not excuse him from that obligation, nor should it forbid the discipline imposed upon him by the Supreme Court of Nevada").

40. *Id.* at 1032.

41. *Id.* at 1074 (Rehnquist, C.J., opinion of the court).

42. *Id.* at 1075 (internal quotation marks omitted).

43. *Id.* at 1076 (emphasis added).

Justice Kennedy, for four Justices, additionally emphasized the special concerns created by limiting the speech of defense attorneys, like Gentile, who have "the professional mission to challenge actions of the State."[44] Kennedy asserted that defense attorneys should be allowed to "take reasonable steps to defend a client's reputation" and pursue lawful strategies to mitigate the charges against clients, including "attempt[ing] to demonstrate in the court of public opinion that the client does not deserve to be tried."[45]

B. *The Compromise Between Fair Trials and the First Amendment*

The major approach to the problem of First Amendment protection for pretrial publicity—which the *Gentile* Court accepted—is to view restrictions on attorney pretrial publicity as a "compromise" between "a lawyer's First Amendment right to free speech and a defendant's Sixth Amendment right to a fair trial."[46] This compromise does not lead to an obvious or consistent outcome.

1. The Model Rules and the ABA

MRPC 3.6 reflects this compromise and has three basic components: (1) the general standard forbidding the lawyer from engaging in pretrial publicity that "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter";[47] (2) a safe harbor listing items a lawyer is allowed to say despite the general standard;[48] and (3) a provision allowing a lawyer to respond to unduly prejudicial publicity "not initiated

44. *Id.* at 1051 (Kennedy, J.); *see also id.* at 1055–56.
45. *Id.* at 1043.
46. *See, e.g.*, Brown, *supra* note 17, at 90 (footnote omitted).
47. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2014).
48. *See id.* at R. 3.6(b). The subsection provides:

> Notwithstanding paragraph (a), a lawyer may state: (1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved; (2) information contained in a public record; (3) that an investigation of a matter is in progress; (4) the scheduling or result of any step in litigation; (5) a request for assistance in obtaining evidence and information necessary thereto; (6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and (7) in a criminal case, in addition to subparagraphs (1) through (6): (i) the identity, residence, occupation and family status of the accused; (ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person; (iii) the fact, time and place of arrest; and (iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

Id.

by the lawyer" or her client.[49] The comments also include a list of "subjects that are more likely than not to have a material prejudicial effect on a proceeding" and thus presumptively violate the standard.[50] In a number of states, this list of presumptively prejudicial items is part of the rule proper.[51]

MRPC 3.6 proclaims its origin from the compromise "between protecting the *right to a fair trial* and safeguarding the *right of free expression*."[52] The ABA's *Prosecution Function & Defense Function Standards* adopt the same justification—but with one important difference. In listing the values underlying the compromise, the Standards recognize that "[a]n accused may never be more in need of the First Amendment right of freedom of speech than when officially labeled a wrongdoer by indictment . . . before family, friends, neighbors, and business associates."[53] This recognition of the accused's potential right to speak in the face of official accusations of wrongdoing is not found in the Model Rules, which seem to strike the balance in favor of the prosecution stating,

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49. *See id.* at R. 3.6(c).

50. *See id.* at R. 3.6 cmt. [5]. The subjects "that are more likely than not to have a material prejudicial effect on a proceeding" are:

> (1) the *character, credibility, reputation or criminal record of a party*, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness; (2) in a criminal case or proceeding that could result in incarceration, *the possibility of a plea of guilty* to the offense or the existence or contents of *any confession, admission, or statement* given by a defendant or suspect or that person's refusal or failure to make a statement; (3) the performance or *results of any examination or test* or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented; (4) *any opinion as to the guilt or innocence of a defendant or suspect in a criminal case* or proceeding that could result in incarceration; (5) information that the lawyer knows or reasonably should know is likely to be *inadmissible as evidence* in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or (6) the *fact that a defendant has been charged with a crime, unless* there is included therein a statement explaining that the charge is merely an accusation and that the *defendant is presumed innocent until and unless proven guilty*.

Id.(emphasis added).

51. *See* ABA, *Variations of the ABA Model Rules of Professional Conduct*, http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_6.authcheckdam.pdf (last visited May 24, 2014) (showing state rules containing the list of presumptively prejudicial statements, including Alabama, Indiana, Michigan, Mississippi, New Hampshire, New York, Texas, and West Virginia).

52. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. [1] (emphasis added).

53. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.4 cmt., at 130 (3d ed. 1993), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

"[t]he public has a right to know about threats to its safety and measures aimed at assuring its security."[54]

In addition to Rule 3.6, MRPC 3.8(f) applies specifically to prosecutors and requires that prosecutors "refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[55] Although facially seeming to impose a more stringent standard on prosecutors, the comments explain that Rule 3.8 is not "intended to restrict the statements which a prosecutor" is expressly allowed to make under Rule 3.6.[56] The Annotated Model Rules do not appear to treat MRPC 3.8 as imposing a higher standard for prosecutors.[57]

2. Applying In-Court Restrictions to Extrajudicial Speech

Professor Lonnie Brown embraces the current compromise and the standard of MRPC 3.6, but notes that problematic publicity persists. Thus, Brown argues that an appropriate solution is to treat attorney statements to the press as if filed in court.[58] His proposal would require attorneys to file transcripts of any statements made to the press, and then subject such statements to the same regulations as in-court speech.[59] Brown argues that his "proposal's incursion on purported First Amendment rights is . . . slight."[60] But an objective review of the proposal indicates otherwise. Courtroom speech, as Professor Frederick Schauer aptly described, is subject to an "omnipresence" of regulation.[61] Brown justifies the constitutionality of his proposal by citing to *Gentile* for the proposition that lawyer speech can "be regulated under a less demanding standard" than restrictions on the press.[62]

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54. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. [1].

55. *Id.* at R. 3.8(f).

56. *Id.* at R. 3.8 cmt. [5].

57. *See* ELLEN J. BENNETT et al., CTR. FOR PROF'L RESPONSIBILITY, ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT R. 3.8 annot. (7th ed. 2011) ("Subsection (f) prohibits a prosecutor from making extrajudicial comments that 'have a substantial likelihood of heightening public condemnation of the accused,' *except for certain 'legitimate' statements necessary to inform the public of the proceedings*." (emphasis added)).

58. *See* Brown, *supra* note 17, at 138 (arguing that the court of public opinion should be viewed as a decision-making courtroom and lawyers should be subject to the rules applicable to courtroom speech in order to create necessary accountability for extrajudicial statements).

59. *Id.* at 138–39.

60. *Id.* at 145.

61. Frederick Schauer, *The Speech of Law and The Law of Speech*, 49 ARK. L. REV. 687, 691 (1997) (noting the omnipresence of speech regulation in law, specifically using the examples of securities regulation and the rules of evidence, an omnipresence that Schauer describes as "unencumbered by either the doctrine or the discourse of the First Amendment").

62. Brown, *supra* note 17, at 143 (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1074 (1991)).

3. Freedman and Starwood's Non-Compromise

Professor Monroe Freedman and Janet Starwood operate on the premise that while the Constitution guarantees an accused a fair trial by an impartial jury, it does not guarantee the State "[a] judicial process untainted by prejudice against the prosecution."[63] Thus, for a criminal defense attorney, the traditional interests being compromised are aligned: the *defendant* has a Sixth Amendment right to a fair trial and the defendant and defense attorney have free speech rights. For defense attorneys and their clients, there is no need to compromise.[64] On the other hand, Freedman and Starwood argue that prosecutors, in light of their government role, "may be forbidden to publish out-of-court attacks that might violate a defendant's fifth and sixth amendment rights to due process."[65]

In a more recent publication, Professor Monroe Freedman and Professor Abbe Smith have succinctly argued that "[p]rosecutors who make statements pursuant to their official duties are *not* protected by the First Amendment," under the Supreme Court's 2006 decision, *Garcetti v. Ceballos*.[66] Thus, Freedman's "non-compromise" is complete. There is no compromise between a defendant's right to fair trial and her attorney's right to free speech; there is also no compromise between a prosecutor's lack of First Amendment rights and his obligation to protect the defendant's right to a fair trial.

Nevertheless, the *Gentile* Court's constitutional emphasis on equal regulation of criminal defense and prosecutor pretrial publicity has undermined acceptance of Freedman and Starwood's approach. *The Restatement (Third) of the Law Governing Lawyers (Restatement)* acknowledges the appeal of Freedman and Starwood's double standard, but states that the "*Gentile* decision removes the constitutional basis for such arguments."[67]

C. *The First Amendment Strongly Protects Attorney Pretrial Publicity*

Professor Erwin Chemerinsky has forcefully argued that the First Amendment should protect attorney pretrial publicity. Applying normal First Amendment analyses, Chemerinsky argues that strict scrutiny is required for what is clearly a content-based restriction on political

63. Freedman & Starwood, *supra* note 10, at 612.

64. *Id.* at 618.

65. *Id.* at 617.

66. FREEDMAN & SMITH, *supra* note 11, at 306 n.99 (emphasis added) (citing Garcetti v. Ceballos, 547 U.S. 410, 421 (2006)).

67. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109 reporter's note (2000).

speech.[68] Chemerinsky then argues that MRPC 3.6 does not pass strict scrutiny—even though ensuring fair trials is a compelling state interest—because restricting attorney speech is "not necessary to obtain a fair trial."[69] Chemerinsky argues there is insufficient evidence showing that juries are prejudiced by attorney publicity,[70] and even assuming publicity prejudices juries, there are less restrictive alternatives to preserve a fair trial.[71] These alternatives include searching voir dire, change of venue, postponing trial, clear instructions to juries about what can be considered, and sequestration of the jury.[72]

Chemerinsky recommends, as a constitutional limitation on pretrial publicity, the actual malice standard adopted by the Supreme Court for defamation in *New York Times v. Sullivan*.[73] As with defamation, Chemerinsky argues that violations must be proven by clear and convincing evidence,[74] the regulating body must prove the attorney's statements were in fact false,[75] and the attorney must have a "subjective awareness of probable falsity."[76] Under such a standard, nearly all pretrial publicity from the prosecution and defense is constitutionally protected.

In a similar vein, Judge (then Professor) Scott Matheson has argued that prosecutors should have strong free speech rights to engage in pretrial publicity, and "should not be subject to regulation unless it poses a serious and imminent threat of prejudice to a judicial proceeding."[77] Although Matheson proffers a multifactor test, the ultimate outcome generally protects prosecutor pretrial publicity, giving prosecutors "more latitude than many," including Matheson, "think is wise or prudent."[78]

D. *Structural Signaling*

Professor Peter Margulies recently posited that First Amendment protection for lawyers should (and constitutionally can) be limited when the regulated speech would otherwise lead to what Margulies terms a "signaling spiral"[79]—"a race to the bottom"[80]—that threatens "the integrity

68. *See* Chemerinsky, *supra* note 14, at 863–67.
69. *Id.* at 881.
70. *Id.* at 881–83.
71. *See id.* at 883.
72. *Id.*
73. 376 U.S. 254, 279–80 (1964) (setting forth the actual malice standard); Chemerinsky, *supra* note 14, at 885.
74. Chemerinsky, *supra* note 14, at 885–86.
75. *Id.* at 886.
76. *Id.*
77. Scott M. Matheson, Jr., *The Prosecutor, the Press, and Free Speech*, 58 FORDHAM L. REV. 865, 931 (1990).
78. *Id.* at 932–33.
79. *See* Margulies, *supra* note 15, at 324, 377.
80. *Id.* at 324–25.

and utility of adjudication."[81] Margulies uses attorney pretrial publicity as one of his prime examples of problematic signaling spirals.[82] Margulies argues that without limits on pretrial publicity "each side would try its case in the media"—"[p]rosecutors would practice character assassination on defendants, and defense counsel would reply in kind, triggering a spiral that made the actual trial an afterthought."[83] Margulies maintains that without judicial regulation of pretrial publicity, "[t]here is no natural break to this process," and further suggests that alternative remedies, such as voir dire, would be inadequate to prevent or cure prejudice.[84]

E. *Ignoring the First Amendment Problem*

A number of scholars ignore possible First Amendment limitations and focus solely on what would be prudent guidelines for attorneys to follow, absent considerations of constitutionality. Professor Gerald Uelmen addresses solely "the *ethical* dimensions of trial publicity" because "the fact that we have a right to do something does not mean it is the right thing to do."[85] Similarly, Professor Judith L. Maute "urges all persons involved with either prosecution or defense of criminal matters steadfastly to refrain from all, or practically all, extrajudicial communications" but notes that whether such restraints "can withstand First Amendment challenge is beyond the scope of [her] essay."[86] Finally, Professors Kevin Cole and Fred Zacharias discuss "the propriety of lawyer statements to the press" apart from the constitutionality of restrictions thereon.[87]

In a related vein, scholars have argued for more stringent restrictions on pretrial publicity, resolving any First Amendment concerns with a cite to *Gentile* without seriously examining whether it would be constitutional to adopt their proposed regime. For example, Professor Laurie Levenson simply asserts that "First Amendment rights are not absolute"[88] and mentions *Gentile*.[89] Levenson argues that states should model their professional conduct rules on the prohibitions on Department of Justice employee pretrial publicity found in the Code of Federal Regulations

81. *Id.* at 349.

82. *See id.* at 347.

83. *Id.*

84. *Id.*

85. Gerald F. Uelmen, *Leaks, Gags and Shields: Taking Responsibility*, 37 SANTA CLARA L. REV. 943, 943 (1997).

86. Maute, *supra* note 17, at 1746.

87. Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627, 1629–30 (1996).

88. Levenson, *supra* note 17, at 1027 & n.22 (citing scholarship for proposition that lawyer speech can be regulated based on *Gentile* principles).

89. *Id.* at 1029–30.

(CFR),[90] which are far more restrictive than *Gentile*'s standard and are not equally imposed on the defense.[91]

Similarly, the *Restatement* adopts "substantial likelihood of materially prejudicing a juror" as the standard for all lawyers, but adds an additional standard forbidding prosecutors from "making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused."[92] The *Restatement* justifies these "*heightened* limitations on extrajudicial comment" by positing that prosecutors "have significantly diminished free-expression rights to comment publicly on matters in which they are officially involved as advocates" and thus "prohibitions . . . can be more extensive" than for other attorneys.[93] The *Reporter's Note* to the *Restatement*, citing solely pre-*Gentile* caselaw,[94] does not explain the constitutional theory justifying this deviation from the equality principle of *Gentile*. Indeed, the *Reporter's Note* rejects Freedman and Starwood's double standard precisely because of *Gentile*'s equality principle.[95]

II. THE ACCESS-TO-JUSTICE THEORY OF THE FIRST AMENDMENT

Normal First Amendment doctrines are ineffective in the context of regulating attorney speech. They fail to protect attorney speech that is essential to the attorney's role in the justice system, and they also fail to identify what attorney speech restrictions are necessary for the proper functioning of the attorney in the justice system.[96] Pretrial publicity is no exception to this problem. Just as the Supreme Court has adopted a role-specific method for examining speech rights of public employees,[97] a

90. *See id.* at 1026–27 ("States should model their own rules after the Code of Federal Regulations."); *see also* 28 C.F.R § 50.2 (2011).

91. *See* 28 C.F.R. § 50.2 (b)(3) (establishing limitations on pretrial disclosures in criminal cases); *id.* § 50.2(b)(6)(v) (providing that personnel from the Department of Justice should refrain from making statements regarding evidence or argument available, "whether or not it is anticipated that such evidence or argument will be used at trial").

92. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109 (2000).

93. *Id.* § 109 cmt. e. (emphasis added).

94. *Id.* § 109 reporter's note, cmt. e. The citations for comment (e) are to a state case and two federal circuit cases that pre-date the 1991 *Gentile* decision. *Id.* (citing Henslee v. United States, 246 F.2d 190, 193 (5th Cir. 1957); United States v. Simon, 664 F. Supp. 780, 795–96 (S.D.N.Y. 1987); *In re* Lasswell, 673 P.2d 855, 858 (Or. 1983)).

95. *See id.* § 109 reporter's note (stating that the *Gentile* Court's approval of the substantial likelihood standard removes the constitutional basis for those who argue that the bar against pretrial publicity should apply only to prosecutors).

96. *See* Tarkington, *supra* note 22, at 52–54 (discussing the flaws in the application of normal First Amendment doctrines to the context of attorney speech).

97. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968) (rejecting the view that public employees may be constitutionally compelled to relinquish First Amendment rights, the Court noted nonetheless that the State has "interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech

specialized method is necessary to properly protect and restrict attorney speech.

The access-to-justice theory that this Article advocates attunes attorney speech protection to the essential functions of the attorney in the justice system.[98] This approach is grounded in established free speech theories and philosophy. Philosopher Ludwig Wittgenstein posited that speech itself can only be understood as part of the "form of life" in which it exists.[99] Thus, viewing the justice system as a desirable "form of life," attorney speech must be understood as part of, and as securing, the proper and constitutional functioning of the justice system.

More specifically, the access-to-justice theory is modeled on a democratic theory of the First Amendment, as initially propounded by Professor Alexander Meiklejohn.[100] Just as citizen free speech is essential to the proper functioning of a democratic government,[101] so too, under the access-to-justice theory, certain species of attorney speech are essential to the proper functioning of the justice system and must be protected accordingly.[102]

Attorneys—through their speech—play a key role in our justice system. They provide clients with speech that has the force of law, speech necessary for effective access to the judiciary, and speech intended to invoke or avoid the power of government in securing life, liberty, or property. The access-to-justice theory proposes that where attorney speech is key to providing or ensuring access to justice or the fair administration of the laws, it is entitled to protection under the Free Speech Clause.[103]

In developing the access-to-justice theory, I began by identifying those areas of speech at the core of the attorney's role in our justice system, areas that therefore require First Amendment protection.[104] Moreover, where the

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of the citizenry in general" and thus created a standard specific for analyzing cases involving the speech rights of public employees).

98. *See generally* Tarkington, *supra* note 22, 58–94 (setting forth the access-to-justice theory for evaluating restrictions on attorney speech).

99. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 11 (trans. G.E.M. Anscombe, 1953) (emphasis omitted) ("[T]he *speaking* of language is part of an activity, or of a form of life."); *accord* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 547 (1988) (arguing that advantages of formalist interpretations of language depend on the domains in which they are used).

100. *See generally* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT, 22–27 (1948) (using traditional American town meetings to illustrate and answer the difficulties of the paradox of freedom as it is applied to speech).

101. *See id.* at 26–27.

102. Tarkington, *supra* note 22, at 61–63.

103. *See id.*

104. *See id.* at 62–63. The areas identified for core protection include: (1) attorney speech that invokes law and legal protection; (2) attorney advice regarding the lawfulness or unlawfulness of proposed or past client conduct; (3) attorney speech necessary to access courts and raise relevant and colorable legal arguments in adjudicative proceedings; and (4) attorney speech necessary to preserve the constitutional rights of individuals. Such speech is essential to the role of the lawyer in

role of the attorney includes challenging and checking government power, the access-to-justice theory protects the attorney's speech in making such a challenge. This "checking value" of the attorney in our system of justice is a primary justification for protecting certain types of attorney speech and it resonates with the core purposes underlying the First Amendment as expounded by Professor Vincent Blasi.[105]

Nevertheless, there are also *restrictions* on attorney speech that are essential to preserve the integrity of our justice system. Alexander Meiklejohn uses the town meeting as an example of his democratic theory.[106] Although political speech is absolutely protected in town meetings, it is and must be abridged in some ways—for example, through rules and regulations about who speaks and when they speak on order by the chair, etc.[107] The abridgment is necessary to accomplish the governmental purpose in holding the town meeting.[108] While manipulation of the process cannot be allowed—for example, through abridging just one side of an issue—abridgment through creating rules of the game is essential to preserve the process itself.[109]

In like manner, certain restrictions on attorney speech are essential to preserve the judicial process and overall justice system in which attorneys work. Thus, the corresponding point of the access-to-justice theory is that there should *not* be protection for attorney speech that frustrates or undermines the justice system—regardless of whether citizens would enjoy protection for the same speech. For example, under the access-to-justice theory, it is constitutional for states to forbid attorneys from referring to inadmissible evidence during a trial.[110] Similarly, states can prevent attorneys from using government power—in the form of law invocation or legal advice—to perpetrate crimes or frauds.[111] It is immaterial that other

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our system of justice and should be afforded core protection and subjected to strict scrutiny, similar to political speech. *Id.*

105. *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (arguing that the "checking value"—"the value that free speech . . . can serve in checking the abuse of power by public officials"—was a primary purpose underlying the First Amendment).

