

IDEOLOGY, *GENTILE* AND PRETRIAL ATTORNEY SPEECH: A RESPONSE TO PROFESSOR TARKINGTON

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INTRODUCTION

Attorneys are officers of the court and essential to the proper functioning of the criminal justice system. In that system, they represent opposing parties with conflicting, indeed adversarial, interests. Should the speech of attorneys be regulated in the American criminal trial process? If so, how can attorney speech be regulated in ways that do not intrude on attorneys' First Amendment rights or defendants' right to a fair trial? Can a balance be struck between the Sixth Amendment right to a fair trial and the First Amendment right to free speech that does not impair the ability of either prosecutors or defense attorneys to function as advocates for their respective clients? These are the questions that Professor Margaret Tarkington sets out to answer in her article, *Lost in the Compromise: Free Speech, Criminal Justice, and Attorney Pretrial Publicity*.¹ As her title suggests, Professor Tarkington is most interested in determining the proper regulation of attorney speech in the pretrial context where investigation, charging decisions and plea bargaining take place.

Professor Tarkington frames the pretrial speech dilemma as one of doctrine, i.e., a problem caused by the misapplication of rules or even the wrong rules. And indeed, there is a doctrinal quandary here to be straightened out. As Tarkington points out, the rules governing pretrial publicity are conflicting and incoherent.² She notes that the usual methods for determining the scope of attorneys' pretrial free speech rights "fail to properly identify attorney speech that should be protected, or that should be restricted."³ Professor Tarkington directs most of her criticism at the Supreme Court's *Gentile v. State Bar of Nevada*⁴ decision and Model Rule of Professional Conduct 3.6.⁵ Model Rule (MR) 3.6, which the Court cites with approval in *Gentile*,⁶ prohibits attorney speech that creates "a substantial likelihood of materially prejudicing an adjudicative proceeding."⁷ Tarkington argues, however, that, as it is interpreted by the Supreme Court, the substantial likelihood of material prejudice rule unduly

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1. 66 FLA. L. REV. 1873 (2014).

2. See *infra* notes 25–34 and accompanying text.

3. Tarkington, *supra* note 1, at 1877.

4. 501 U.S. 1030 (1991).

5. MODEL RULES PROF'L CONDUCT R. 3.6 (2014), available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_6_trial_publicity.html.

6. See *infra* note 13 and accompanying text.

7. MODEL RULES PROF'L CONDUCT R. 3.6(a).

cramps attorney speech and at the same time fails to advance the defendant's interest in a fair trial.⁸

On the other hand, the difficulties found in the regulation of attorney pretrial speech may have little or nothing to do with doctrine. Instead, the problems Professor Tarkington identifies may have more to do with ideology than with overarching legal rules and standards. That is to say, regardless of the ostensible rules in place, the outcome of cases like *Gentile* might still turn out to be the same. Criminal rule makers and interpreters may decide these cases based on their ideology and their assessment of the interests that are at stake.⁹ This is because criminal trials are anything but ideologically neutral and involve the application of state coercion in its most severe form, i.e., the deprivation of life, liberty and property. Anything that undermines the ability of the state to exact punishment for the transgression of its rules undermines state power, a fact that cannot be lost on judges and legislators.

In the remaining parts of this brief response, I will sketch out an argument that the allocation of free speech rights between prosecutors and defenders, as well as the balance struck between the right of free speech and right to a fair trial, is determined chiefly by ideology and political considerations. In Part I, I will review Professor Tarkington's description of the problems posed by current approaches used to regulate attorney pretrial speech. In Part Two, I will examine Professor Tarkington's solution to these problems. In Part III, I will discuss why ideology trumps doctrine when it comes to attorney speech regulation in the criminal justice context. Finally, I conclude that any successful attempt to reform laws regulating attorney speech must expressly confront the ideological considerations that shape them.