106. *See* MEIKLEJOHN, *supra* note 100, at 22–27.

107. *See id.* at 23–26.

108. *Id.* at 23 ("The town meeting, as it seeks for freedom of public discussion of public problems, would be wholly ineffectual unless speech were thus abridged.").

109. *See id.* at 23–27 (arguing that citizens may not be barred from exercising their freedom of speech at town hall meetings "because their views are thought to be false or dangerous," but those same citizens may have their speech limited by rules and procedures necessary to engage in practical self-governance—the purpose for holding the town hall meeting—).

110. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.4(e) (2014) (barring attorneys from alluding "to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence" in trial).

111. *See id.* at R. 1.2(d).

citizens enjoy free speech rights under *Brandenburg v. Ohio*[112] to advocate even the most unlawful actions. Because of their role in the system of justice and their tie to government power, attorneys do not have such a right when assisting and advising clients.[113]

Of course, in between these two extremes there are likely categories of attorney speech that are neither essential to the proper functioning of the justice system nor frustrating to that system. In such instances, the normal doctrines of the First Amendment may provide the appropriate framework. But where attorney speech is tied to government power and affects the workings of the justice system, the scope of appropriate protection and restriction under the First Amendment must be attuned to the attorney's role in the justice system.

The problem of First Amendment protection for attorney pretrial publicity is alleviated by this approach. Under the access-to-justice theory, rather than viewing free speech aspects of pretrial publicity as a compromise between incompatible constitutional rights to a fair trial and lawyer free speech, the lawyer's free speech right is itself defined by the lawyer's role in and the proper functioning of the justice system. Thus, the appropriate scope of free speech protection for attorney pretrial publicity is determined by examining the respective roles of the prosecutor and defense attorney in the criminal justice system and the effects of pretrial publicity by each on the proper functioning of that system.

It is important to emphasize what the existence and absence of a First Amendment right means. If there is a First Amendment right to engage in pretrial publicity, then government regulators (such as a state bar or the federal government in the CFR) cannot limit pretrial publicity except in compliance with that right. If there is not a First Amendment right to engage in pretrial publicity then governmental entities are able to regulate and restrict attorney pretrial publicity, but they are not required to restrict such publicity.

III. REPRESENTATION IN THE CRIMINAL JUSTICE SYSTEM

There are several factors that make representation in the criminal justice system different from lawyer representation in other contexts. In determining the appropriate scope of First Amendment protection for pretrial publicity in the criminal justice system, it is important to recognize

112. *See* Bradenburg v. Ohio, 395 U.S. 444, 447 (1969) (holding that the constitution forbids states from prohibiting speech that advocates violating laws or using force "except where such advocacy is directed to inciting or producing imminent lawless action *and* is likely to incite or produce such action" (emphasis added)).

113. Tarkington, *supra* note 22, at 83–84 (discussing why the *Brandenburg* standard should be inapplicable to attorney legal advice and arguing that attorneys constitutionally can be forbidden from using "government power—in the form of law or legal advice—to perpetrate crimes or frauds" even if their speech would not incite imminent lawless or violent action)).

these differences and how they produce differing obligations, incentives, and duties for the prosecution and the defense. Those incentives and obligations affect the willingness of attorneys to engage in pretrial publicity, the harm to the accused, and the public's perception of that publicity.

A. *Heightened Constitutional Significance of Life and Liberty*

As Professor Geoffrey Hazard has argued, "the legal profession's traditional ideal viewed the lawyer as the protector of life, liberty, and property through due process."[114] Under the access-to-justice theory, the role of the lawyer in protecting life, liberty, and property is not merely a means for understanding a lawyer's professional responsibilities; rather, it is a key for properly shaping attorney-speech protection.

In considering attorney speech in the criminal justice system, it is important to recognize that the Constitution affords greater protection to life and to liberty than it does to property. As noted by Justice Wiley B. Rutledge in his *Bowles v. Willingham* concurrence, civil proceedings generally involve "rights of property, not of personal liberty or life as in criminal proceedings."[115] While deprivations of property are "serious," Justice Rutledge argues they "are not of the same moment under our system" of justice as criminal deprivations of life and liberty.[116] This divergence is apparent from the fact that the Constitution itself expressly mandates specific procedural protections for criminal deprivations, which are simply not applicable in the civil context.[117] Justice Rutledge acknowledges such procedural differences and concludes: "It is in this respect perhaps that our basic law, following the common law, most clearly places the rights to life and to liberty above those of property."[118] Additionally, the Suspension Clause[119]—forbidding Congress from suspending the writ of habeas corpus absent rebellion or invasion—underscores the Founder's preferential protection for life and liberty and for freedom from unlawful restraint or incarceration.[120]

The use of state power and processes by attorneys in the criminal justice system to either secure or deprive individuals of life and liberty is therefore a particularly weighty concern. Recognizing the constitutional weight afforded to governmental deprivations of life and liberty foreshadows that

114. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1266 (1991); *accord* FREEDMAN & SMITH, *supra* note 11, at 15–16.

115. 321 U.S. 503, 521–29 (1944) (Rutledge, J., concurring).

116. *Id.* at 525.

117. *See id.*

118. *Id.*

119. U.S. CONST. art. I, § 9, cl. 2.

120. *See* Boumediene v. Bush, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.").

speech essential to securing life and liberty may call for greater protection, while speech that may undermine individuals' rights to life and liberty may be subject to greater restriction.

B. *Obligations to Undertake and Continue the Representation*

One primary and publicly recognized difference between the prosecution and the defense is that the prosecution is only supposed to bring charges and pursue them through trial if they are supported by probable cause.[121] Thus, if evidence does not support bringing charges against the accused, the prosecution should drop the charges. Consequently, the very existence of charges against an individual is a public statement that the prosecutor has obtained sufficient evidence of guilt to create probable cause to charge that person. The fact that the prosecutor is undertaking or continuing the representation against the accused indicates to the public the prosecutor's belief, at some level, in the validity of the cause and the likely guilt of the defendant.

Yet, the fact of representation by the criminal defense attorney carries no such weight or implication. Criminal defendants have a constitutional right to the effective assistance of counsel.[122] The public understands (and rightly so) that even the most culpable criminal defendants guilty of the most heinous crimes are provided an attorney. Because the availability of representation for the defendant is constitutionally required, the public may seriously doubt that the defense attorney believes in her client's cause—indeed, for all the public knows, the defense attorney may even know her client is guilty. Thus, the defense attorney may need to publicly indicate some level of belief in her client's cause because the simple fact of representation will not imply it.

C. *Duty Not to Disclose Information Relating to the Representation*

It is "[a] fundamental principle in the client-lawyer relationship [] that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."[123] Outside of extremely limited exceptions, attorneys are forbidden from disclosing information learned in the course of a representation to the press or others,[124] unless the client gives informed consent to the disclosure or the attorney is impliedly

121. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2014) ("The prosecutor in a criminal case shall: (a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause . . . .").

122. *See* U.S. CONST. amend. VI; Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) ("The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

123. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2014).

124. *See id.* at R. 1.6.

authorized to make the disclosure for the representation.[125] The professional duty of confidentiality is very broad.[126] And lawyers do not obtain a First Amendment right to disclose client information just because it involves information that is political, of public concern, involves public figures, or because of the corresponding right of the press or the public to receive such information. The duty of confidentiality specifically silences the attorney, but not others who may have the same information.[127] Attorneys have not generally challenged confidentiality requirements under the First Amendment.[128] Rather, attorneys generally understand that confidentiality requirements are essential to their role in the system of justice for obtaining full information from the client and using that information to invoke or avoid government power on behalf of the client.[129] However, it would frustrate the system of justice, and undermine client disclosure and trust, for an attorney to instead publicize such information to the embarrassment and detriment of the client. The client provides information to the attorney for the express purpose that the attorney, endowed with a law license from the state, will be able to use the information to invoke or avoid government power on the client's behalf. As an essential component of the role of the lawyer in the justice system, states can constitutionally prohibit attorneys from disclosing confidential information, absent client consent, outside of what is necessary for the attorney to fulfill that role.

Thus, before disclosing information to the press, the criminal defense attorney should communicate to the client her desire to publicize information relating to the representation and receive the client's consent to the disclosure.[130] There may be some situations in which the defense

125. *Id.* at R. 1.6(a); *see also id.* at R. 1.6 cmt. [5] (explaining that "a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation").

126. *See id.* at R. 1.6(a) (stating that generally, "[a] lawyer shall not reveal information relating to the representation of a client"); *id.* at cmt. 3 (explaining that the attorney's duty of confidentiality "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source").

127. *See id.* at R. 1.6 cmt. [1] ("This Rule governs the disclosure *by a lawyer* of information relating to the representation of a client during the *lawyer's representation of the client*." (emphasis added)).

128. However, in a recent case, the Supreme Court of Virginia held that it would violate an attorney's First Amendment rights for the State to discipline him under Rule 1.6 for blogging about embarrassing information regarding clients in concluded cases, where the information had been contained in public court proceedings. *See* Hunter v. Va. State Bar, 744 S.E.2d 611, 620 (Va. 2013). Under the access-to-justice theory, the Virginia Supreme Court's decision is incorrect. There are many restrictions on attorney speech that are essential to the proper functioning of the attorney's role in the system of justice, and, for the reasons noted in the text, confidentiality is one of them.

129. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (noting that the duty of confidentiality is the "hallmark of the client-lawyer relationship" and that it encourages frank and full communication between lawyer and client).

130. *See id.* at R. 1.6(a) ("A lawyer shall not reveal information relating to the representation

attorney's public statements are impliedly authorized to carry out the representation.[131] Ideally, and when feasible, a defense attorney will communicate with the accused and receive consent even in such situations.[132]

Prosecutors, in contrast, do not represent individual clients, but instead represent the sovereign.[133] In that role, the prosecution acts as agent and principal.[134] Yet, prosecutors obtain information about the accused solely because of their governmental role to exercise state criminal power.[135] Further, the information is provided to them from the investigative arm of the State, which obtained information through the exercise of coercive state power. If prosecutors were not representing the sovereign, they simply would not have access to the personal and highly derogatory information regarding the alleged criminal conduct of others. It is the People who have granted police powers to the State in our democratic compact. The State is to exercise its investigative powers and to provide such information to prosecutors for the sole purpose of executing the criminal law and fulfilling society's interests in deterrence, incapacitation, retribution, and rehabilitation.

Just as defense attorneys do not have a First Amendment right to disclose confidential information, prosecutors should not have a First Amendment right to publish information relating to the representation obtained solely through the exercise of state power—except when the publication is necessary to society's purpose in granting access to such information: namely, the investigation and prosecution of a particular crime.[136] Unnecessary publication of such information undermines the integrity of the government's coercive power to obtain information despite privacy rights, and, as discussed below, can undermine the constitutional rights of the accused.[137]

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of the client *unless the client gives informed consent* . . . ." (emphasis added)).

131. *See, e.g.*, *id.* at R. 1.6 cmt. [5] (2011) (providing examples of circumstances in which disclosure of confidential client information is implicitly authorized).

132. *See id.* at R. 1.4(a)(1) (requiring attorneys to "promptly inform the client of any decision or circumstance with respect to which the client's informed consent . . . *is required by these Rules*" (emphasis added)).

133. *See* Berger v. United States, 295 U.S. 78, 88 (1935) ("The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern all . . . .").

134. R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2–3 (2005).

135. *See* Bruce A. Green, *Why Should Prosecutors "Seek Justice?,"* 26 FORDHAM URB. L.J. 607, 626 (1999) (providing that, because of the prosecutor's special relationship with the sovereign, the prosecutor "wield[s] not only superior financial resources but also the human resources of police departments or other investigative agencies").

136. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(f).

137. *See infra* Subsections IV.A.2–5 (explaining that the prosecution should not undermine a defendant's right to a presumption of innocence, coerce an unjust plea, exacerbate harm to a defendant's reputation, or undermine the defendant's right to a fair trial).

Additionally, the incentives for disclosure are often different for the prosecution than they are for the defense. The prosecutor, acting as agent and principal, is not an actor in the underlying case—her actions and the actions of her client (hopefully) are not generally part of the alleged crime or controversy. While the defendant and his counsel may likely desire confidentiality regarding the case, the prosecutor may have no personal interest in confidentiality regarding the underlying facts of the case (unless, for example, such publicity would indicate abuse of state power). This difference arises because the information the prosecutor learns and discloses is primarily about third persons rather than her own client. Thus, a prosecutor will often have access to damaging information about the accused, while the defense generally will not have any information that would be harmful to the prosecution or her government client. In such cases, without restrictions on publicity, the prosecution can use information obtained through state coercive power to the detriment of the accused, undermining constitutional protections without fear of any similar harm recurring to herself or her client.

IV. PRETRIAL PUBLICITY RIGHTS UNDER THE ACCESS-TO-JUSTICE THEORY

Under the access-to-justice theory, and in light of the differences just outlined, it is essential to examine the roles of the prosecutor and the defense attorney to determine whether engaging in pretrial publicity is essential to either role (and thus requires protection) or frustrates that role (and thus lacks First Amendment protection).

A. *The Role and Concomitant Speech Rights of the Prosecutor*

Prosecutors play a very unique, specific, and important role in our justice system. As a representative of the sovereign, the prosecutor represents society collectively[138] in undertaking the sovereign's "awesome power to bring criminal charges" against individuals.[139] Thus, the central job of the prosecutor is to deprive individuals of life, liberty, and property, which must be done through just and constitutionally mandated processes. Both the prosecutor and the defendant—as well as any victims—are members of the society the prosecutor represents.[140] Professor R. Michael Cassidy elaborates that "[u]nlike other advocates . . . the prosecutor has obligations of even handedness precisely because he does not represent an individual but rather the collective good,"[141] which requires that "all of

138. CASSIDY, *supra* note 134, at 2–3.

139. Mosteller, *supra* note 20, at 1366.

140. *See id.* (noting that while the prosecutor is primarily a representative of the accuser—the sovereign—the prosecutor also represents other constituencies, including the public and the public interest).

141. CASSIDY, *supra* note 134, at 3.

[society's] members are treated fairly and protected from governmental overreaching."[142] As explained in the ABA Prosecution Function Standards, "it is fundamental that the prosecutor's obligation is to *protect the innocent* as well as to *convict the guilty*, to *guard the rights of the accused* as well as to *enforce the rights of the public*."[143] For "[t]he duty of the prosecutor is to seek justice, not merely to convict,"[144] and *not* to "*maximize* potential punishment."[145] The prosecutor's actions should reflect society's valid criminal justice interests in ascertaining guilt and allocating punishment in accord with deterrence, incapacitation, retribution, or rehabilitation. It may be that the defendant is innocent, or is guilty of a lesser offense, or that a lesser punishment or even no punishment is the just result. Overarchingly, "the prosecutor's obligation is . . . to take steps to ensure an accurate result through a fair process."[146] In an oft-quoted passage, the Supreme Court eloquently explained:

> The United States Attorney *is the representative* not of an ordinary party to a controversy, but *of a sovereignty* whose obligation to govern impartially is as compelling as its obligation to govern at all; and *whose interest*, therefore, in a criminal prosecution *is not that it shall win a case, but that justice shall be done*. As such, he is in a peculiar and very definite sense the servant of the law, *the twofold aim of which is that guilt shall not escape or innocence suffer*. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much *his duty to refrain from improper methods calculated to produce a wrongful conviction* as it is to use every legitimate means to bring about a just one.[147]

As examined in *Gentile*, the traditional compromise for pretrial publicity is between free speech and the Sixth Amendment right to a fair trial.[148] Similarly, the *Restatement* identifies as the primary concern publicity that interferes with the trial proper.[149] Yet, the prosecutor's role is not limited to trying cases. The prosecutor plays several key roles in the system of justice from the investigative stage, to the filing of charges, to

142. *Id.*

143. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION STANDARDS § 3-1.2, cmt., at 5 (3d ed. 1993) (emphasis added), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

144. *Id.* § 3-1.2(c).

145. CASSIDY, *supra* note 134, at 2–4.

146. *Id.* at 3–4.

147. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

148. *See supra* Section I.B.

149. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 109, 109 cmt. b, 109 cmt. d (2000).

bargaining for pleas, to the trial itself. Prosecutorial pretrial publicity can undermine important interests at each of these stages, including both constitutionally-mandated interests and interests defined by the role of the prosecutor to seek justice.

The failure to recognize these other interests is not harmless. Attorney discipline for violating pretrial publicity rules has often been based on the timing of the statements and their potential to undermine the trial itself—with the assumption that the preservation of a fair trial is the primary interest affected by pretrial publicity.[150] Thus, if statements are made well before trial, an attorney may avoid discipline.[151] Because approximately 95% of state and federal criminal cases are not tried, but are pled,[152] the prosecutor can engage in whatever publicity she wishes—negatively affecting the interests of the accused—without risking discipline for violating the rule. But in addition to affecting a fair trial, prosecutorial pretrial publicity can undermine the presumption of innocence, interfere with an accused's ability to obtain a fair plea, and ruin a defendant's reputation and liberty—even if all charges are ultimately dropped or the defendant is ultimately acquitted.

1. Free Speech Right to Publish the Indictment

When attorney speech protection is properly attuned to the role of the attorney in the justice system, there are instances in which attorneys have greater free speech rights than nonlawyer citizens. As Freedman and Starwood recognized, "in at least one important respect, the prosecutor's rights of expression are broader than those of the ordinary citizen."[153] Namely, "the prosecutor is specially privileged . . . to go beyond the bounds that normally restrict other citizens by publishing charges in an

150. The ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT for Rule 3.6 state that "timing has proved to be an important criterion in assessing [a statement's] potential for prejudice." BENNETT et al., CTR. FOR PROF'L RESPONSIBILITY, *supra* note 57, § 3.6 annot.

Similarly, the Restatement identifies as a primary concern, comments that contaminate a jury or influence a prospective witness—both concerns directed solely at publicity that interferes with the trial proper. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109(a), 109 cmt. b (2013). In comment (d), the Restatement explains that the substantial likelihood of material prejudice prohibition "deals *only* with public comment by an advocate likely to reach a lay factfinder or witness through the media." *Id.* § 109 cmt. (d) (emphasis added).

151. *See* BENNETT et al., CTR. FOR PROF'L RESPONSIBILITY, *supra* note 57, § 3.6 annot. (noting that the timing of the lawyer's statement is an important criterion in determining whether the lawyer's statement will be "the subject of a disciplinary proceeding or a motion in a pending proceeding"). The Restatement explains that "timing may be relevant," and thus, "a statement made long before a jury is to be selected presents less risk." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 109, cmt. c.

152. *See* JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PROSECUTING CRIME 1016 (4th ed. 2010).

153. Freedman & Starwood, *supra* note 10, at 617.

indictment that might otherwise constitute defamation."[154] Prosecutors appropriately are protected in making statements as part of their advocacy function in initiating or presenting the State's case, which includes publishing charges in an indictment.[155] Indeed, they have absolute immunity in performing those functions, meaning "prosecutors are immunized even when the plaintiff establishes that the prosecutor acted intentionally, in bad faith, and with malice."[156] Although lay persons under such circumstances would be subject to a defamation lawsuit—even by public officials and figures under the liberal *New York Times Co. v. Sullivan* standard[157]—prosecutors have a speech right to make statements in the indictment, regardless of motive or malice.

In a more recent publication, Freedman and Smith argue instead that prosecutors acting in their official capacities simply "are *not* protected by the First Amendment," citing *Garcetti v. Ceballos*.[158] In its broad pronouncements, *Garcetti* might be said to stand for such a proposition.[159] Nevertheless, other commentators have not read *Garcetti*'s holding as categorically foreclosing prosecutorial free speech rights,[160] and it would

154. *Id.*

155. *See, e.g.*, Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (explaining that prosecutor actions "in preparing for the initiation of judicial proceedings or for trial, and which occurr in the course of his role as an advocate for the State, are entitled to the protections of absolute immunity"); Imbler v. Pachtman, 424 U.S. 409, 431 (1976) (recognizing absolute immunity for prosecutor's conduct "in initiating a prosecution and in presenting the State's case").

156. Margaret Z. Johns, *Reconsidering Absolute Prosecutorial Immunity*, 2005 BYU L. REV. 53, 54 & n.6 (noting that, in some cases, "prosecutors received absolute immunity for inducing perjury, failing to disclose exculpatory evidence, fabricating evidence and presenting false testimony, improperly influencing witnesses, initiating a prosecution without probable cause, and breaching plea agreements"). Johns argues that absolute immunity is not necessary to protect the judicial system and prosecutorial function and "the defense of qualified immunity will protect all but the most incompetent and willful wrongdoers." *See id*. at 55.

157. 376 U.S. 254, 279–80 (1964) (holding that public officials can only recover for defamation if the statement was made with actual malice, which requires a showing that the speaker knew the statement was false or made the statement with reckless disregard as to its truth or falsity).

158. FREEDMAN & SMITH, *supra* note 11, at 306 n.99 (4th ed. 2010) (emphasis added).

159. *See* Garcetti v. Ceballos, 547 U.S. 410, 421 (2006) ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 37 (2008) ("The breadth of *Garcetti*'s holding is remarkable. Under *Garcetti*, any duty-related speech of a public employee is denied constitutional protection, no matter how valuable its contribution to public discussion and debate . . . .").

160. *See, e.g.*, Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 4, 34 (2009) (proposing "a less deferential approach to assessing" government expression and arguing that *Garcetti* should apply only to "the speech of public employees that [the government] has specifically hired to deliver a particular viewpoint that is transparently governmental in origin and thus open to meaningful credibility and accountability checks by the public"); Rosenthal, *supra* note 159, at 39 (arguing that the Court in *Garcetti* embraced a new First Amendment inquiry that focuses on "an identification of

compound the errors of that case to do so. The *Garcetti* Court held that a deputy district attorney, Richard Ceballos, could be punished by his employer for his speech in fulfilling what he understood were his obligations under *Brady v. Maryland*[161] to provide exculpatory materials to the defense.[162] Without examining whether the materials fell within *Brady*'*s* requirements, the Court held that when "mak[ing] statements pursuant to their official duties," government employees "are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[163]

As indicated by the access-to-justice theory, *Garcetti* was wrongly decided.[164] The prosecutor's right to engage in speech that is essential to the role of the prosecutor as a minister of justice—including speech that secures the rights of the accused—is a prime example of speech essential to the system of justice and entitled to core free speech protection. Thus, even if *Garcetti* did stand for the proposition that prosecutors do not have First Amendment rights for official duties, that would be a flawed approach for determining essential free speech rights of prosecutors. Moreover, as broadly as the Supreme Court painted in *Garcetti*, the case does not readily stand for the proposition that prosecutors have no First Amendment rights whenever acting as a prosecutor. The *Garcetti* Court did not even cite to *Gentile* or in any way indicate that its holding implicated (let alone overturned) *Gentile* or First Amendment rights of prosecutors to engage in pretrial publicity.

Although this paper will not catalog a prosecutor's speech rights, under the access-to-justice theory prosecutors do have First Amendment rights in their official capacities—including, at their core, free speech rights to fulfill their role in the system of justice. Prosecutors have speech rights to invoke government power on behalf of their sovereign client to protect the public interest and promote the fair administration of the laws, to initiate criminal proceedings, to access court processes and make relevant and colorable arguments therein, and to engage in speech that is necessary to protect the constitutional and legal rights of the accused.

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the scope of legitimate managerial prerogatives," which prerogatives extend "only to constitutionally permissible managerial objectives").

161. 373 U.S. 83 (1963).

162. *Garcetti*, 547 U.S. at 414–15, 421; *see also id.* at 442 (Souter, J., dissenting) (discussing Ceballos' belief that *Brady* required him to give to defense counsel an internal memorandum as exculpatory evidence).

163. *Id.* at 421 (majority opinion).

164. *See* Janet Moore, *Democracy and Criminal Discovery Reform after* Connick *and* Garcetti, 77 BROOK. L. REV. 1329, 1331–32 (2012) (arguing that *Garcetti* was wrongly decided and its ill-effects are exacerbated by the Supreme Court's *Connick v. Thompson*, 131 S. Ct. 1350 (2011) decision); Tarkington, *supra* note 22, at 91–95 (arguing that *Garcetti* is flawed and that its rule exacerbates problems surrounding prosecutorial disregard of *Brady*'s requirements); Margaret Tarkington, *Government Speech and the Publicly Employed Attorney*, 2010 BYU L. REV. 2175, 2176–79 (arguing that *Garcetti* was wrongly decided).

2. No Right to Undermine the Presumption of Innocence

The traditional compromise embraced in *Gentile* identifies the right to a fair trial as the sole competing interest with free speech.[165] Yet the prosecutor plays a central role in the system of justice, starting in the investigative stage and with the decision to bring charges. Prosecutorial pretrial publicity can affect the proper and constitutional functioning of the criminal justice system from the outset of a case. A notable example is the presumption of innocence—that a person is presumed innocent until proven guilty—which is a "basic rule of both criminal and constitutional law."[166]

Historically, the presumption had two separate and important components.[167] First, it constituted a "rule of proof," namely, that the prosecution bore the burden to prove guilt at trial.[168] Second, it was a "shield against punishment" before conviction, meaning that the accused could not be subjected to pretrial punishment and was to be treated with the dignity accorded to other presumptively innocent people in society.[169] In *Bell v. Wolfish*,[170] the Supreme Court appeared to limit the presumption of innocence as solely creating a "rule of proof" for trial and not having application pretrial.[171] The *Bell* Court recognized a separate due process right to protect criminal defendants from "punish[ment] prior to an adjudication of guilt."[172] Unfortunately, however, the Court defined that right so narrowly as to be ineffectual.[173]

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165. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1075 (1991) (Rehnquist, C.J., opinion of the court) (noting the Court's attempt to strike a balance between the "First Amendment rights of attorneys in pending cases and the State's interest in fair trials").

166. *See* Rinat Kitai, *Presuming Innocence*, 55 OKLA. L. REV. 257, 260 (2002).

167. *See generally* François Quintard-Morénas*, The Presumption of Innocence in the French and Anglo-American Traditions*, 58 AM. J. COMP. L. 107, 109–10 (2010) (tracing the historical understanding and application of the presumption of innocence in French, English, and American legal systems and showing that the presumption of innocence served, in both the civil law and the common law, as a pretrial protection against punishment as well as a rule of proof for trial).

168. *See id.* at 108–10.

169. *See id.* at 108–10, 148 ("The issue is ultimately . . . whether persons accused of crime are treated with the dignity and respect due to presumably innocent individuals.").

170. 441 U.S. 520 (1979).

171. *See id.* at 533. In *Bell*, the Court stated:

> The presumption of innocence is a doctrine that allocates the burden of proof in criminal trials; it also may serve as an admonishment to the jury to judge an accused's guilt or innocence solely on the evidence adduced at trial . . . . *But it has no application to a determination of the rights of a pretrial detainee* during confinement *before his trial has even begun*."

Id. (emphasis added).

172. *Id*. at 535.

173. The majority opinion established a standard for determining when a condition of pretrial detention constitutes punishment. *Id.* at 539. The Court determined: "[I]f a particular condition or

Nevertheless, some states have rejected *Bell* and still treat the presumption of innocence as applying and protecting the accused in pretrial contexts.[174] Further, recent scholarship has read *Bell* as limited to its factual context of addressing the constitutionality of conditions of confinement for those in pretrial detention.[175] Scholars have also grounded the presumption of innocence in the Due Process Clauses and the Sixth Amendment, arguing that the presumption declares fundamental constitutional law that serves the historical dual purpose of protecting individuals before trial and providing the appropriate burden of proof during trial.[176] Importantly, prosecutorial pretrial publicity can undermine both aspects of the presumption. First, prosecutorial pretrial publicity can expose the accused to punishment and loss of dignity and reputation prior to trial and conviction. Second, prosecutorial pretrial publicity can undermine the burden of proof at trial.

The pretrial purposes of the presumption are grounded in the Constitution and political theory. Professor Shima Baradaran has traced the constitutional history of the presumption back to the Magna Carta and to the early United States as an essential component of due process and of the constitutional compact between the individual and government.[177] Professor Rinat Kitai has similarly argued that the presumption of innocence "operates to balance the State's power against the freedom of the individual."[178] Kitai explains:

> The State's power to impose punishment on individuals is almost unlimited. Thus, there is great danger in granting the State an unlimited authority to use this power against the individual prior to his conviction . . . . The presumption of

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restriction of pretrial detention is reasonably related to a legitimate governmental objective, it does not, without more, amount to 'punishment.'" *Id.* Justice Stevens, in his dissent, challenged the majority's formulation and argued that "[i]t is readily apparent that this standard is nothing more than the 'rational basis' requirement." *See id*. at 584 n.15 (Stevens, J., dissenting). Justice Marshall similarly noted that the majority's test was "ineffectual" and "lacks any real content"—which Marshall found "unsupportable, given that all of these detainees are presumptively innocent and many are confined solely because they cannot afford bail." *See id.* at 563, 565 (Marshall, J., dissenting).

174. *See* Shima Baradaran, *Restoring the Presumption of Innocence*, 72 OHIO ST. L.J. 723, 766 & n.231 (2011) (noting the divergence among state courts as to the pretrial applicability of the presumption of innocence).

175. *See id.* at 776.

176. *See id.* at 727–37 (discussing due process and historical basis for the presumption of innocence); *see generally*, Shima Baradaran, *The Presumption of Punishment*, CRIMINAL LAW AND PHILOSOPHY (June 6, 2013), http://link.springer.com/article/10.1007/s11572-013-9236-7/fulltext.html (arguing the constitutional basis for pretrial presumption under historical due process and Sixth Amendment jury trial rights); Quintard-Morénas, *supra* note 167, at 107–10 (reviewing historical and constitutional understanding of presumption in French and Anglo-American law).

177. *See* Baradaran, *supra* note 176.

178. Kitai, *supra* note 166, at 280.

> innocence . . . prevents and limits the State from acting against a person until his conviction. *It constitutes the guarantee, for guilty and innocent persons alike, that the State cannot impose punishment prior to conviction* . . . . [I]f the imposition of measures of punishment were possible at any time prior to conviction, the individual could not be protected *from arbitrary and abusive behavior by the State*.[179]

Prosecutors are part of the enforcement arm of the state. They can literally destroy people's lives with their state power to charge and prosecute crime and with the damning information regarding others to which they are privy as part of their office. But the presumption of innocence checks that power. As Baradaran shows, this check on power is grounded in the Due Process Clauses and the Sixth Amendment: The State, including the prosecution, cannot impose punishment against an accused until they are convicted by a jury of the accused's peers.[180] Thus, quoting the Supreme Court's recent decision in *Southern Union Co. v. United States*,[181] Baradaran argues that the "jury acts 'as a bulwark between the State and the accused,'" prohibiting punishment until "'the prosecution has proved each element of an offense beyond a reasonable doubt.'"[182]

Prosecutorial pretrial publicity can impose pretrial punishment on an individual. That punishment may come in the form of loss of reputation and dignity, loss of society, and loss of business (as demonstrated by the *Gentile* case itself)[183]—even when there is no pretrial incarceration.[184] The prosecutor has access to highly derogatory information about people, but this access is provided by the State and its investigative arm for the sole purpose of justly pursuing criminal charges against those who are guilty and not for use against the innocent.[185] Moreover, because the public and

179. *Id.* at 280–81 (emphasis added).

180. Baradaran, *supra* note 176 ("The Due Process Clause, taken together with the Sixth Amendment right to a jury trial and presumption of innocence, mandates that a jury assess the facts of all elements of the crime charged and prevent conviction without proof beyond a reasonable doubt of every fact that constitutes the crime." (citations omitted)).

181. 132 S. Ct. 2344 (2012).

182. Baradaran, *supra* note 176 (quoting *S. Union Co.*, 132 S. Ct. at 2350–51).

183. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1040 (1991) (noting that following the pretrial announcement, Western Vault suffered heavy economic losses and soon went out of business due to the loss of customers); Kitai, *supra* note 166, at 284 (noting that pretrial stages may impose physical or mental damages on the accused and that "[e]ven if a person's guilt is never proven, the individual suffers a unique humiliation that can last months and even years").

184. Baradaran's arguments are aimed at curbing pretrial detention, yet she concludes that it is essential to adhere to the presumption of innocence (especially as grounded in the historical understanding of due process and the jury trial right) because "the presumption protects in places that a modern understanding and application of due process procedures cannot reach." *See* Baradaran, *supra* note 176. Prosecutorial pretrial publicity is such an area where the presumption of innocence is needed.

185. *See* Berger v. United States, 295 U.S. 78, 88 (1935).

press are aware of the prosecutor's special access to information, any statements made by a prosecutor may be regarded as especially accurate.

The presumption of innocence not only protects the individual from the State's power, but moreover, as Kitai explains, it preserves "a partnership between the individual and the State."[186] In a democracy, as part of the compact between the individual and the state, the individual agrees to abide by the laws of the State, but the State agrees not to punish the individual unless and until she is convicted of a crime.[187] The commission of a crime creates a conflict between the State and the individual, as does the State's accusation against the person to be held responsible for that crime, labeled a criminal, and stripped of freedoms generally available to the populace.[188] Kitai argues that the presumption lessens the alienation between the individual and the State.[189] Whether innocent or guilty, the presumption of innocence emphasizes the dignity and freedom of the individual and "her right not to be exposed to unjustified harm by the State."[190]

In representing the State, the prosecutor also represents society as a whole, including the accused.[191] Pretrial publicity by the prosecutor that treats the accused as a criminal prior to conviction, exacerbates alienation between the individual and the State, and undermines the constitutional compact that the accused is innocent in the eyes of the State unless and until proven guilty. When the prosecutor engages in such pretrial publicity, he not only undermines these purposes as to that specific individual, but for all members of society, who may rightly begin to wonder whether or not they can trust the State not to subject them to punishment prior to conviction. Indeed, Kitai argues that in addition to any harm actually felt by the accused, the "very treatment *of the individual by the State as guilty before conviction* creates moral harm," which "emanates from the breach of the State's commitment to preserve an individual's status as innocent" prior to conviction.[192]

Consequently, Kitai argues that "the presumption of innocence should *prohibit the State from taking steps that reflect an assumption of guilt* of the accused that are not strictly necessary in order to conduct the investigation and trial."[193] Under the access-to-justice theory, it is contrary to the prosecutor's role to undermine the purposes and constitutional

186. Kitai, *supra* note 166, at 281.

187. *Id.* at 280–83.

188. *Id.* at 283.

189. *Id.*

190. *Id.* 282–83.

191. Mosteller, *supra* note 20, at 1366 (noting that the prosecutor, as a representative of the sovereign, represents various constituencies, including the accuser, the public, and even those charged with a crime).

192. Kitai, *supra* note 166, at 288 (emphasis added).

193. *Id.* at 292 (emphasis added and omitted).

underpinnings of the presumption of innocence. Thus, the state can constitutionally prohibit any prosecutorial pretrial publicity that treats the accused as if already convicted (or with an assumption of guilt), unless the speech is *essential* to a valid investigative or trial purpose. A regulation like the federal CFR—which categorizes specific topics that Department of Justice personnel are not to discuss with the press,[194] in addition to prohibiting them from arranging "perp walks,"[195] and from discussing even admissible evidence[196]—is thus constitutionally permissible. The CFR contains a short list of things that federal prosecutors can publicly say, including basic identifying information regarding an accused, but then limits even this category by concluding:

> Disclosures should include only *incontrovertible, factual matters, and should not include subjective observations*. In addition, *where background information or information relating to the circumstances of an arrest or investigation* would be highly prejudicial *or where the release thereof would serve no law enforcement function*, such information *should not be made public*.[197]

Such a standard is far more restrictive than the *Gentile* standard. But the CFR standard comports with the purposes of the presumption of innocence and the role of the prosecutor in the justice system, and so it is constitutional under the access-to-justice theory. Similarly, prohibitions on prosecutorial publicity that "heighten[s] public condemnation of the accused," as found in the Restatement and MRPC 3.8, are constitutionally permissible—even if more restrictive than the normal MRPC 3.6 standard, and even if such prohibitions violate *Gentile*'s equality principle by not including similar restrictions on defense publicity regarding the government.

The presumption of innocence is also beneficial to the just investigation, prosecution, and resolution of criminal proceedings. The presumption reminds the prosecution, law enforcement, and the public that the accused might ultimately be found innocent,[198] which provides a pretrial check to prosecutorial overconfidence in the strength of the case

194. *See* 28 C.F.R. §§ 50.2(b)(3)(i)–(iv) (2012) (limiting permitted disclosures).

195. *See id.* § 50.2(b)(7) ("Personnel of the Department of Justice should take no action to encourage or assist news media in photographing or televising a defendant or accused person being held or transported in Federal custody.").

196. *See id.* § 50.2(b)(6)(v) (prohibiting Justice Department personnel from making "[s]tatements concerning evidence or argument in the case, whether or not it is anticipated that such evidence or argument will be used at trial").

197. *Id.* § 50.2(b)(3)(iv) (emphasis added).

198. *See* Kitai, *supra* note 166, at 279–80 (arguing that the presumption of innocence encourages the recognition that the accused might be innocent and therefore also encourages law enforcement agencies to pursue both incriminating and exculpatory evidence).

against the accused. Pretrial publicity by the prosecution undermines this salutary purpose of the presumption. Michael Nifong's statements about the Duke Lacrosse players present a poignant example of how a prosecutor's pretrial publicity can wed him to the charges despite even overwhelming evidence that develops to the contrary.[199] Once a prosecutor—a political actor—makes public statements about a prosecution, he will be held politically accountable and feel political pressure to live up to those statements.[200] This can blind the prosecutor to mitigating evidence and put pressure on the prosecutor to achieve a particular result rather than to do his job: to seek justice.

Finally, prosecutorial pretrial publicity can undermine the interest recognized by *Bell* itself: the prosecutorial burden of proof. The *Bell* Court explained that the presumption "allocates the burden of proof" and serves to admonish the jury to determine "an accused's guilt or innocence solely on the evidence adduced at trial and not on the basis of . . . other matters not introduced as proof at trial."[201] As discussed below, prosecutorial pretrial publicity can negatively affect a jury's verdict and perception of the evidence.[202] Thus, the trial aspect of the presumption of innocence can be undermined by pretrial publicity that can influence the jury into carrying a presumption of guilt.

3. No Right to Coerce an Unjust Plea

Prosecutorial pretrial publicity can also affect the defendant's decision and ability to take a plea, for example, by coercing the defendant to plead in order to end continued scandal in the press.[203] While the traditional compromise focuses on pretrial publicity as it may affect the right to a fair trial, the Sixth Amendment's "public trial, by an impartial jury"[204] has become occasional, and plea bargains are the norm. Over 95% of federal and state criminal charges end in a plea.[205] As the Supreme Court has

199. *See* Mosteller, *supra* note 20, at 1337, 1349, 1358–64 (showing that Nifong gave fifty to seventy press interviews in the first week after being briefed about the allegations, but then continued with the charges for months on end after receiving exculpatory DNA evidence).