I. THE PROBLEM

In *Gentile*, the Supreme Court held that attorney pretrial speech was subject to regulation under a less demanding standard than that applied to First Amendment speech generally.¹⁰ This is because attorneys are officers of the court, have special access to information and their statements are deemed "especially authoritative."¹¹ The defense attorney in *Gentile*

8. See *infra* notes 25–34 and accompanying text.

9. For an empirical study that shows how behavioral influences can affect judicial decision-making in the criminal context, see generally Gregory C. Sisk et. al., *Charting the Influences on the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377 (1998) (reviewing thirty years of social science research on judicial decision-making factors in sentencing guidelines, and demonstrating that various behavioral influences, such as political ideology, law school education, and prior employment experiences, among others, affect judicial decision-making.).

10. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1074 (1991).

11. *Id.*

participated in a press conference where he asserted his client's innocence, claimed government witnesses were lying and that his client was a scapegoat for police malfeasance.¹² In *Gentile*, the Supreme Court approved a Nevada professional responsibility rule that was in all essential details a copy of MR 3.6.¹³ Under MR 3.6, a defense attorney was prohibited from making any statement that creates "a substantial likelihood of materially prejudicing an adjudicative proceeding."¹⁴ Moreover, the Nevada rule stated that statements related to the "character, credibility, [or] reputation"¹⁵ of a witness and statements expressing "any opinion as to the guilt or innocence of a defendant or suspect"¹⁶ are more likely than not to materially prejudice a court proceeding.¹⁷ *Gentile* was found in violation of the Nevada rule by the Nevada courts,¹⁸ but the Supreme Court reversed this finding.¹⁹ Pointing to section 177(3) of the Nevada rule, a 5-4 majority of the Supreme Court²⁰ found that *Gentile* reasonably believed that his speech was subject to a "safe harbor" that allowed an attorney to "state without elaboration . . . the general nature of the . . . defense."²¹ Since *Gentile* may have been misled by this provision, the Supreme Court declared that the Nevada rule was void for vagueness and could not be enforced against *Gentile*.²² Thus, under Rehnquist's opinion in *Gentile*, attorney speech may be severely limited,²³ but under Kennedy's opinion, that limitation would not apply under certain specified circumstances.²⁴

According to Tarkington, the current approach to regulating attorney

12. *Id.* at 1033, 1034, 1045, 1059 app. A.

13. *See id.* at 1033, 1036 (stating that Rule 177 of the Nevada Supreme Court Rules is "almost identical" to Rule 3.6 of the Model Rules of Professional Conduct and that the rules are "not necessarily flawed"); *id.* at 1075–76 ("We agree with the majority of the states that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between First Amendment rights of attorneys in pending cases and the State's interest in fair trials."). To examine the similarities between Nevada Supreme Court Rule 177 and Model Rule of Professional Conduct 3.6, compare NEV. SUP. CT. R. 177 (1991), *reprinted in Gentile*, 501 U.S. at 1060 app. B, with MODEL RULES PROF'L CONDUCT R. 3.6 (2014); *id.* at R. 3.6 cmt. 5(1)–(6), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_3_6_trial_publicity/comment_on_rule_3_6.html.

14. MODEL RULES PROF'L CONDUCT R. 3.6(a).

15. NEV. SUP. CT. R. 177(2)(a).

16. *Id.* at R. 177(2)(d).

17. *Id.* at RR. 177(1)–(2)(a), (2)(d).

18. *Gentile*, 501 U.S. at 1033.

19. *Id.* at 1058.

20. *Id.* at 1032.

21. *Id.* at 1048, 1049–51.

22. *Id.* at 1048–51.

23. *Id.* at 1074 (Rehnquist, C.J., majority opinion with respects to Parts I and II).

24. *Id.* at 1048–49 (Kennedy, J., majority opinion with respects to Parts III and VI) (explaining that a limitation on attorney speech may not apply when there is a safe harbor or when the statute is void for vagueness because the safe harbor is poorly worded).