200. *See* Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2472 (2004) ("Prosecutors are particularly concerned about their reputations because they are a politically ambitious bunch. Most district attorneys are elected, and many have parlayed their prosecutorial successes into political careers . . . .").

201. Bell v. Wolfish, 441 U.S. 520, 533 (1979).

202. *See infra* Subsection IV.A.5.

203. *See* Neb. Press Ass'n v. Stuart, 427 U.S. 539, 600 n.24 (1976) (Bennan, J., concurring) (noting prevalence of pleading and instructing judges to "guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty").

204. U.S. CONST. amend. VI.

205. *See* DRESSLER & THOMAS, *supra* note 152, at 1016 (showing that in fiscal year 2004, approximately 96% of federal charges resulted in nontrial convictions, and over 95% of state felony convictions were procured by guilty pleas).

recently recognized: "The reality is that plea bargains have become *so central* to the administration of the criminal justice system" that it "is insufficient simply *to point to the guarantee of a fair trial* as a backstop that inoculates any *errors in the pretrial process*."[206] Pretrial publicity that can unjustly manipulate a plea is thus not inoculated by the fact that it did not undermine the actual trial. Current prohibitions on pretrial publicity are aimed at safeguarding trial and empaneling an impartial jury; they are not keyed to publicity that may affect a plea, and thus, they fail to protect the accused's actual interests in modern criminal process.

Scholars have examined the factors, pressures, and incentives at play in plea bargaining to determine whether pleas actually reflect a fair trial and reflect society's valid criminal justice interests in ascertaining guilt and allocating appropriate punishment.[207] Problematically, much of what occurs in plea bargaining is secretive and unknown.[208] While scholars disagree about the workings and desirability of plea bargaining,[209] there are several key understandings that are important when examining the potential effect of pretrial publicity on pleas.

The core premise of plea bargaining is that it approximates the result of trial while avoiding the costs of trial—a plea equals the approximate trial result minus some fixed discount for saving the costs of trial.[210] Plea

206. Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (emphasis added).

207. *See* Bibas, *supra* note 200, at 2469–2527 (examining and identifying existing structural distortions, costs, incentives, and psychological phenomena inherent in plea bargaining and concluding that "the classical model of fully informed and rational bargaining in the shadow of trial . . . . is seriously misleading"); Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980–91, 2003 (1992) (examining structural flaws and incentives inherent in plea bargaining and discussing the importance of transparency and open adversarial proceedings to mitigate such flaws and more closely comport with the criminal justice system's goal of ascertaining guilt and appropriating punishment)). *See generally* H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 64–66, 89–96 (2011) (describing the problem of coercive plea bargaining and proposing a solution).

208. *See, e.g.*, Bibas, *supra* note 200, at 2475 (noting that "plea bargaining is hidden from public view" and is "a secret area of law"); Schulhofer, *supra* note 207, at 2002 ("In plea bargaining, the attorney's role is *virtually immune from scrutiny* or control." (emphasis added)).

209. *Compare* Schulhofer, *supra* note 207, at 2000–09 (advocating abolition of plea bargaining), *and* Albert Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968) (same), *with* Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1975 (1992) (arguing that plea bargaining is a desired and efficient form of bargaining essential to secure scarce judicial resources), *and* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909–10 (1992) (arguing that, under classical contract theory, plea bargaining "supports the freedom to bargain over criminal punishment"). Some scholars focus on reforming discrete conditions of plea bargaining. *See* Caldwell, *supra* note 207, at 77 ("Rather than complete abolition, it is the unethical abuse of the [prosecution's] unique bargaining position[] that needs to be eradicated."); *cf.* Fred Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1123 (1998) ("accept[ing] plea bargaining as a given" and instead "focus[ing] on the ethical role of prosecutors" in plea bargaining).

210. *See* Bibas, *supra* note 200, at 2464 ("The conventional wisdom is that litigants bargain

bargaining, ideally, takes place in "the shadow of expected trial outcomes,"[211] with the parties' expectations regarding trial results as the central bargaining chip. Thus, for a defendant, the most important factor is her understanding of the strength of the prosecution's case against her.[212]

One of the core inadequacies in plea bargaining is the parties' lack of knowledge regarding the merits of the case.[213] Unlike civil proceedings, criminal procedure in most states includes extremely limited pretrial discovery.[214] Thus, the defendant may have to guess at the strength of the prosecutor's case.[215] Pretrial publicity by the prosecutor can skew the defendant's view of the merits of the prosecutor's case and, thus, lead the defendant to plead guilty to charges that may be unwarranted by the evidence—especially where such publicity leads to condemnation of the defendant from family, friends, and associates.

Plea bargaining involves acute inequities in the respective bargaining positions of the prosecution and the defense. Unlike civil proceedings, where a civil defendant can often inflict equal costs on the plaintiff through counterclaims, discovery, and other devices, the criminal defendant can do nothing to pressure or harm the prosecution.[216] In contrast, the prosecutor "can exercise coercion unilaterally for the purpose of encouraging a settlement; for example, by threatening lengthy pretrial detention and interfering with a defendant's ability to earn his livelihood."[217] Moreover, the defendant is threatened with loss of liberty (and perhaps life), reputation, employment, association with family and friends, and personal interests and affairs. The prosecution, comparatively, has nothing to lose.[218] At the very most, the prosecutor will lose a case if it goes to trial

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toward settlement in the shadow of expected trial outcomes. In this model, rational parties forecast the expected trial outcome and strike bargains that leave both sides better off by splitting the saved costs of trial.").

211. *Id.* at 2464–65.

212. *Cf. id.* at 2470 ("The strength of the prosecution's case is the most important factor, but other considerations come into play." (footnote omitted)).

213. *Id.* at 2495–96 ("The result of inadequate discovery is that the parties bargain blindfolded."); Schulhofer, *supra* note 207, at 1998 (noting that the "expansion of pretrial discovery" would "directly address the flaws of plea bargaining" so parties could "accurately estimate ex ante the likelihood of conviction at trial"); Zacharias, *supra* note 209, at 1129–32 (noting the lack of "fully available information by both negotiating parties" and that "[i]n most jurisdictions, bilateral discovery is limited severely" in criminal proceedings).

214. Zacharias, *supra* note 209, at 1129–31.

215. *See* Schulhofer, *supra* note 207, at 2002 (stating that pleas are based on "an uninformed guess about the likelihood of conviction").

216. Zacharias, *supra* note 209, at 1133–34.

217. *Id.* (footnote omitted).

218. *See* Caldwell, *supra* note 207, at 74 ("If defendants do not settle, they face the potential loss of entire years of freedom, connection with loved ones, and earning capacity, among other potential costs—prosecutors do not face any such losses.").

and the defendant is acquitted.[219] Yet if the defendant pleads (even to significantly lower charges), the prosecutor gets a "win" for her conviction rate.[220]

Plea bargaining is complicated by agency costs.[221] Prosecutors represent the State and society and are obligated to seek justice. Yet as political actors, they have incentives to enhance their own reputations, obtain high conviction rates, avoid embarrassing losses, and control workloads.[222] Overall, these incentives work to create a strong preference for pleas over trials—as pleading takes less time and every plea is a win for the prosecution (a conviction), while trials risk being a loss.[223]

While such incentives appear compatible with legitimate criminal justice ends and judicial resources, they have produced some recognized perverse results. As catalogued by many scholars, prosecutors have a strong incentive to pursue a plea when the evidence of guilt is weak—which includes some scenarios where defendants are in fact innocent.[224] Rather than dismissing charges—resulting in a "loss" for the prosecutor's conviction rate and perhaps exposing a faulty investigation that targeted innocent people[225]—prosecutors can get a "win" and avoid harming their

219. *Cf. id.* (noting that defendants risk loss of freedom, time with loved ones, and economic production at the plea bargaining phase, yet the prosecution "only stand to lose time and resources spent going to trial").

220. *See* Bibas, *supra* note 200, at 2471 ("[P]rosecutors want to ensure convictions. They may further their careers by racking up good win-loss records, in which every plea bargain counts as a win but trials risk being losses.").

221. Schulhofer, *supra* note 207, at 1987 (noting that the complex negotiating framework features parties in interest who are represented by agents—prosecutor and defense counsel—whose conflicting goals create a problem of agency costs). Schulhofer further notes that there are agency costs between the state's interest in criminal justice and the chief prosecutor's goals to "enhance her reputation and her political standing" as an elected official. *Id.* at 1987. Moreover, he notes "there is an additional layer of agency problems in the relationship between the chief prosecutor and her assistants." *Id.* at 1987–88; *accord* Bibas, *supra* note 200, at 2470–72 (noting several conflicting interests of the prosecutor that may interfere with that prosecutor's justice seeking function).

222. *See* Bibas, *supra* note 200, at 2471–72; Schulhofer, *supra* note 207, at 1987–88.

223. *See* Bibas, *supra* note 200, at 2471 (discussing the prosecutor's incentive to ensure good win-loss records by plea bargaining rather than going to trial, which involves a risk of loss); Schulhofer, *supra* note 207, at 1987 (noting that while the typical prosecutor occasionally tries cases that could be disposed of more efficiently, the prosecutor "will want to ensure settlement, even if this requires overly generous plea offers").

224. *See* Alschuler, *supra* note 209, at 52, 59 (interviewing prosecutors in ten major metropolitan areas and reporting comments from prosecutors such as, "[w]hen we have a weak case for any reason, we'll reduce to almost anything rather than lose" and "[t]he only time we make a deal is when there is a weakness in the case" (internal quotation marks omitted)); Bibas, *supra* note 200, at 2473 (noting prosecutors "can make irresistible offers in weak cases" and doing so may serve to "cover up faulty investigations that mistakenly target innocent suspects").

225. Bibas, *supra* note 200, at 2473 (noting that if prosecutors can "buy off credible claims of innocence cheaply, they [can] cover up faulty investigations that mistakenly target innocent suspects").

own careers if they can instead get a defendant to plead.[226] Shockingly, both DNA exonerations and police scandals have demonstrated that a significant number of innocent people plead guilty in our criminal justice system,[227] in addition to unknown numbers who plead falsely to minor crimes.[228]

In our system of justice, the role of the prosecutor "is to do justice."[229] As the Supreme Court has explained: "It is *as much* [the prosecutor's] duty *to refrain from improper methods calculated to produce a wrongful conviction as it is* to use every legitimate means to bring about a just one."[230] Yet it is "[t]he universal rule"—according to Professor Albert Alschuler after interviewing prosecutors across the country—for prosecutors to increase pressures to plead when a case is particularly weak.[231] When a case is weak, and acquittal probable, the obvious and just answer is that charges should be dropped—not that the prosecution should get a win through a plea deal and the accused should become a convicted criminal. Prosecutors should not be given and do not need any further tools to pressure defendants into pleading, including entering pleas that do not reflect the evidence against the accused. To the extent that pretrial publicity can be used as an "improper method" pressuring defendants and skewing the justness of plea bargains, it is contrary to the role of the prosecutor to engage in the practice.

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226. *See* Alschuler, *supra* note 209, at 62 ("When prosecutors respond to a likelihood of acquittal by magnifying the pressures to plead guilty, they seem to exhibit a remarkable disregard for the danger of false conviction."); *see also id.* at 61–62 (relating stories where innocent defendants were offered and subsequently took an extraordinary reduction in charges as a plea deal rather than risking conviction of initial serious charges with attendant severe punishment).

227. *See* Samuel R. Gross et al., *Exonerations in the United States 1989 through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523, 533–35 (2005) (noting several scandals in jurisdictions where scores of individuals falsely pled guilty to charges, one of which involved between 100 to 150 people—mostly young Hispanic males—who falsely pled guilty to gun or drug charges); Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 796–802 (countering the "myth" that the innocent do not plead guilty, and recounting numerous cases where later-exonerated criminal defendants had previously pled guilty in face of pressures to plead).

228. Gross et al., *supra* note 227, at 536 (explaining from exoneration data that "nobody, it seems, seriously pursues exonerations for defendants who are falsely convicted of shop lifting, misdemeanor assault, drug possession, or routine felonies—auto thefts or run-of-the-mill burglaries—and sentenced to probation, a $2000 fine, or even six months in the county jail or eighteen months in state prison," but concluding from pretrial detention and other indicators that "[s]ome defendants who accept [such plea] deals are innocent, possibly in numbers that dwarf false convictions in the less common but more serious violent felonies, but they are almost never exonerated").

229. Mosteller, *supra* note 20, at 1365 ("A fundamental ethical duty of a prosecutor is described generally as 'the duty to seek justice' or 'to do justice.'" (footnote omitted)).

230. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

231. *See* Alschuler, *supra* note 209, at 60; *see also id.* at 66 (quoting a defense attorney as saying, "the tendency is always to plead people who are effectively unconvictable" (internal quotation marks omitted)).

A related and recognized coercive tool available to prosecutors is to overcharge defendants—prosecutors charge defendants with higher-level offenses or more counts of an offense than are supported by the evidence.[232] Prosecutors are ethically prohibited from bringing charges that are not supported by probable cause.[233] As Professor H. Michael Caldwell has remarked, "whenever a prosecutorial agency files charges that are disproportionate or misrepresentative of the defendant's actions, that agency runs afoul of the ethical guidelines governing prosecutors, abuses its prosecutorial power, and compromises the justice system as a whole."[234] Despite these ethical duties and the severe consequences to the life and liberty of accused persons, prosecutors have "a powerful incentive to begin the inevitable negotiating process from a position of strength, which often results in overcharging."[235] Prosecutors enjoy absolute immunity from suit regarding their charging functions, so they are not accountable to the accused for overcharging.[236] Overcharging can scare the defendant into pleading because the sheer volume or severity of charges may have an adverse effect on the jury and therefore work to the advantage of the prosecutor if the case goes to trial.[237] Overcharging can also convince the defendant that a prosecutor is giving him a good—and perhaps irresistible—deal by reducing the charges, when the heightened charges should not have been brought in the first place.[238]

Pretrial publicity can add an extra layer of pressure to already-coercive (and unethical) overcharging. The overcharged defendant is not only publicly accused of crimes, but is publicly accused of crimes regarding which there actually was insufficient evidence to have charged her.[239] Publicity regarding an overcharged indictment may significantly increase pressures on the defendant to plead—including pressures from friends, family, and associates who receive the publicity. Pretrial publicity

232. *See* Caldwell, *supra* note 207, at 84 (noting that prosecutors have an "incentive to file more serious charges than those supported by the evidence" to pressure more risk adverse defendants to accept a plea).

233. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8(a) (2014).

234. Caldwell, *supra* note 207, at 66 (footnotes omitted).

235. *Id.* at 65; *see also* Bibas, *supra* note 200, at 2519 ("The conventional explanation for overcharging is that it gives prosecutors additional plea-bargaining chips.").

236. *See supra* note 156 and accompanying text.

237. *See* Alschuler, *supra* note 209, at 98–99 (explaining that "overcharging has both an economic and a psychological effect at trial, and may therefore make trial a less attractive alternative," as it increases the cost of the defense, the motions and instructions to be prepared, jury confusion, and a presumption of guilt).

238. *See* Alschuler, *supra* note 209, at 85 ("The charge is the asking price in plea bargaining . . . ."); Bibas, *supra* note 200, at 2519 (discussing the anchoring effect of overcharging and giving the example that "[d]efendants who anchor initially on maximum life sentences are more likely to think they are getting good deals when they are offered lower sentences").

239. *See* Caldwell, *supra* note 207, at 83–84 (arguing that prosecutors overcharge defendants to seek harsher penalties than the underlying evidence warrants).

regarding an overcharged indictment manifestly *heightens* public condemnation of the accused by bringing condemnation for crimes beyond what can be or is even expected to be proven at trial. It seems obvious that being charged with first-degree murder will bring greater public condemnation than being charged for involuntary manslaughter. Similarly, a charge for forcible rape is going to bring more public condemnation against the defendant than a charge for battery.[240] An indictment containing fourteen counts of a certain crime is likely more damaging to a defendant's reputation than an indictment for one count.[241] Moreover, upon hearing of a multiple-count indictment, the public may be more likely to form an opinion that the accused is guilty. As Alschuler notes about the effects of overcharging at trial, a jury, upon hearing "an endless list of charges" against the defendant, tends to think, "[t]he District Attorney could be wrong once, but no one could be wrong this often."[242] The public—from which the jury venire is selected—may have the same reaction to a publicized announcement from the prosecution that an accused has been arrested on twenty counts of a particular crime. Thus, publicity regarding an overcharged indictment may further undermine the presumption of innocence (as well as a fair trial, as noted below) by creating an even stronger indication of guilt than would publicity about charges for which there is sufficient evidence.

Prosecutors may avoid pretrial publicity in cases where the evidence is weak—indeed, plea bargains can hide weak cases from public scrutiny. Some commentators posit that prosecutors may be more likely to try high-profile cases—even where there is strong evidence of guilt or where a defendant may have wanted to plead.[243] While the defendant in such a case, obviously, still has a trial in which guilt is determined by a jury, the flaw is that the prosecutor's decision whether to offer a plea bears no relationship to the criminal justice interests of the sovereign he represents.[244] Moreover, in publicized cases where the evidence is weak, prosecutors may prefer to seek a plea over a likely acquittal. Alschuler notes that "political

240. *Cf.* Alschuler, *supra* note 209, at 61 (relating a case where a defendant was offered, and accepted a plea deal that reduced charges from kidnapping and forcible rape to one count of simple battery).

241. *See id.* at 98 (noting that overcharging may affect the subsequent "reading of the accusations to the jury" because jurors may be overwhelmed by the amount of allegations lodged by the prosecutor).

242. *Id.* at 98–99 (internal quotation marks omitted).

243. *See id.* at 107 (noting the "political importance" of "serious, publicized cases, and [that] in these cases plea agreements are unusually difficult to secure"); Schulhofer, *supra* note 207, at 1988 (noting that prosecutors "may gain" reputation and career advancement by "trying a case that the public interest would require to be settled"); *see also id.* at 1987 ("The chief prosecutor will occasionally want to try a case that could be resolved more efficiently by settlement.").

244. *See* Alschuler, *supra* note 209, at 64 (noting that trying clear cases and pleading weak cases is "at best, a dangerous allocation of institutional responsibility" because "[i]f trials ever serve a purpose, their utility is presumably greatest when the outcome is in doubt").

considerations may . . . make it important for a prosecutor to secure a conviction for a particular crime, and plea negotiation may provide the only practical means of achieving this objective" precisely because there exists insufficient evidence to succeed at trial.[245]

Under the access-to-justice theory, the prosecutor can be forbidden from engaging in publicity as a coercive tactic to obtain a plea from the accused. The problem with publicity in this context—as with other coercive tactics like overcharging and excessive pretrial detention—is that it is a method for obtaining a plea that is entirely divorced from the merits of the case, the culpability of the accused,[246] or society's actual interests in deterrence, incapacitation, retribution, and rehabilitation.[247] Those interests are entrusted to the prosecutor, who is then given the State's "awesome power" to bring criminal charges against individuals and deprive them of life or liberty. Once a person pleads guilty, they are a convicted criminal—they have a criminal record that will follow them and have consequences, often for the rest of their lives.[248] Prosecutors already hold all the chips; they can exert pressure on the accused to plead even where evidence is weak and acquittal is likely. Thus, it is entirely appropriate to limit the ability of the prosecutor to further stack the deck and increase pressure through pretrial publicity. Publicity that has such an end or effect frustrates the proper functioning of the criminal justice system and constitutionally can be prohibited.

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245. *Id.* at 109. Alschuler recounts a high-profile murder of a policeman where the perpetrator who actually killed the policeman was himself killed in a car chase. *Id.* at 109. However, the perpetrator's girlfriend was arrested and charged with robbery—a crime she apparently participated in—and with the murder of the police officer. "[A]s the prosecutor admits, the state had no murder case at all" against her. *Id.* at 110. "[B]ecause a conviction in connection with the policeman's death was important for political reasons," the prosecutor made a plea deal where the girlfriend pled guilty to armed robbery *and voluntary manslaughter* with a total sentence "less severe than that she might have received after a trial for the armed robbery alone." *Id.* at 110.

246. *See* Berger v. United States, 295 U.S. 78, 88 (1935) (explaining that prosecutors serve the criminal law, "the twofold aim of which is that guilt shall not escape or *innocence suffer*" (emphasis added)).

247. *See* Bibas, *supra* note 200, at 2468 (noting that rather than focusing on society's actual interest, "plea bargaining effectively bases sentences in part on wealth, sex, age, education, intelligence, and confidence"); Schulhofer, *supra* note 207, at 2003 (arguing "that plea bargaining injures the public interest in optimal deterrence, the defendant's interest in accurately assessing the risk of acquittal, and the societal interest in minimizing conviction of the innocent").

248. *See, e.g.*, Lahny R. Silva, *In Search of a Second Chance: Channeling* BMW *v.* Gore *and Reconsidering Occupational Licensing Restrictions*, 61 U. KAN. L. REV. 495, 499 (2012) ("Today there are approximately 38,000 statutory and regulatory disqualifications triggered solely by the fact of prior felony conviction. This amounts to an average of 700 per jurisdiction, and it is estimated that 65% of these are employment related." (footnote omitted)).

4. No Right to Exacerbate Harm to the Accused's Reputation

Perhaps most obviously, the prosecutor can wreak serious reputational harm on the accused through pretrial publicity, particularly pretrial publicity that treats the accused as guilty, contains inculpatory information, or arouses public passions and emotion against the accused. The Duke Lacrosse players were the subject of national shame when Michael Nifong publicly accused them of "gang-like rape" performed with "racial hostility" and described the rape as having "a deep racial motivation" that was "absolutely unconscionable" and "totally abhorrent . . . . add[ing] another layer of reprehensibleness, to a crime that is already reprehensible."[249]

Although reputational harm is one of the most obvious problems associated with prosecutorial publicity, the Supreme Court has held that governmental deprivation of "reputation" alone is insufficient to create a due process violation.[250] Rather, a criminal defendant whose reputation is harmed by government actions must show "stigma-plus," meaning that the reputational harm must result in an independent constitutional violation.[251] Indeed, in December 2012, the U.S. Court of Appeals for the Fourth Circuit held that several of the Duke Lacrosse players' due process claims based on harm to reputation should be dismissed because the plaintiffs had failed to establish the requisite "plus" constitutional violation.[252] The U.S. Court of Appeals for the Seventh Circuit has similarly held that a plaintiff suing the prosecution for denial of due process based on media statements that harmed her reputation "must identify a 'plus' other than the indictment, trial, and related events for which the [prosecution] possess[es] absolute prosecutorial immunity."[253] While other courts have found a constitutional deprivation of liberty in a prosecutor's use of knowingly

249. Mosteller, *supra* note 20, at 1351 (providing excerpts of statements made by disbarred District Attorney Michael Nifong).

250. *See* Paul v. Davis, 424 U.S. 693, 711 (1976) (concluding that one's "interest in reputation . . . is quite different from the 'liberty' or 'property'" interests protected by the Due Process Clause).

251. *See id.* at 701 (rejecting "the proposition that reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause"); Eric J. Mitnick, *Procedural Due Process and Reputational Harm: Liberty as Self-Invention*, 43 U.C. DAVIS L. REV. 79, 92 (2009) ("The stigma-plus test places emphasis on the consequences of reputational harm; for example, on whether there was a coincident loss of employment or a concurrent alteration of some additional right or status, such as the ability to purchase alcohol.").

252. *See* Evans v. Chalmers, 703 F.3d 636, 654 n.12, 654–55 (4th Cir. 2012) (dismissing certain Fourth Amendment claims and explaining that "[t]he parties dispute whether a Fourth Amendment violation constitutes a cognizable 'plus,'" yet because the court held that the plaintiffs failed to state a Fourth Amendment claim, the court does not address that question). Notably, these dismissed claims were against officers and municipalities, as Nifong had not appealed the district court's holding that Nifong did not enjoy qualified immunity for his investigatory actions. *See id.* at 645 & n.1.

253. Buckley v. Fitzsimmons, 20 F.3d 789, 798 (7th Cir. 1994).

fabricated evidence to bring about an indictment, pretrial detention, and related harms,[254] the bottom line is that a due process claim against the prosecutor for depriving the accused of reputation will usually be unsuccessful.

Nevertheless, the fact that the Supreme Court has not recognized a constitutional remedy for deprivation of sheer reputation does not mean that reputation is a legally insignificant interest—nor does it mean that government must allow its prosecutors to run amok in using information provided them through the government's own investigative arm to unnecessarily destroy the reputations of its citizens. The existence of the common law tort of defamation shows the enduring societal recognition of the value of reputation as a legally protected interest. Moreover, some states have recognized reputation as an interest protected in its own right by the state's constitution.[255]

In any prosecution, the State has used its police powers to obtain access to the most damning information about people and provides that information to the prosecutor for one purpose: for the just prosecution of crime. Under the access-to-justice theory, the prosecutor can be prohibited from using such information in ways that are inconsistent with that governmental purpose or that otherwise undermine the core prosecutorial duty to seek justice. The State neither obtains derogatory information about citizens nor provides it to the prosecutor for the purpose of arbitrarily destroying a citizen's reputation, with attendant social and economic effects. While reputational harms are a concomitant part of being prosecuted,[256] the prosecution should not be able to exacerbate those harms through publicity that is unnecessary to the just investigation and prosecution of a crime, particularly with inflammatory and inculpatory publicity. Thus, under the access-to-justice theory, the prosecutor lacks a free speech right to engage in pretrial publicity that is unnecessary for the just investigation and prosecution of crime and which heightens reputational harm to the defendant.

Consequently, the *Restatement*'s prohibition against "heightening public condemnation of the accused" is constitutionally permissible. This is so even though the prohibition is aimed at preserving reputation and even if it is interpreted to impose a more restrictive standard for prosecutors than defense attorneys in contravention of *Gentile*'s equality principle. Similarly, restrictions like those found in the CFR, forbidding prosecutors from engaging in nearly all inculpatory publicity and from

254. *See, e.g.*, Zahrey v. Coffey, 221 F.3d 342, 354–55 (2d Cir. 2000) (noting circuit conflict).

255. *See, e.g.*, Dodd v. Reese, 24 N.E.2d 995, 998 (Ind. 1940) (explaining that the Indiana State Constitution specifically protects reputation in parity with property).

256. *See* Kitai, *supra* note 166, at 284 ("A person, innocent as well as guilty, may experience insult, unfair persecution, rejection, and betrayal as a consequence of being treated like a criminal prior to conviction.").

speaking to the press to arrange a perp walk, are also constitutional because they safeguard the governmental purpose—doing justice—for which information is obtained and given to the prosecution as well as protect the accused's reputation and associated interests until a jury is able to determine guilt as required in our constitutional criminal process. A perp walk (telling the press the time and place of arrest and then having law enforcement take the accused on a long walk to the police car or station for a "photo op" of the accused in custody) harms the reputation of the accused for no just prosecutorial purpose, but for the press to obtain and publish emotionally charged photos of the accused in actual custody.[257] For example, in 2011, Dominique Strauss-Khan was subjected to a perp walk in New York City, at a time when he was a forerunner for the 2012 French presidential election.[258] One of the more remarkable aspects of the walk was New York Mayor Michael Bloomberg's comments to the press. While noting that the perp walk was "humiliating," Bloomberg said he didn't "have a lot of sympathy" for Strauss-Khan, who resigned from his position as the Managing Director of the International Money Fund within days of the arrest.[259] Bloomberg explained: "if you don't want to do the perp walk, don't do the crime."[260] Apparently having forgotten about the presumption of innocence, Bloomberg agreed that it would be a "real sad thing [] if somebody is accused, does the perp walk, and turns out not to have been guilty. And then society really should look in the mirror and say we should be more careful the next time."[261] Three months later, a justice in the Supreme Court of Manhattan dismissed the charges against Strauss-Khan.[262]

Indeed, the fact that federal constitutional law is unavailing in providing the accused with a remedy—combined with general hurdles of immunity for civil claims against prosecutors—increases the justification for allowing state regulators to prohibit the prosecution from using publicity to impose reputational harms on the accused that are unnecessary to the investigation and prosecution of the crime. The personal impact of reputational harms is evident in *Gentile* itself, where the prosecutor's

257. *See, e.g.*, Lauro v. Charles, 219 F.3d 202, 203 (2d Cir. 2000) (holding that the Fourth Amendment is violated where the police "force an arrested person to undergo a staged 'perp walk' for the benefit of the press, when the walk serves no other law enforcement purpose").

258. *See* Daniel Trotta, *NY Mayor Defends "Perp Walk" of IMF Chief*, REUTERS (May 17, 2011, 9:16 PM), http://www.reuters.com/article/2011/05/18/strausskahn-bloomberg-idAFN1714122920110518.

259. *Id.* (internal quotation marks omitted).

260. *Id.* (internal quotation marks omitted).

261. *Id.* (internal quotation marks omitted).

262. *See* John Eligon, *Strauss-Kahn Drama Ends with Short Final Scene*, N.Y. TIMES (Aug. 23, 2011), http://www.nytimes.com/2011/08/24/nyregion/charges-against-strauss-kahn-dismissed.html?pagewanted=all.

pretrial publicity resulted in Sanders losing his business.[263] While the prosecution should and must be protected in publishing the indictment and other speech necessary to their official function in prosecuting individuals, the flip side of that protection is that the State can prohibit the prosecutor from publicizing information or engaging in publicity that exacerbates harm to the accused. It is contrary to the role of the prosecutor to use the information society provides to him through the exercise of coercive state power to inflict reputational harm on individuals that is unnecessary to the prosecution of crime. Under the access-to-justice theory, the prosecutor lacks a free speech right to engage in such publicity.

5. No Speech Right to Undermine a Fair Trial

As recognized even in the traditional compromise, it is an essential part of the prosecutor's role to see that the accused receives a fair trial.[264] In the American system of criminal justice, the jury trial right is "no mere procedural formality, but a fundamental reservation of power in our constitutional structure."[265] The jury is a representation of the People acting as an essential check on government power to deprive individuals of life or liberty through the execution of criminal law. Thus, the impartial jury is specifically designed to check prosecutorial power.[266] Prosecutorial pretrial publicity can undermine—and even bias to the prosecution's favor—this essential check on prosecutorial power created in the Constitution to protect individual life and liberty.

The prejudicial impact of pretrial publicity on juries in the criminal justice system has been shown in numerous psychological studies and empirical research.[267] Studies show that the bias created by pretrial

263. Gentile v. State Bar of Nev., 501 U.S. 1030, 1043 (1991) (Kennedy, J.).

264. *See, e.g.*, Levenson, *supra* note 17, at 1053 ("Prosecutors must balance the duty to zealously represent the community with the constitutional duty to respect a defendant's right to a fair trial.").

265. Blakely v. Washington, 542 U.S. 296, 305–06 (2004).

266. *See* Baradaran, *supra* note 176 (arguing the "jury acts 'as a bulwark between the State and the accused,'" prohibiting punishment until "'the prosecution has proved each element of an offense beyond a reasonable doubt.'" (quoting S. Union Co. v. United States, 132 S. Ct. 2344, 2350–51)); *see also* Erik Lillquist, *The Puzzling Return of Jury Sentencing: Misgivings About* Apprendi, 82 N.C. L. REV. 621, 624 (2004) (noting that prosecutors possess "enormous power" to secure a conviction or guilty plea from a defendant, and because defendants will "very likely be convicted" of the crime charged, "[j]uries are one of the few remaining checks on this power of prosecutors").

267. *See* Nancy Mehrkens Steblay et al., *The Effects of Pretrial Publicity on Juror Verdicts: A Meta-Analytic Review*, 23 LAW & HUM. BEHAV. 219, 219, 229–30 (1999) (performing a meta-analytic review of forty-four empirical studies involving 5,755 participants on the effects of pretrial publicity on juries, and finding overall that "negative pretrial publicity significantly affects jurors' decisions about the culpability of the defendant," that "[j]urors exposed to publicity which presents negative information about the defendant and crime are more likely to judge the defendant as guilty than are jurors exposed to limited [pretrial publicity]," and that "the combination of data in this meta-analysis has demonstrated a convergence of the evidence across method to the conclusion that

publicity is generally pro-prosecution and against the accused. Empirical studies have found that certain types of pretrial publicity have a statistically significant prejudicial effect on juries. Examples include the following: information regarding a prior criminal record of the accused,[268] a confession of the accused (even if retracted),[269] results of tests implicating

pretrial publicity has a significant impact on juror decision making"); *see also, e.g.*, Dennis J. Devine et al., *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 PSYCHOL. PUB. POL'Y & L. 622, 688 (2001) (showing that juror bias induced by negative pretrial publicity is not mitigated by jury deliberation, and may, in fact, be enhanced by that negative publicity); Steven Fein et al., *Can the Jury Disregard that Information? The Use of Suspicion to Reduce the Prejudicial Effects of Pretrial Publicity and Inadmissible Testimony*, 23 PERSONALITY & SOC. PSYCHOL. BULL. 1215, 1215–16 (1997) ("Research has shown that jury verdicts can be influenced by . . . pretrial publicity concerning the defendant, disclosure of his or her prior record, current events in the news, incriminating testimony ruled inadmissible by the judge, hideous crime-scene images, [and] clearly coerced confessions . . . ." (citations omitted)); Norbert L. Kerr et al., *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 665, 695 (1991) ("Not unexpectedly, we found that exposure to certain types of highly prejudicial pretrial publicity, including information concerning the defendant's prior record, the existence of incriminating physical evidence, and defendant's implication in another crime, did bias mock jury verdicts. Such publicity, therefore, can create a threat to an impartial jury."); Norbert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 115, 124 (1994) (concluding that "there is considerable evidence that prejudicial publicity can and does bias verdicts"); Christine Ruva et al., *Effects of Pre-Trial Publicity and Jury Deliberation on Juror Bias and Source Memory Errors*, 21 APPLIED COGNITIVE PSYCHOL. 45, 45 (2007) (finding that "[e]xposure to [pretrial publicity] significantly affected guilty verdicts, sentence length, perceptions of defendant credibility, and misattributions of [pretrial publicity] as having been presented as trial evidence"); Christine L. Ruva & Michelle A. LeVasseur, *Behind Closed Doors: The Effect of Pretrial Publicity on Jury Deliberations*, 18 PSYCHOL. CRIME & L. 431, 442 (2012) (arguing that jurors who were exposed to negative pretrial publicity were significantly more likely than their non-exposed counterparts to discuss ambiguous trial facts in a manner that supported the prosecution's case); Christina A. Studebaker & Steven D. Penrod, *Pretrial Publicity: The Media, the Law, and Common Sense*, 3 PSYCHOL. PUB. POL'Y & L. 428, 433 (1997) ("[P]retrial publicity has been found to influence evaluations of the defendant's likability, sympathy for the defendant, perceptions of the defendant as a typical criminal, pretrial judgments of the defendant's guilt, and final verdicts.").

268. Kerr et al., *supra* note 267, at 695; Amy L. Otto et al., *The Biasing Impact of Pretrial Publicity on Juror Judgments*, 18 LAW & HUM. BEHAV. 453, 465 (1994) (finding that prior criminal record publicity "caused subjects to believe that the defendant was a 'typical criminal,'" which in turn was related to a final guilty verdict); *see also* Kerr, *supra* note 267, at 124; Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions*, 6 PSYCHOL. PUB. POL'Y & L. 677, 681 (2000) ("[P]rior record information indirectly influenced final verdicts by leading participants to believe that the defendant was a 'typical criminal.'").

269. Kerr, *supra* note 267, at 124 (summarizing Padawer-Singer study with significant prejudicial effect from publicity reporting a prior criminal record and "that the defendant had retracted a confession"); Lieberman & Arndt, *supra* note 268, at 680–81 (summarizing Tans & Chafee experimental study on pretrial publicity finding that "a police report of a confession was the most damaging category of information").

the accused,[270] inadmissible incriminating evidence,[271] and statements regarding the character of the accused.[272] Such information has a cumulative effect: the more of it an individual receives, the more likely she is to adjudge the accused guilty.[273]

An "abundance of studies" show "that jurors who claim to be unbiased are still influenced by pretrial publicity" and that an individual's self-evaluation of impartiality—even when sincere—fails to correlate with whether their opinion of guilt is in fact influenced by pretrial publicity.[274] Indeed, once a person has made a prejudgment of guilt, they will actually perceive trial evidence differently. Thus, researchers have found that subjects who prejudged guilt because of pretrial publicity actually interpreted the prosecution's case as significantly stronger than subjects who were not exposed to pretrial publicity.[275] Further, emotional pretrial publicity (meaning publicity arousing public passion but with no

270. *See* Otto et al., *supra* note 268, at 455 (noting that empirical studies have found that non-confession inculpatory reports such as failed lie detector tests can influence juror judgments of guilt).

271. *See* Kerr et al., *supra* note 267, at 673, 695 (discussing inadmissible incriminating physical evidence as a subset of prejudicial pretrial publicity); Otto et al., *supra* note 268, at 464–65 (finding that inadmissible evidence influenced pretrial judgments of guilt, which "directly related to final verdicts").

272. Otto et al., *supra* note 268, at 464 (finding "[t]he strongest effects were for the negative pretrial publicity about the defendant's character," but the study did not include confession by the defendant).

273. *See* Lieberman & Arndt, *supra* note 268, at 680 (citing study by Tans & Chaffee showing the cumulative effect of pretrial publicity against defendant); Gary Moran & Brian L. Cutler, *The Prejudicial Impact of Pretrial Publicity*, 21 J. APPLIED SOC. PSYCHOL. 345, 345, 349–55 (1991) (field study of actual cases showed knowledge of the case from pretrial publicity "was positively and significantly correlated with perceived culpability of the defendant but nonsignificantly correlated with willingness to admit partiality"); Steblay et al., *supra* note 267, at 231 ("Multiple indicators of a defendant's 'guilt' (confession, prior record, incriminating evidence) produced an increased effect on juror judgments of guilt . . . .").

274. Leiberman & Arndt, *supra* note 268, at 683; Fein et al., *supra* note 267, at 1223 (finding that pretrial publicity of inadmissible evidence biased mock juror's verdicts despite "'jurors' self-reports of how little they were influenced by the inadmissible information"); Kerr, *supra* note 267, at 125 (summarizing studies, including Sue, Smith & Pedroza's study in which individuals exposed to publicity who indicated their own ability to be impartial "were still much more likely to convict than jurors never exposed to the publicity (53 percent guilty versus 23 percent guilty, respectively)"); Moran & Culter, *supra* note 273, at 345, 349–55 (field study where exposure to pretrial publicity "was positively and significantly correlated with perceived culpability of the defendant," but failed to correlate with the individuals' self-assessments of impartiality).

275. Otto et al., *supra* note 268, at 463 ("Subjects who believed the defendant was guilty prior to viewing the trial were more likely, after viewing the trial, [to] the think the evidence was strong . . . ."); *see also* Steblay et al., *supra* note 267, at 231 (citing Moore's study indicating "that negative publicity provides not just isolated fragments of information, but a belief framework about defendant culpability" and "[t]his biased schema then *directs the juror's attention and provides a filter through which subsequent evidence is perceived*" (emphasis added)).

inculpatory information, such as graphic crime scene pictures[276]) has strong prejudicial effects even when completely irrelevant to determining the guilt of the accused.[277]

Despite the essential role of the jury in checking prosecutorial power and the psychological literature showing prejudicial effects on juries, the Supreme Court's current case law makes it nearly impossible for a defendant to obtain a reversal of a conviction based on a denial of a fair trial because of prejudicial pretrial publicity. According to the Court: "[P]retrial publicity—even *pervasive, adverse publicity*—does not inevitably lead to an unfair trial."[278] Thus, prosecutors who fuel negative pretrial publicity have very little to lose. If their pretrial publicity happens to prejudice the jury to render a guilty verdict, the verdict usually will not be overturned.