speech is problematic because it does not restrict prosecutor's pretrial speech sufficiently. The *Gentile* rule allows prosecutorial comments that can damage a defendant's reputation or business and it allows the prosecutor to present the defendant in an unfavorable light through such practices as "perp walks."²⁵ Tarkington believes the limitations on prosecutor speech included in Department of Justice regulations²⁶ provide more appropriate restrictions on prosecutor pretrial speech, although these stronger restrictions are not required under the *Gentile* rule.²⁷ Moreover, current speech rules permit the prosecutor to use pretrial publicity to pressure a defendant into a plea bargain²⁸ even in the case of a weak prosecution case and when the prosecutor has overcharged the defendant.²⁹ On the defense side, the current rules are also troubling because they do not allow defense attorneys sufficient latitude to counter prosecution pretrial charging and publicity.³⁰ In addition, *Gentile* and MR 3.6 do not grant defense attorneys an affirmative right to engage in pretrial speech to promote their clients' interests.³¹ Tarkington argues such a right is needed in order to reinforce the presumption of innocence,³² and counter prosecution attacks on a defendant's reputation³³ or efforts to force a guilty plea.³⁴

II. TARKINGTON'S SOLUTION

Tarkington would fix the problems she demonstrates by crafting a new rule for attorney pretrial speech. Instead of looking at whether attorney speech would "materially prejudice an adjudicative proceeding," as the Court does in *Gentile*,³⁵ Tarkington would ask whether the speech was necessary to carry out "the essential functions of the attorney in the justice system."³⁶ Since the prosecutor's basic function in the CJS is to bring criminal charges on behalf of the state,³⁷ Tarkington would grant prosecutors the right to publish the indictment³⁸ and to respond to pretrial

25. Tarkington, *supra* note 1, at 1902–04, 1915. A "perp walk" is "telling the press the time and place 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." *Id.* at 1915.

26. 28 C.F.R. § 50.2 (2012) (setting out the Department of Justice regulations of prosecutor pretrial speech)

27. Tarkington, *supra* note 1, at 1904.

28. *Id.* at 1909.

29. *Id.* at 1909–12.

30. *Id.* at 1923, 1926, 1930, 1934.

31. *Id.*

32. *Id.* at 1923, 1925–28.

33. *Id.* at 1932–33.

34. *Id.* at 1928–31.

35. *See supra* notes 13–24 and accompanying text.

36. Tarkington, *supra* note 1, at 1888.

37. *Id.* at 1895.

38. *Id.* at 1898.

publicity initiated by the defense.³⁹ Other than that, Tarkington would severely limit prosecutor pretrial speech rights. Under her “access to justice” theory, prosecutors would have no right to use speech that weakens the presumption of innocence,⁴⁰ coerces an unjust plea,⁴¹ exacerbates harm to an accused’s reputation,⁴² or otherwise undermines a fair trial.⁴³ She justifies these restrictions because prosecutorial pretrial publicity can undermine these important constitutionally mandated interests “even if all charges are ultimately dropped or the defendant is ultimately acquitted.”⁴⁴

Defense attorneys would gain vastly expanded pretrial free speech rights under Tarkington’s access to justice theory. While defense attorneys only have a limited right to state the nature of the defense under the safe harbor provisions of MR 3.6(b),⁴⁵ Tarkington would grant defense attorneys a broad right to pretrial speech in order to reinforce the presumption of innocence,⁴⁶ to secure a fair plea,⁴⁷ to protect the client’s reputation⁴⁸ and to assure a fair trial.⁴⁹ Most interestingly, Tarkington asserts that defense attorneys should be able to “vouch” for the innocence of their clients,⁵⁰ which directly conflicts with MR 3.6. This broad expansion of attorney pretrial speech rights flows from the nature of the defense attorney’s responsibility to “protect the defendant’s life, liberty and property when [the defendant is] facing the full force of government power. . . .”⁵¹ Tarkington also argues that “[i]t would undermine recognized and core purposes of the First Amendment if the government could bring public criminal charges against a person and 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.”⁵²

Through reviewing the nature of the functions that prosecutors and defense attorneys are supposed to serve in an adversarial criminal justice system, Tarkington has produced a pragmatic proposal for the regulation of attorney pretrial speech. What is not so clear to me is why her proposals necessitate a new theory of First Amendment speech. Tarkington claims

39. *Id.* at 1938–40.

40. *Id.* at 1900, 1903–04.

41. *Id.* at 1912.

42. *Id.* at 1913–16.

43. *Id.* at 1916–22.

44. *Id.* at 1897.

45. *See supra* note 21 and accompanying text.