Unfortunately, a number of prosecutors engage in prejudicial pretrial publicity. In a content analysis of media reports covering crimes in major American news outlets, Dorothy J. Imrich, Charles Mullin, and Professor Daniel Linz found that prejudicial information (defined as material presumptively deemed prejudicial by MRPC 3.6) appeared in 27% of media reports identifying criminal defendants.[279] Importantly, the most frequent source of such prejudicial information was law enforcement or the prosecution.[280] Although the majority of criminal defendants do not have to face negative pretrial publicity, as Professor Norbert L. Kerr reports, "the absolute number is not trivial (more than 12,000 per year in the United States)."[281]

Although a conviction following such adverse pretrial publicity may not be overturned as a violation of due process, under the access-to-justice theory, states can nevertheless prohibit and punish prosecutors who engage in prejudicial pretrial publicity that undermines the defendant's chances for an impartial jury.[282] The prosecutor represents "a sovereignty whose obligation *to govern impartially* is as compelling as its obligation to govern

276. Kerr, *supra* note 267, at 123 (describing emotionally biasing publicity).

277. *See* Kerr et al., *supra* note 267, at 673–75 (describing an experiment in which jurors convicted a defendant of armed robbery based on unrelated, emotional news reports of the defendant's involvement in a hit and run despite the fact that the news reports lacked any appreciable evidentiary value).

278. Skilling v. United States, 130 S. Ct. 2896, 2916 (2010) (emphasis added) (internal quotation marks omitted) (quoting Neb. Press Ass'n v. Stuart, 427 U.S. 539, 554 (1976)).

279. Dorthy J. Imrich et al., *Measuring the Extent of Prejudicial Pretrial Publicity in Major American Newspapers: A Content Analysis*, 45 J. COMM. 94, 94, 104, 106, and 112 (1995) ("Law enforcement officers and prosecutors were most often the sources of potentially prejudicial information about criminal suspects.").

280. *See id.* at 94, 98, 104–05, 112–13.

281. Kerr, *supra* note 267, at 121.

282. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2014) (setting forth prohibitions on lawyer pretrial extrajudicial statements); *id.* at R. 3.8(f) (setting forth limitations on extrajudicial statements made by prosecutors specifically).

at all."[283] It is part of the prosecutor's role to ensure that the defendant receives a fair trial with an impartial jury, and it is contrary to that role—and a violation of the prosecutor's duty to his government client—for the prosecutor to engage in pretrial publicity that has been shown to undermine juror impartiality against the accused. Under the access-to-justice theory, prosecutors lack a First Amendment right to engage in speech that will undermine the constitutional rights of the accused, the prosecutor's own role in the justice system, or the jury's role as a check on prosecutorial power in our constitutional criminal justice system. Thus, prosecutors can constitutionally be forbidden from engaging in pretrial publicity that can prejudice jury verdicts—especially publicity involving the specific categories of highly prejudicial information that studies strongly indicate can bias potential jurors.

The studies cited above illuminate a significant tension between the accused's right to an impartial jury and the First Amendment rights *of the press* to report criminal cases.[284] This Article does not address that problem. While a "compromise" between competing constitutional values may be appropriate when considering the accused's right to a fair trial and the *media's right* to report under the Free Speech and Free Press Clauses, yet, under the access-to-justice theory, there cannot and should not be a "compromise" between the prosecutor's free speech rights and the accused's fair trial rights. The prosecutor's free speech rights are defined by her role in the justice system. In acting on behalf of the State in executing the full weight of its criminal powers against individuals to deprive them of life or liberty, the prosecutor lacks any free speech right to engage in pretrial publicity that undermines a criminal defendant's fair trial.

In arguing for broad rights for attorneys to engage in pretrial publicity, Chemerinsky notes the existence of less restrictive alternatives to publicity prohibitions, such as extensive voir dire, sequestration, change of venue, and continuance.[285] Nevertheless, Freedman and Starwood note that many such "fixes" require the defendant to give up a different constitutional right in order to regain a fair trial:

> Apart from sequestration, the most effective alternatives for avoiding the effects of prejudicial publicity are delaying the trial, changing venue and trying the case before a judge without a jury. Yet *each of those alternatives involves the forfeiture by the defendant of a right guaranteed by the sixth amendment*: the right to a speedy trial, the right to be tried in

283. Berger v. United States, 295 U.S. 78, 88 (1935) (emphasis added).

284. Notably, the "English approach" to regulating media "accepts restricting the free flow of information in order too protect the right of the accused to a fair trial." *See* Giorgio Resta, *Trying Cases in the Media: A Comparative Overview*, 71 LAW & CONTEMP. PROBS. 31, 36–38 (2008).

285. Chemerinsky, *supra* note 14, at 879 (extrapolating from *Nebraska Press*).

> the state and district in which the crime was committed and the right to trial by jury.[286]

The prosecutor—as the representative of the State and the person exercising government power to deprive people of life and liberty—must uphold these other constitutional rights of the accused.[287]

Moreover, psychological and empirical studies indicate that at least some of these more modest remedies may be ineffectual at curbing pretrial publicity.[288] While a searching voir dire may help in cases involving very limited publicity (such that all jurors exposed to any publicity may be excused[289]), in cases where there is wide-spread publicity about a case, voir dire does little if anything to curb prejudice created by publicity.[290] Change of venue may work if the publicity is localized so that exposed jurors are no longer included in the venire—although in the age of the internet that may become a diminishing reality. One study indicates that continuance may be effective to dilute the prejudicial effect of factual pretrial publicity, but not emotional pretrial publicity.[291] Overall, there is considerable doubt as to the effectiveness of these "less restrictive alternatives" in alleviating

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286. Freedman & Starwood, *supra* note 10, at 617 (emphasis added); *accord* Matheson, *supra* note 77, at 882 (arguing that the accused's constitutional rights may still be endangered notwithstanding the court's use of alternatives to pretrial publicity restrictions).

287. *See* Freedman & Starwood, *supra* note 10, at 617 (noting that the accused's constitutional rights—including her Fifth and Sixth Amendment rights to due process and a fair trial—serve as limits to the prosecutor acting in official government capacity).

288. Studebaker & Penrod, *supra* note 267, at 439–46, 456 (1997) (reviewing research regarding various methods and concluding that "traditional safeguards, such as continuances, extended voir dire, jury deliberations, and judicial instructions to disregard the pretrial publicity or use it under limited conditions have been found to be ineffective" at eliminating the bias created by pretrial publicity).

289. *See* Kerr et al., *supra* note 267, at 700.

290. Norbert L. Kerr reports on one such study:

> Jurors exposed to prejudicial pretrial publicity who passed through the entire voir dire gauntlet were no more or less likely to convict than those who were excused (by anyone [judges, prosecutors, or defense attorneys]), but *both groups were significantly more likely to convict than jurors unexposed to the publicity*. Thus, the net effect of the voir dire process as simulated in this study was nil—the biasing effect of exposure to prejudicial pretrial publicity survived this voir dire process unscathed.

Kerr, *supra* note 267, at 126 (emphasis added); *see also* Fein et al., *supra* note 267, at 1216 ("Research on mock jurors as well as actual juries has found that trial lawyers are generally unable to use voir dire to eradicate the biasing effects of pretrial publicity . . . ."); Kerr et al., *supra* note 267, at 700 (finding "Our study . . . along with a number of other studies, suggests that confidence in voir dire as an effective remedy for exposure to extensive, highly prejudicial pretrial publicity is not warranted." (footnote omitted)); Lieberman & Arndt, *supra* note 268, at 682 (reviewing studies finding that attorneys are generally unsuccessful in their attempts to use voir dire to remove the prejudicial effects of pretrial publicity).

291. Kerr et al., *supra* note 267, at 675.

the prejudicial effects of pretrial publicity.[292] Consequently, the prosecution should not be able to prejudice the jury venire in reliance on ineffectual fixes—some of which may also deny the defendant of other constitutional rights.

B. *The Role and Concomitant Speech Rights of the Criminal Defense Attorney*

The access-to-justice theory has particular force when it comes to whether the criminal defense attorney should have a First Amendment right to engage in pretrial publicity. The theory posits that there should be protection for attorney speech that invokes or avoids government power in the preservation of life, liberty, or property.[293] The criminal defense attorney's role is to protect the defendant's life, liberty, and property when facing the full force of government power being brought against him.

The criminal defense attorney is thus the accused's "champion against a hostile world,"[294] and she has heightened duties of loyalty, confidentiality, communication, and zealous representation. As the *ABA Defense Function Standards* explain, "included in defense counsel's obligations to the client is the responsibility of furthering the defendant's interest *to the fullest extent that the law and the applicable standards of professional conduct permit*."[295] By protecting the rights of the accused and challenging the prosecution, the defense counsel is "fulfilling a necessary and important function" in the criminal justice system.[296] In fact, "[t]he basic duty defense counsel *owes to the administration of justice* and *as an officer of the court* is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[297]

The defense counsel's duty to provide effective representation is constitutionally mandated. The Sixth Amendment expressly provides that a criminal defendant is to have "the Assistance of Counsel for his defense."[298] Defense attorneys serve a constitutional function of checking the State's exertions of criminal power against individuals. As Justice Kennedy observed in *Gentile*, "the criminal defense bar . . . has the professional mission to challenge actions of the State."[299]

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292. As Studebaker and Penrod summarize: "[I]t appears that the effects of pretrial publicity can find their way to the courtroom, can survive the jury selection process, can survive the presentation of trial evidence, can endure the limiting effects of judicial instructions, and cannot only persevere through deliberation, but may actually intensify." Studebaker & Penrod, *supra* note 267, at 445.

293. *See* Tarkington, *supra* note 22, at 61.

294. FREEDMAN & SMITH, *supra* note 11, at 20.

295. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2 cmt., at 122 (3d ed. 1993) (emphasis added), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf.

296. *Id.*

297. *Id.* § 4-1.2(b) (emphasis added).

298. U.S. CONST. art. VI.

299. Gentile v. State Bar of Nev., 501 U.S. 1030, 1051 (1991) (Kennedy, J.).

Indeed, all of the interests that cut against a prosecutor having a free speech right to engage in pretrial publicity actually cut in favor of recognition of that right for the criminal defense attorney because of her constitutional role in challenging state power brought to bear against individuals. Thus, a criminal defense attorney should have a protected right to engage in pretrial publicity necessary to preserve the presumption of innocence, to obtain a fair plea, to protect the reputational and liberty interests of the accused, and to secure a fair trial.

1. Free Speech Right to Speak for the Accused

Because the criminal defense attorney represents an individual client—unlike the prosecutor, who represents an amorphous government client—it could be argued that the following interests only demonstrate that the accused should have a free speech right to engage in pretrial publicity, rather than the defense attorney on behalf of the accused. The accused himself, of course, must have a First Amendment right to engage in pretrial publicity in the face of criminal charges—a right not all courts have recognized.[300] It would undermine recognized and core purposes of the First Amendment if the government could bring public criminal charges against a person and could also deny that person the right to publicly respond to those charges until and except in the venue of a trial conducted by the government itself. Vincent Blasi argued that a primary purpose in enacting the First Amendment was to check government power.[301] Further, under democratic theories of the First Amendment, the accused should be able to subject the use of government criminal power to the scrutiny of the ultimate sovereign in our system, the People[302]—including, as Justice Kennedy argued in *Gentile*, "to demonstrate in the court of public opinion that the [accused] does not deserve to be tried."[303] Finally, the accused should have such a right as an essential component of preserving her own liberty and status as a member of society.

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300. *See, e.g.*, State v. Grossberg, 705 A.2d 608, 614 (Del. Super. Ct. 1997) (issuing gag order against criminal defendant forbidding her from making pretrial statements to the press in high-profile murder case). *But see* Breiner v. Takao, 835 P.2d 637, 642 (Haw. 1992) (reversing gag order issued by trial court against criminal defendant).

301. Blasi, *supra* note 105, at 527, 538 ("[T]he most influential free-speech theorists of the eighteenth century—those who drafted the First Amendment and their mentors—placed great emphasis on the role free expression can play in guarding against breaches of trust by public officials. Indeed, if one had to identify the single value that was uppermost in the minds of the persons who drafted and ratified the First Amendment, this checking value would be the most likely candidate." (footnotes omitted)).

302. *See* Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 253–57 (explaining that "[a]ll constitutional authority to govern the people of the United States belongs to the people themselves" and that while the people are "'the governed,'" yet "in a deeper sense" the people have "sovereign power" over the government to whom they have delegated specific and limited powers).

303. *Gentile*, 501 U.S. at 1043 (Kennedy, J.).

Although recognizing the right of the accused to speak for herself is essential, it is insufficient. The defense attorney must have his own free speech right to speak in his official capacity on behalf of the accused. Criminal defendants face the full weight of the government's brute force being brought against them to literally take away their lives and liberty. In facing "what is so much stronger than themselves,"[304] they are constitutionally provided with the assistance of counsel—someone who understands the law, defenses thereto, and the workings of the criminal justice system. That counselor can use her legal expertise to ascertain the rights of the accused and to declare to the public when the prosecution is abusing its power. It is the role of the defense attorney to protect the life, liberty, and property of the accused, and under the access-to-justice theory, that includes protecting the client's constitutional and legal interests discussed herein, even through the medium of pretrial publicity.

Recognizing the right of the attorney to speak also helps to provide parity between the public spokespersons for the prosecution and the defense. The prosecution does not represent an individual with his own speech rights; thus, the State speaks only through the prosecutor. Statements made on behalf of the State, including in the indictment and charging affidavit, are made by a professional who is trained in law, speaking, reasoning, evidence, and the art of persuasion. Criminal defendants, as a whole, are disproportionately poor and undereducated.[305] They may be inarticulate (or less than fluent in English), or struggling with mental-health issues. As Freedman and Smith note, "[i]t could be disastrous . . . for an unskilled defendant to confront the cacophony and confusion of a press conference."[306] Moreover, any statements that could be interpreted as incriminating could be used against the accused at trial.[307] It is essential for the accused to have an advocate who is categorically an equal match with the State's spokesman in education and training to protect the accused's interests.

In speaking on behalf of the defendant, however, the defense attorney is not merely a public-relations specialist. The lawyer's training in the law and access to information regarding the case, including communications with the defendant, enable the lawyer to make comments to the press that are far more protective of the defendant's legal rights than if they came from another source—including from the defendant.[308] A lawyer's training

304. O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897).

305. *See* Russell D. Covey, *Longitudinal Guilt: Repeat Offenders, Plea Bargaining, and the Variable Standard of Proof*, 63 FLA. L. REV. 431, 436 (2011) (noting that "most criminal defendants are indigent").

306. FREEDMAN & SMITH, *supra* note 11, at 101–02.

307. *See id.* at 102.

308. *See id.* ("Defense counsel, by virtue of her knowledge about the case and her training as an advocate, is frequently the most appropriate person to speak publicly on behalf of the defendant.").

enables him to evaluate the justness of the charges brought by the prosecution and any relevant defenses.[309] This is particularly true in an age in which laws are often complex and even the accused may not understand the law's requirements or the legal showing necessary to establish a defense.

Importantly, the defense attorney cannot just begin revealing information about the case without her client's express or implied consent.[310] Without authorization, the defense attorney cannot reveal confidential information, which includes all information relating to the representation, whatever its source.[311] Thus, it is important to recognize the source of the defense attorney's First Amendment right to engage in pretrial publicity on behalf of her client. It is not because the information is of public concern, is political speech, or is in a public record. Rather, the criminal defense attorney has these speech rights under the access-to-justice theory because these rights are essential to fulfilling her role in the criminal justice system to fully represent her client and protect her client's rights to life and liberty from government forfeiture. Indeed, the defense attorney has speech rights sufficient not only to protect the client's interests in securing an ultimate fair trial—as emphasized in the traditional compromise—but also to preserve the presumption of innocence, obtain a fair plea, and protect the client's reputation and liberty interests.

2. Free Speech Right to Reinforce the Presumption of Innocence

The presumption of innocence, as constitutionally grounded in the Due Process Clauses and in the Sixth Amendment right to jury trial, encompasses two underlying purposes, both of which are consistent with (and even buttressed by) defense attorney pretrial publicity.[312] First, defense attorney pretrial publicity can act as a "shield against punishment before conviction," shoring up the presumption's goal that the accused be treated with the dignity accorded to all other presumably innocent people in society.[313] Upon publication of even the fact of an arrest or indictment, pretrial publicity from the defense can remind the public that the prosecution has yet to prove its case and that they should suspend judgment until a jury has spoken. When faced with criminal charges causing family, friends, and associates to treat the accused as guilty, the

309. *See id.*

310. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2014).

311. *Id.* (prohibiting, absent an applicable exception, lawyers from revealing information "relating to the representation of a client" without informed consent or implied authorization); *see also id.* at R. 1.6 cmt. [3] (noting that the professional duty of confidentiality is greater in breadth than the attorney-client privilege because it "applies in situations other than those where evidence is sought from the lawyer through compulsion of law" and to "all information relating to the representation, whatever its source").

312. *See supra* note 176 and accompanying text.

313. Quintard-Morénas, *supra* note 167, at 107–08, 148.

defense should be able to respond publicly to preserve the accused's right not to be subjected to punishment until a jury has found him proven guilty beyond a reasonable doubt.

Unfortunately, MRPC 3.6 only presumptively allows the defense attorney to state the "defense involved."[314] Further, presumptively prejudicial statements include statements regarding the evidence, forensic tests, the character, lack of criminal record, and the innocence of the accused.[315] The defense attorney should not be limited to identifying the defense, but should be able to elaborate on the defense, including exculpatory evidence. Because the public is aware that an accused is entitled to counsel, they may not give much weight to defense attorney statements containing a vague reference to the existence of a defense. It is imperative that the defense attorney be allowed to present the public with exculpatory facts and elaborate on the defense. Such specific information should have a greater impact on the public in presuming innocence until trial because the public will understand that reserving judgment against the accused is not merely a legal technicality, but may be justified in fact. Of course, the presumption of innocence and the Sixth Amendment right to trial by an impartial jury are in no way technicalities, but are the bedrock of our criminal justice system and a constitutional reservation to the People of the power of government to deprive individuals of life and liberty. Yet to help the public understand the constitutional weight of the presumption, defense attorneys need to be able to reinforce the presumption, including by being free pretrial to elaborate on exculpatory evidence and defenses in specific cases. Even though defense attorneys often may not wish to initiate publicity, the fact that they do in some cases may serve on the whole to reinforce the presumption of innocence for criminal defendants collectively.

As Kitai explains, the presumption of innocence is part of the compact between the individual and the State[316] and it serves to lessen the friction between the two in the face of criminal charges.[317] Allowing the State (in the form of lawyer regulation) to tell an accused that her constitutionally provided counselor cannot speak publicly on her behalf, or explain why a defense exists, or why charges should not be brought under law exacerbates tensions between the accused and the State, thus undermining the presumption's salutary effects. The government must uphold the presumption of innocence and should not be able to foreclose the defense attorney from publicly questioning the propriety of criminal charges. The State, through its prosecutor, has singled out the accused as a member of society who allegedly deserves to lose her life or liberty. But the State's

314. MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2014).
315. *Id.* at R. 3.6 cmt. [5].
316. Kitai, *supra* note 166, at 281–82.
317. *Id.* at 282–83.

power is limited by the presumption of innocence.[318] Having brought charges against an accused, the State should not be able to muzzle attempts of the accused or his counselor to declare his innocence, to elaborate on his defense, or to argue that charges are unwarranted.

Moreover, the defense attorney should be able to declare to the press (when doing so is not a misrepresentation) her belief that the accused is innocent. Such "vouching" for client innocence has been condemned by some scholars[319] and MRPC 3.6 includes as presumptively prejudicial "any opinion as to the guilt or innocence of a defendant or suspect in a criminal case."[320] But where the defense attorney believes a client to be innocent or to be unjustly charged, there is no state justification in forbidding the attorney from stating so publicly. The attorney's statements serve to bolster the presumption of innocence. Again, the prosecution will be able to respond to such statements, for example, by noting that it has evidence sufficient to continue the prosecution. Nevertheless, in light of the presumption of innocence, the prosecution lacks a free speech right to vouch for the guilt of the accused because the prosecution, in representing the State, must abide by the presumption.[321] Although this approach is facially unequal, continued prosecution itself implies evidence supporting guilt,[322] and the result is consistent with the presumption of innocence and the differing roles of the prosecutor and the defense attorney in the criminal justice system. Thus, MRPC 3.6's limitation on vouching is an appropriate limit on prosecutorial speech, but it violates the defense attorney's free speech rights.

Freedman and Starwood posit that "a situation in which a defendant could generate publicity sufficient to prejudice the case against the prosecution scarcely can be imagined."[323] While there are many possible factors in play,[324] the difficulty in prejudicing the prosecution exists in part

318. *See id.* at 280 ("The presumption protects the individual's right of freedom within and from the state.").

319. *See* Cole & Zacharias, *supra* note 87, at 1665–72 (criticizing the use of vouching by attorneys).

320. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. [5] (2014) (noting that "any opinion as to the guilt or innocence of the defendant or suspect in a criminal case" is more likely than not to prejudice the proceeding).

321. *See* Kitai, *supra* note 166, at 279 (noting that the presumption of innocence reminds law enforcement agencies that the defendant may actually be innocent, and that the presumption therefore "forbids considering a person as guilty because of the existence of incriminating evidence against her").

322. *See supra* Section III.B.

323. Freedman & Starwood, *supra* note 10, at 607.

324. Differing access to major media outlets is a possible reason why the defense may not be able to have as great an influence as the prosecution. In the age of the internet, some defense attorneys, including the defense teams for George Zimmerman and for Bei Bei Shuai posted their own publicity directly on their own websites and social media. *See* Hochberg, *supra* note 3; *Free Bei Bei Shuai*, PENCEHENSEL.COM, http://www.pencehensel.com/Practice-Area-Overview/Criminal-

because of the presumption of innocence. The trial is supposed to start with the jury presuming that the defendant is innocent and with the prosecution bearing a heavy burden to overcome that presumption.[325] Thus, even if jurors were to go into a trial inclined to think the defendant was innocent, that would not undermine the legal presumption that is supposed to exist.

Defense pretrial publicity can also help ensure the second purpose of the presumption of innocence, which is to establish the burden of proof for the prosecution. Where pretrial publicity by the defense attorney works to alleviate juror pro-prosecution bias—which at least one empirical study supports[326]—it sustains the presumption of innocence in requiring the prosecution to prove a case beyond a reasonable doubt.

3. Free Speech Right to Secure a Fair Plea

As noted by several commentators, criminal defense attorneys can be as much of a problem, if not more, in securing fair pleas for their clients as the prosecution. Often paid by case volume or flat fee, with many facing enormous caseloads, they have strong economic incentives to encourage their clients to plead rather than take cases to trial.[327] Thus, many criminal defense attorneys compound the prosecution's pressure on defendants to plead guilty regardless of the evidence in the case—indeed, the defense attorney may not have or take the time to investigate the merits, defenses, or anything at all about the matter before recommending a plea.[328]

Nevertheless, criminal defense attorneys should be able to speak to the press to alleviate the inequities favoring the prosecution in the plea bargaining process. One of the problems in plea bargaining is its secretive nature.[329] Where evidence is weak or defendants have a credible claim of innocence, prosecutors can hide cases from public scrutiny with sweet

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Defense/Free-Bei-Bei-Shuai.shtml (last visited May 24, 2014) (linking internet users to information posted by Bei Bei Shuai's defense attorneys on YouTube, Facebook, and Twitter).

325. *See* Kitai, *supra* note 166, at 279 ("The presumption of innocence operates during trial to shift the burden of proof onto the prosecution, who strives to refute it on a factual level.").

326. *See infra* text accompanying notes 362–366.

327. *See, e.g.*, Bibas, *supra* note 200, at 2476–77 (providing that "flat fees create financial incentives [for defense attorneys] to plead cases out quickly in order to handle larger volumes"); Schulhofer, *supra* note 207, at 1988 (noting defense counsel's "powerful financial incentives . . . to settle as promptly as possible"). *See generally* Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1180, 1204–05, 1263 (1975) (studying defense attorneys and showing the overwhelming incentives that lead them to pressure defendants to plead).

328. *See, e.g.*, Bibas, *supra* note 200, at 2479–2482 ("[M]any public defenders are overburdened. They handle hundreds of cases per year, far more than privately retained attorneys do. This volume ordinarily means that pleas become the norm . . . . [and] overburdened defense attorneys cannot spend enough time to dig up all possible defenses. The result is fewer plea-bargaining chips and less favorable plea bargains." (footnote omitted)).

329. *See id.* at 2475 (positing that plea bargaining represents a secret area of law, hidden from public view).

deals that make the cases go away[330] and, in fact, still result in a "win" for the prosecution's record. Yet prosecutors are "a politically ambitious bunch," who are often beholden to an electorate and thus will care about negative press they may receive.[331] Where a defendant is charged who is innocent, who has a strong defense, or who is significantly overcharged, his attorney should be able to publicly state as much to the press. Such publicity may put political pressure on the prosecution. The prosecution does have a right to respond to such publicity,[332] but where the evidence and information indicates that a prosecution is unwarranted, publicity may help pressure the prosecution to lower or drop charges.

A recent example may be found in the prosecution of Bei Bei Shuai, who faced a potential sentence of forty-five to sixty-five years in prison after being charged with murder and attempted feticide.[333] Shuai, while pregnant, ingested rat poison in a suicide attempt after her boyfriend left her.[334] A friend found Shuai and took her to the hospital where she gave birth by Cesarean section but the baby died three days later.[335] Linda Pence, the attorney for Bei Bei Shuai undertook considerable publicity in Shuai's behalf, including creating a website, a Facebook page, a Tumblr page, and a Twitter account.[336] Included on Pence's website was an invitation to the public to express their dissatisfaction with the charges to the prosecutor, complete with a link to the prosecutor's office address and phone number.[337] Shuai eventually pled guilty to criminal recklessness, a misdemeanor, and was given credit for her entire sentence of 178 days.[338] Although it is impossible to know whether the defense attorney's publicity influenced the prosecutor in deciding to offer the plea, it may have. The issue is whether the defense attorney should have a constitutionally protected speech right to freely engage in such publicity on behalf of a defendant. As an attorney, Pence was able to frame the issues in a way to protect Shuai's interests,[339] to note Shuai's lack of criminal history, and to

330. *See id.* at 2473.

331. *Id.* at 2472 ("Most district attorneys are elected, and many have parlayed their prosecutorial successes into political careers.").

332. *See infra* Section IV.D.

333. *See Free Bei Bei Shuai*, *supra* note 324.

334. *Id.*; Diana Penner, *Woman Freed after Plea Agreement in Baby's Death*, USA TODAY, (Aug. 2, 2013), http://www.usatoday.com/story/news/nation/2013/08/02/woman-freed-after-plea-agreement-in-babys-death/2614301/.

335. *See* Penner, *supra* note 334.

336. *See Free Bei Bei Shuai*, *supra* note 324.

337. *Id.* (explaining to online readers that they "can also write a letter to or call the Prosecutor's Office to show [their] support for Bei Bei and ask for her charges to be dropped before trial").

338. *See* Penner, *supra* note 334.

339. For example, Pence did not state or imply on her website that the rat poison was the cause of death. Indeed, Pence successfully undermined the prosecution's cause of death evidence. *See Free Bei Bei Shuai*, *supra* note 324. The prosecutor noted in interviews about the plea that rulings

elaborate on the applicable law and precedent that could be set by a conviction in the case.[340]

Kevin Cole and Fred Zacharias have argued that defense attorney pretrial publicity—especially publicity vouching for a defendant's innocence—can influence a prosecutor to offer a better deal to avoid continued negative publicity.[341] Nevertheless, they express concern that if such pretrial publicity (even if true) is allowed to help one defendant, then other defendants would expect the attorney to engage in the same speech on their behalf. Thus, clients who were guilty would be faced with a dilemma: to tell their attorney all of the facts and foreclose vouching, or to lie to their lawyer so that she will vouch for their innocence.[342] Further, Cole and Zacharias argue that if vouching is allowed, then a defense counsel's failure to vouch for a client might lead to prejudicial consequences such as negative inferences drawn by the public and the potential jury pool or signals to prosecutors about the relative guilt of the client.[343]

Despite such concerns, the alternative—foreclosing such pretrial publicity—is unacceptable. It would contravene the role of the defense attorney and his duties to the accused if he were prohibited from publicly declaring the innocence of his client when the declaration was true and would likely operate to the client's benefit in obtaining a fair plea or getting charges dropped altogether. As noted, plea bargaining is significantly skewed in favor of the prosecution, which is able to exert considerable pressure on the defendant to plead.[344] The defense has close to zero ability to pressure the prosecution to advance an equitable plea deal or reduce or drop charges.[345] Because it is the essential role of the defense attorney to protect the life and liberty of the criminal defendant in the face of the full weight of government power, the defense attorney cannot be prohibited from using one of the few tools he has to exert pressure on a politically-accountable prosecution: public opinion.

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from the court had hurt their case, including that "Dr. Jolene Clouse, who performed the autopsy on newborn Angel Shuai, didn't consider other possible causes for the brain bleeding that caused her death, including a drug that Shuai received while she was in the hospital." *Bei Bei Shuai Pleads Guilty in Baby's Death*, HUFFINGTON POST (Aug. 2, 2013), http://www.huffingtonpost.com/2013/08/02/bei-bei-shuai-guilty_n_3698383.html.

340. *Free Bei Bei Shuai*, *supra* note 324.

341. Cole & Zacharias, *supra* note 87, at 1648.

342. *Id.* at 1665–66.

343. *Id.* at 1665.

344. *See supra* notes 217–218 and accompanying text.

345. *See* Alschuler, *supra* note 327, at 1179–80 (positing that the romantic conception of the defense attorney in the plea bargaining process as an "equalizer" is often "more romanticized than real" (internal quotation marks omitted)).

It is a well-established fact that some innocent individuals plead guilty.[346] If a prosecutor brings unjustified charges, the defense attorney should be able to publicly call the prosecutor on it. Not only does this serve to protect that individual criminal defendant's interests, it also may serve to bring to light the fact that the prosecutor is not exercising her discretion appropriately. Such public scrutiny may in turn improve the integrity of prosecution. One major concern regarding the plea bargaining system is that it is done in the dark and prosecutors are able to "cover up faulty investigations that mistakenly target innocent suspects."[347] If prosecutors are aware that they are likely to receive negative publicity for unwarranted or substantially overcharged indictments, they may exercise greater care in ensuring that charges are warranted.[348]

But the fears of Cole and Zacharias that every criminal defendant will want such publicity and will expect their attorneys to vouch for their innocence to the press are unlikely to materialize. As discussed more fully below, under the access-to-justice theory, once the defense opens the door, the prosecution has a right to respond to the electorate and explain the decision to charge and the evidence that supports that charge. The right of the prosecution to respond (but not to initiate) publicity creates a disincentive for defendants to initiate publicity themselves. Only defendants who have little or no reason to fear publicity from the prosecution explaining the evidence against them would find defense attorney "vouching" useful to their cases. But if the defendant is innocent or is grossly overcharged, then the chance of a successful response from the prosecutor is not as big a threat. In such a case, if the prosecutor responds by disclosing weak evidence, the defense can explain why the prosecution's response is unavailing. Ultimately this may help both sides to properly determine the value of a case, resulting in a fairer plea bargain.

Indeed, tying into the prior subsection, the presumption of innocence is intended not only to help society reserve judgment against the accused, but also to help *the prosecution* reserve judgment through a constant reminder that the accused might ultimately be found innocent at trial.[349] Now that most cases are not tried, the presumption often will not have that same weight for the prosecution. But pretrial publicity from the defense that reinforces the presumption of innocence can provide a pretrial check on prosecutorial overconfidence in the strength of the case against the accused, and thus bolster the chance of a fair plea.

346. *See, e.g.*, *supra* note 227 and accompanying text.

347. Bibas, *supra* note 200, at 2473.

348. *See id.* at 2472 (noting that prosecutors are "particularly concerned about their reputations" and respond to public pressures and incentives).

349. *See* Kitai, *supra* note 166, at 279–80.

4. Free Speech Right to Preserve Client Reputation and Liberty

In discussing the social value of pretrial publicity, Chemerinsky notes the importance of attorney's protection of their clients' reputations because "[a] client who is never prosecuted, or who is prosecuted and acquitted, may have been ill-served by a lawyer who allowed public speculation about his guilt to go unchallenged."[350] The defense attorney has the ability to challenge, as a matter of both law and fact, the legal appropriateness of pressing charges. Notably, Chemerinsky does not make this observation as part of his First Amendment analysis. Yet under the access-to-justice theory, the defense attorney's free speech rights include speech necessary to her role in protecting her client's reputation in the face of criminal charges.

The existence of the common law tort of defamation shows the enduring societal recognition of the value of reputation and its time-honored status as a legally protected interest. Nevertheless, when criminal charges are brought against an individual, the prosecution is cloaked with immunity and the individual cannot sue the prosecutor for defamation to protect his reputation.[351] While it is necessary to protect the prosecutor in publishing charges in an indictment, such protection also means that the accused is left bereft of a traditional remedy to protect her reputation in the face of a publication that would generally be defamatory if untrue and if it had been published in a different scenario.[352] Consequently, once indicted, the defendant and her constitutionally mandated counsel can timely salvage the reputation of the accused before family, friends, and associates only through a response to the charges. The defendant should not be forced to wait until trial (months or years later) to protect her reputation. To require such a delay would allow the government to deprive the accused of reputation during the pretrial period—with resultant personal and professional harms, but without any remedy. Although the accused and her counsel may decide that waiting until trial is the wisest course, they should have a right to protect the accused's reputational interests promptly, publicly, and forcefully if they deem it necessary or desirable.

Thus, it was perfectly consistent with his role as a defense attorney for Gentile to hold a press conference to protect his client's reputation and property interests once Sanders was indicted.[353] Gentile recognized the severe reputational harm that his client, Sanders, had already suffered due to publicity regarding the crime. Although a jury ultimately acquitted

350. Chemerinsky, *supra* note 14, at 869 (alteration in original) (quoting Uelman, *supra* note 85, at 951–52).

351. *See supra* note 156 and accompanying text.

352. *See* Freedman & Starwood, *supra* note 10, at 617 (stating that the prosecutor is specially privileged "to go beyond the bounds that normally restrict other citizens by publishing charges in an indictment that might otherwise constitute defamation").

353. *See* Gentile v. State Bar of Nev., 501 U.S. 1030, 1033 (1991) (Kennedy, J.).

Sanders on all counts,[354] Sanders's personal and professional life was on a ruinous trajectory.[355] A defense attorney is not required to await trial to publicly counter the disastrous array of personal and professional harms that come with indictment against her client.

Under the access-to-justice theory, because it is the central role of the defense attorney to protect the accused's life, liberty, and property interests (which liberty interests include reputation), the attorney has a free speech right to engage in pretrial publicity to protect her client's reputational interests pretrial. Although the Supreme Court has not recognized a constitutional remedy for reputational harm absent a showing of "stigma-plus,"[356] that does not undermine the importance of reputation as an essential component of a person's actual liberty interests. Reputation directly affects a person's ability to live as a free member of society—free to work, associate with others, and live, as Attorney François Quintard-Morénas argues, "with the dignity and respect due to presumably innocent individuals."[357]

In an era where pretrial detention has become common,[358] pretrial publicity from the defense may not only protect the client's reputation, it may actually help bring about a plea or dismissal that would put an end to the accused's pretrial detention. Thus, the attorney would not only be protecting the accused's liberty interests in reputation, but his liberty interests in being free from unlawful or unjustified incarceration. As noted, the framers considered freedom from unlawful restraint of special importance in our constitutional justice system.[359]

5. Free Speech Right to Protect a Fair Trial

A criminal defendant's constitutional right to a fair trial by an impartial jury is not a formality, but an essential populist check on the government's power to deprive people of life and liberty. Although few criminal cases proceed to trial, the right to a trial exists in every case up until there is a plea waiving that right. As noted above, empirical studies on pretrial publicity indicate that publicity generally works in favor of the prosecution and against the defense.[360] Even emotional publicity of no inculpatory value has been shown to prejudice mock juries against the accused.[361]

Notably, one empirical study indicated that pro-defense publicity can

354. *Id.*

355. *See id.* at 1040 (noting that after the media reports, Sanders' company "suffered heavy losses as customers terminated their box rentals, and the company soon went out of business").

356. *See supra* text accompanying notes 250–54.

357. Quintard-Morénas, *supra* note 167, at 148.

358. *See* Baradaran, *supra* note 174, at 725.

359. *See supra* Section III.A.

360. *See supra* notes 273–75 and accompanying text.

361. *See supra* notes 276–77 and accompanying text.

lessen the effects of pro-prosecution pretrial publicity.[362] In that study, a control group was exposed to no publicity and all other participants were exposed to pro-prosecution publicity.[363] Some of the exposed participants were additionally exposed to a brief article where the defense attorney questioned the motives of the press and the prosecution, indicating that the prior reports "knowingly ignore[] facts which would point toward a defendant's innocence" and that the prosecution was trying to "sway public opinion."[364] Interestingly, a minority of subjects in the no-publicity group voted guilty (indicating the weakness of the mock-prosecution's case), yet more than 75% of the subjects who were solely exposed to the pro-prosecution publicity voted guilty.[365] Finally, those who were exposed to the pro-defense publicity "were *no more likely to convict* than were the participants in the no-publicity control condition."[366] Thus, the pro-defense publicity (and its implication of innocence) did not prejudice the group in favor of the defendant; rather, it leveled the playing field back to what it had been prior to the pro-prosecution publicity. Although this is only one study on the effect of pro-defense publicity, it illustrates that pro-defense publicity may be able to level the playing field for the defense, and restore the right to a fair trial by an impartial jury.

Because the role of the defense attorney includes protecting the accused's right to a fair trial, he should have a speech right to use publicity to lessen prejudice for a client publicly charged with wrongdoing. Even were we to imagine a situation where defense pretrial publicity resulted in a jury that was predisposed to find the defendant innocent,[367] that "presumption of innocence" would not run contrary to the proper functioning of the criminal justice system. As noted, the presumption of innocence is in part grounded in the accused's Sixth Amendment right to a jury trial.[368]

MRPC 3.6 undermines the free speech rights of criminal defense attorneys to protect the fair trial rights of their clients. The rule, as elaborated in the comments, presumptively forbids lawyers from commenting on "the character, credibility, reputation or criminal record" of the accused or a witness, "the expected testimony of a party or witness," or the results of forensic tests.[369] While the prosecution appropriately can be foreclosed from publicizing negative character evidence, the criminal

362. Fein et al., *supra* note 267, at 1218.

363. *Id.* at 1218–19.

364. *Id.* at 1219 (internal quotation marks omitted).

365. *Id.*

366. *Id.*(emphasis added).

367. Freedman & Starwood, *supra* note 10, at 607 (arguing that such a scenario could scarcely be imagined).

368. *See supra* note 176 and accompanying text.

369. MODEL RULES OF PROF'L CONDUCT R. 3.6 cmt. [5] (2014).

record of the accused, and forensic test results,[370] the "equality" of imposing these same prohibitions on the defense is problematic. If the defense has witnesses or forensic test results that undermine the prosecution's case, and if the defense wants to use that information to publicly counter the weight of charges or level the playing field in public opinion, they should be able to do so. Further, if the defense wants to present to the press positive evidence regarding the character, lack of criminal record, or reputation of the accused, the defense should be able to do so in order to preserve all of the interests noted herein: a fair trial, a fair plea, the presumption of innocence, and the liberty and pretrial reputation of the accused.

If the defense commented on any of these items, as discussed below, the prosecution would be able to respond with information necessary to counter the publicity. Through this mechanism, not only are the fair trial rights of the defendant preserved, but the other related constitutional rights of the defendant are properly put into the defendant's own hands. Commentators have argued that the effects of pretrial publicity can be fixed by other mechanisms, many of which require the defendant to give up a different constitutional right (speedy trial, venue, and jury trial) to regain a fair trial.[371] Under the access-to-justice theory, the Constitution permits limiting the prosecution from initiating most publicity; thus extensive attorney publicity should only be generated if the defense pursues it first. Consequently, if such publicity ultimately required one of the above fixes (and the concomitant forfeiture of one of the defendant's rights) it would often be because the defense pursued that option. Freedman and Starwood initially endorsed this approach, noting that if the defendant or her counsel's speech "should boomerang and result in so much prejudicial publicity that the defendant must waive one or more sixth amendment rights, so be it."[372] Defense counsel and the accused could weigh such potential consequences prior to initiating publicity.

C. *Constitutional Limitations on Attorney Pretrial Publicity*

Under the access-to-justice theory, prosecutors have extremely limited First Amendment rights to engage in pretrial publicity. They have a constitutional right to engage in publicity that is necessary to fulfill their purpose in the system of justice and have no constitutionally protected right to undermine the criminal justice system, including the rights of the accused, through pretrial publicity. Thus, they have a free speech right to engage in publicity that is truly necessary to conduct the investigation, prosecution, and trial. Consequently, restrictions like those found in the CFR are constitutional, and could be constitutionally imposed on state

370. *See id.*

371. Freedman & Starwood, *supra* note 10, at 617.

372. *Id.*

prosecutors, as Levenson proposes.[373] Again, this does not mean that states are required to restrict prosecutors to the fullest extent that the Constitution allows. States are free to continue with lesser restrictions on prosecutorial speech, but the Constitution is not a barrier to state regulations that would foreclose prosecutors from engaging in pretrial publicity beyond what is necessary to conduct the investigation, prosecution, and trial.

Further, prosecutors do not have a constitutional right to divulge all information contained in public records. MRPC 3.6 contains a public record exception allowing for such disclosures, but the CFR does not allow disclosure of materials on the basis that the information is contained in a public record.[374] The Model Rules' public record exception has been interpreted in ways that generally swallow much of the force of the rule's overall limitation on pretrial publicity, even as to presumptively prejudicial materials.[375] For example, in *Attorney Grievance Commission of Maryland v. Gansler*,[376] the prosecutor avoided discipline under Rule 3.6 by invoking the public records exception when he published the prior criminal record of an accused based on the argument that criminal records are contained in public court records.[377] As noted above, the prior criminal record of an accused is one of the categories of pretrial publicity that has been found to prejudice jurors against the defendant and undermine his rights.[378] It is contrary to the role of the prosecutor to inject such information into the public view. It may be that media sources are able to dig up the information, but it should not come from the prosecutor whose role includes protecting the accused's constitutional rights.

The constitutionality of restrictions on attorney disclosure of matters that are of public record is not limited to this context. Attorneys of individual clients are not constitutionally privileged to release information relating to the representation of a client in violation of the duty of confidentiality just because it is a matter of public record somewhere. Rather, they are forbidden from undermining their client's interests

373. *See supra* text accompanying notes 89–91.

374. *Compare* MODEL RULES OF PROF'L CONDUCT R. 3.6(b) (2014) (allowing lawyers to publicize "information contained in a public record"), *with* 28 C.F.R. § 50.2(b)(3) (2013) (containing no provision that would allow for the release of information relating to a criminal proceeding on the basis that it is contained in a public record).

375. *See, e.g.*, Muex v. State, 800 N.E.2d 249, 252 (Ind. Ct. App. 2003) (holding there was no violation of Rule 3.6 by publicizing forensic results of inculpatory DNA tests because they were included in the Affidavit of Probable Cause, a public record); Attorney Grievance Comm'n of Md. v. Gansler, 835 A.2d 548, 566–68 (Md. 2003) (reasoning there was no violation of Rule 3.6 for public disclosure of a defendant's criminal record based on the "broadest" construction of the phrase "information in a public record").

376. 835 A.2d 548 (Md. 2003).

377. *Id.* at 568. The court noted that future attorneys "will have the burden of establishing that such information was contained in a bona fide public court record accessible to the general public," but that many criminal records could be found in "publicly accessible court records." *Id.*

378. *See supra* note 268 and accompanying text.

through such a disclosure.[379] In a similar vein, the prosecutor can constitutionally be prohibited from undermining the constitutional rights of the accused—even if the prosecutor can find some public record that contains the information. States are free to continue to have a public records exception, but it is not constitutionally required, and the CFR's lack of a public records exception is constitutional.

Defense attorneys have strong First Amendment rights to engage in pretrial publicity to protect their clients' interests in a fair trial, a fair plea, reputation, and liberty. They have a right to fully elaborate on the defense, including discussing publicly any exculpatory evidence, testimony, forensic tests, and the character, criminal record, and reputation of the accused. Consistent with their role in and the purposes of the criminal justice system, defense attorneys do have one significant limitation on their speech, which is reflected in both MRPC 4.1 and 8.4. In her speech to the press, the defense attorney lacks a First Amendment right to knowingly "make a false statement of material fact or law to a third person"[380] or to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[381] MRPC 4.1, as proffered here as the constitutional limitation, only prohibits the "knowing" false or misleading statement—requiring "'actual knowledge of the fact in question,' which 'may be inferred from circumstances.'"[382] Such a limitation, although similar, is more restrictive than Chemerinsky's recommendation of adopting *Sullivan*'s actual malice standard, under which the state would be required to prove that the attorney subjectively entertained doubts as to the truth of the statements.[383] Under MRPC 4.1, the lawyer must know that the statements are false or materially misleading, but knowledge can be inferred by the circumstances. Even so, it leaves great leeway for criminal defense attorneys to engage in pretrial publicity, as long as they do not engage in blatant misrepresentations and falsehoods.[384]

379. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [3] (2014) (providing that Rule 1.6(a)'s bar on disclosing information relating to the representation of the client applies "to all information relating to the representation, whatever its source").

380. *Id.* at R. 4.1.

381. *Id.* at R. 8.4 (including in the definition of misconduct, any "conduct involving dishonesty, fraud, deceit or misrepresentation").

382. *See* BENNETT et al., CTR. FOR PROF'L RESPONSIBILITY, *supra* note 57, § 4.1 annot. (quoting MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2014)).

383. *See supra* text accompanying notes 73–76.

384. The overlap of MRPCs 4.1 and 8.4 with pretrial publicity already exists under the rules. For example, in *Iowa Sup. Ct. Prof'l Ethics & Conduct v. Visser*, 629 N.W.2d 376, 383 (Iowa 2001), the court held that the attorney had not violated an Iowa professional ethics rule similar to MRPC 3.6 by his publicity, but that he had nevertheless engaged in dishonest conduct in violation of an Iowa ethics rule congruent to MRPC 8.4 because he knew that part of what he said was untrue.

D. Gentile's *Equality Principle and the Right to Respond*

Even in a regime where prosecutors have limited free speech rights and defense attorneys have robust free speech rights, *Gentile*'s equality principle does have play in one very important sense. Once the defendant opens the door by engaging in pretrial publicity, the prosecution should be constitutionally privileged to respond to such statements. The prosecutor represents a sovereign that is required to act impartially. Moreover, the sovereign's objectives in exercising its criminal powers must include complying with constitutional requirements in the conviction of the guilty while sparing the innocent.[385] To the extent that a defense attorney's statements indicate that the prosecutor—as the representative of the sovereign—is abusing that power, the prosecutor has a right to respond. Further, prosecutors are political actors, using government resources, and exercising political discretion under public scrutiny.[386] It is part of the prosecutor's role to protect the interests of the government, and it is not in the government's interests for the public solely to hear (and come to believe) that prosecutions lack justification when, in fact, that is not the case.

A right to respond is already found in MRPC 3.6(c), and, as with that provision, the prosecutor's constitutional right to respond is "limited to such information as is necessary to mitigate the recent adverse publicity."[387] It does not give the prosecution carte blanche to publicize all information and opinions about the case. Further, as with defense attorneys, the prosecution's response must comport with MRPCs 4.1 and 8.4. Under the access-to-justice theory, the prosecution has no free speech right to engage in false statements, misrepresentations, or dishonesty. While defense publicity opens the door to prosecutorial response, it does not suddenly enable the prosecution to "strike foul" blows[388] that would dishonestly and unjustly work to undermine all of the interests discussed above—including the presumption of innocence, a fair plea, a fair trial, and the reputational interests of the accused.

Moreover, under the access-to-justice theory, there is one area where the prosecution can respond, but can be prohibited from responding "in kind"—vouching for a client's innocence or guilt. While a defense attorney can vouch for her client's innocence, if the statement is not a knowing misrepresentation, the prosecution cannot vouch for the guilt of the accused pretrial. To provide such a constitutional right to the prosecution pretrial is directly contrary to the presumption of innocence.[389] The

385. Berger v. United States, 295 U.S. 78, 88 (1935).

386. *See* Bibas, *supra* note 200, at 2472 (noting the political ambition of prosecutors).

387. *See* MODEL RULES OF PROF'L CONDUCT R. 3.6(c) (2014).

388. *Berger*, 295 U.S. at 88 (explaining that while a prosecutor "may strike hard blows, he is not at liberty to strike foul ones").

389. *See supra* Subsection IV.A.2.

prosecutor can, however, respond with information that mitigates defense vouching, and the very fact of continued prosecution of the accused will signal to the public the prosecution's continued belief in the defendant's guilt.

The criminal defense team that decides to use publicity to protect the accused's interests in reputation, the presumption of innocence, a fair plea, and a fair trial, must make that decision with proverbial fear and trembling. Once they open the publicity door, the prosecution will be privileged to respond. The defense must contemplate the reality that more publicity generally works to favor the prosecution,[390] and thus publicity can backfire to harm the interests of the accused. When Zimmerman's defense attorneys decided to create a webpage, Facebook page, and Twitter account, commentators recognized the significant risks for the defense in fueling publicity, including through social media. One attorney commentator aptly remarked: "'You have to . . . understand that you're playing with a monster that will devour you if you screw up.'"[391]

Admittedly, publicity as to a particular crime or a particular defendant or victim may bring intense media scrutiny without initiation from either the prosecution or the defense. In such a case, the defense, of course, maintains the right to initiate publicity of its own; and if they do so, the prosecution has a right to respond in mitigation. Nevertheless, the prosecution has no right to respond to publicity not coming from the defense unless the media reports significantly undermine the prosecution's case. Under the access-to-justice theory, the prosecution lacks a free speech right to use media interest in a crime as an excuse to fuel the fire of publicity harmful to an accused.

The access-to-justice theory, thus, gives the accused the choice to either close down nearly all publicity coming from the prosecution by refusing themselves to engage in publicity or, alternatively, to engage the press and allow the prosecution to respond. Putting this choice in the hands of the defense is appropriate in our criminal justice system in light of the constitutional mandates intended to safeguard the citizenry from abuse of criminal power, the constitutional undergirding of the presumption of innocence, and the reputational and liberty interests of the accused.

The rejection of differing free speech rights for the prosecution and defense—as argued by Freedman and Starwood in 1977—has mostly arisen from *Gentile*'s equality principle.[392] That principle is founded on the First Amendment prohibition against viewpoint-based restrictions.[393] The

390. *See supra* note 273 and accompanying text.

391. Hochberg, *supra* note 3 (quoting Scott Greenfield, a New York attorney and blogger).

392. *See supra* notes 10–12 and accompanying text.

393. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377, 384–88 (1992) (explaining the rationale that government is prohibited by the First Amendment from "driv[ing] certain ideas or viewpoints from the marketplace" (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime

primary objection to viewpoint-based restrictions is that they distort public debate and knowledge by allowing the public to hear only one side of an issue.[394] Distortion of public debate is arguably more problematic when it involves government processes, such as the workings of the criminal justice system.

However, the alleged viewpoint-discrimination problem is illusory. First, under the access-to-justice theory, once the defense attorney opens the door to publicity, the prosecutor can respond. Thus, it is not accurate to say that this approach is viewpoint discrimination. The public is never given only the defense version without the prosecution having a right to tell their side of the same story.

More importantly, even before the prosecution responds, allowing the defense to engage in pretrial publicity is not one-sided. The government has made the most devastating public statement possible about the accused by officially declaring him a wrongdoer and seeking forfeiture of his life or liberty through the indictment. That indictment, along with the charging affidavit, may contain the most damaging information that can be disclosed regarding that individual. Thus, any publicity from the defense is already a "response" to the prosecution itself.

The ABA asserted a related argument in rejecting Freedman and Starwood's approach, namely the "general presumption in the adversarial system [that] rules appl[y] equally to both sides."[395] This argument similarly lacks merit. Under the access-to-justice theory of the First Amendment, considerations about the proper functioning of the adversary system are relevant when examining free speech rights. Where both parties categorically are likely to have equal incentives, powers, and rights (as exist in the civil context), then equal rules may be appropriate. But a criminal prosecution does not involve two sides with categorically similar incentives to engage in pretrial publicity, equal power to impose harms and costs on the other, or equal interests at stake.[396] The prosecution does not represent an individual client whose life or liberty is being threatened in the proceeding or whose reputation and livelihood could be devastated by

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Victims Bd., 502 U.S. 105, 116 (1991))); Police Dep't. of Chi. v. Mosley, 408 U.S. 92, 95–98 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

394. *See, e.g.*, *Mosley*, 408 U.S. at 96 ("Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))).

395. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 8-1.1(b) cmt., at 6–7 (3d ed. 1992), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_standards_fairtrial.authcheckdam.pdf.

396. *See* Zacharias, *supra* note 209, at 1133–34 (discussing, in the context of plea bargaining, the coercive relationship between the prosecution and the defendant, noting that "[t]he prosecution . . . can exercise coercion unilaterally" and the "defendant can do nothing in response").

publicity; the defense does. The defense cannot impose any harm on the prosecutor or her client; but the prosecutor selects the severity of the charges and can seek pretrial detention. Importantly, the defense attorney's publicity can also protect several constitutionally mandated interests—a fair trial, the presumption of innocence, and due process—while similar publicity from the prosecution could undermine those same interests. It is thus constitutionally justifiable to treat them differently, especially where it will not result in viewpoint discrimination. Moreover, this would not be the only area where, in light of the constitutional rights of the criminal defendant (such as the right against compelled self-incrimination), the prosecution is foreclosed from speech until the defense opens the door and makes the prosecution's speech an appropriate response.[397]

The ABA additionally argues that recognizing a strong right for the defense and extremely limited rights for the prosecution would "[g]iv[e] one side a preferred position with respect to extrajudicial statements," which "would tend to encourage that side to exploit its advantage."[398] But, as noted, the prosecution begins with an advantage (the indictment) and has power to coerce and harm the defendant. Giving the defense a free speech right to counter this advantage works to level the playing field. Further, the defense has inherent incentives to limit pretrial publicity. Once the door is opened, the prosecutor can respond with information that may embarrass the defendant, indicate guilt, or arouse public passion to the detriment of the accused. Many people charged with a crime will not want this kind of publicity, and if they can avoid it, they will.[399] Thus, knowledge of the prosecution's right to respond curbs the defense attorney's inclinations to ever open that door, rather than creating an "exploitable" advantage. Recognizing strong defense attorney rights to initiate publicity should not lead to a parade of horribles in most cases, nor to even the signaling spiral race-to-the-bottom that Margulies predicts.[400]

In contrast to the defense, the prosecution has no inherent incentives to limit pretrial publicity, and publicity will generally work in its favor both for its political goals and in influencing the jury venire. Giving the prosecution rights to speech equal to those of the defense results in one of two undesirable regimes: either (1) the defense will have free speech rights

397. If a criminal defendant does not testify at trial, the prosecution is prohibited from raising certain evidence, including the criminal record of the defendant. However, if the defendant testifies, the prosecution can enter evidence to impeach the credibility of the defendant, such as a criminal record. *See* FED. R. EVID. 609 (permitting the introduction of evidence of a defendant's prior criminal conviction for purposes of impeachment).

398. ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 8-1.1 cmt., at 7 (3d ed. 1992), *available at* http://www.americanbar.org/content/dam/aba/publishing/criminal_justice _section_newsletter/crimjust_standards_fairtrial.authcheckdam.pdf.

399. Matheson, *supra* note 77, at 884–85 (noting the devastating effect on the defendant's reputation when it is published that the defendant committed a crime).

400. *See supra* Section I.D.

appropriate to their role and the prosecution will have equal rights allowing the prosecution to undermine the defendant's rights to fair trial, her reputation, and the presumption of innocence; or (2) the prosecution will be limited in its rights to speech, and the defense will not be able to contest pretrial the full weight of government condemnation. MRPC 3.6 can be seen as a compromise of these two undesirable alternatives, forged from a desire to create an equal standard: the defense is deprived of much of its free speech rights and the prosecution is somewhat restricted in its speech, but is still allowed considerable leeway (particularly through the public records exception, which the prosecution can manipulate by including information they wish to publicize in the indictment or charging affidavit). Unfortunately, this regime results in the worst of both worlds. The prosecution can generally initiate publicity regarding a case and has no inherent or structural disincentive to do so, thereby undermining the rights of the accused. Yet the defense, unable to curb prosecutorial publicity, can only engage in limited pretrial publicity, which may be insufficient to protect the accused's interests. The result is completely backwards; it inspires prosecutorial publicity without appropriately protecting the free speech rights of the defense.

The Supreme Court's insistence in *Gentile* on employing the same rules for the prosecution and the defense is misguided. Rather than creating a viewpoint-neutral regime, MRPC 3.6 undermines the free speech rights of criminal defense attorneys to protect their clients' rights to a fair trial, to reinforce the presumption of innocence, to secure a fair plea, and to protect the defendant's reputation and liberty. Moreover, in light of the government's public statement of charges and the prosecution's right to respond, the recognition of strong defense rights is not viewpoint-based discrimination.

CONCLUSION

The right to a jury trial, the presumption of innocence, the social compact between the individual and the State—these are among the weighty interests in our criminal justice system that can be bolstered or undermined through attorney pretrial publicity. The procedural protections that exist in the Constitution for criminal justice are neither technicalities nor formalities. Rather, they are indicative of the inestimable value of life and liberty, and they act as a "bulwark between the State and the accused"[401]—protecting the personal liberties of the individual from state overreaching and forfeiture.

The traditional "compromise" of these interests is unnecessary to give the First Amendment rights of lawyers their proper scope. Unfortunately, the compromise of MRPC 3.6 and *Gentile* has failed to produce the fair

401. S. Union Co. v. United States, 132 S. Ct. 2344, 2351 (2012).

and equal regime it aimed at creating. Instead, the compromise violates the speech rights of defense lawyers to protect their clients' rights to a presumption of innocence, a fair plea, and a fair trial. The compromise also improperly creates false constitutional walls that have kept states from curbing their own representatives—prosecutors—from prejudicing the state's criminal processes. Both of these failings work to one end: undermining the rights and constitutional processes necessary to protect the guilty and the innocent in the face of state power to forfeit life or liberty.