46. Tarkington, *supra* note 1, at 1925–28.

47. *Id.* at 1923, 1928–31.

48. *Id.* at 1932–33.

49. *Id.* at 1933–35.

50. *Id.* at 1927.

51. *Id.* at 1922.

52. *Id.* at 1923.

that her access to justice theory attunes attorney speech to “the essential functions of the attorney in the criminal justice system.”⁵³ And so it does. However, one could just as well read her argument as demonstrating that some of the current speech regulations are ill-advised because they restrict pretrial speech when it is not reasonable to believe the speech will have “a substantial likelihood of materially prejudicing an adjudicative proceeding.”

For example, in *Gentile*, the attorney’s statements that his client was innocent and that the prosecution’s witnesses were drug-dealers, drug users and money launderers had no substantial likelihood of prejudicing an adjudicative proceeding given the facts of that case.⁵⁴ In *Gentile*, previous press reports indicated that evidence pointed both to Sanders, Gentile’s client, and two police officers.⁵⁵ At the time of *Gentile*’s press conference, the police officers had been cleared⁵⁶ and Sanders had been indicted, indicating the prosecutor’s belief that Sanders was the guilty party.⁵⁷ Even if *Gentile*’s statements were heard by potential jurors, they would have been balanced out by the information previously released by the police and the prosecution. At worst, *Gentile*’s statements, if believed at all, would have caused jurors to look more carefully at the evidence in the case. Furthermore, as Justice Kennedy pointed out in his opinion, *Gentile*’s press conference took place more than six months before the trial in a populous urban community and much of the evidence *Gentile* discussed was already in the public domain.⁵⁸ Consequently, there was “no support for the conclusion that petitioner’s statements created a likelihood of material prejudice, or indeed of any harm of sufficient magnitude or imminence to support a punishment for speech.”⁵⁹

Additionally, it is not clear why some of the other attorney speech proposals that Tarkington reviews in her article will not work. In the article, she examines Lonnie Brown’s proposal to regulate out-of-court speech as closely as in-court speech;⁶⁰ Freedman and Starwood’s argument that while prosecutors have no free speech rights at all, defendant’s free speech rights should not be regulated in the pretrial context;⁶¹ Erwin

53. *Id.* at 1888.

54. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1045 (1991).

55. *Id.* 1039–40.

56. *Id.* at 1042 (noting that the prosecution had publicly reported the police officers had been cleared).

57. *Id.* at 1033, 1040–1041, 1044.

58. *Id.* at 1044, 1046.

59. *Id.* at 1048.

60. Tarkington, *supra* note 1, at 1883 (citing 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, 138 (2004)).

61. *Id.* at 1884 (citing MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS, 306 n.99 (4th ed. 2010)).

Chemerinsky's application of the First Amendment's actual malice standard to attorney speech;⁶² Peter Margulies' "signaling spiral" standard for regulation of pretrial attorney speech;⁶³ and the Restatement's "substantial likelihood of heightening public condemnation of the accused" standard,⁶⁴ among others. Her analysis of these proposals is for the most part descriptive and she fails to explain what makes them unsuitable. She does suggest, however, that Freedman and Starwood's proposal⁶⁵ and the Restatement⁶⁶ would run afoul of the rationale offered by Justice Rehnquist in *Gentile*⁶⁷ that any standard regulating attorney speech should "apply[] equally to all attorneys participating in a pending case,"⁶⁸ an approach Tarkington calls the "equality principle."⁶⁹ But she herself jettisons the equality principle based on her assessment that the functions and powers of prosecutors and defense attorneys are so different that they necessitate different treatment.⁷⁰ By not telling us where the other proposals fall short, Tarkington fails to establish the need for the doctrinal changes she advocates.

III. THE LIMITS OF DOCTRINE

At the end of the day, I do not believe that doctrine had anything to do with disagreement between Justice Kennedy and Chief Justice Rehnquist in *Gentile*. Rather, I think that *Gentile* was charged with an ethical violation of the Nevada rules in retaliation for his audacity in attacking the police and prosecutors as he waged a vigorous defense for his client. The fact that the finding of an ethical violation was upheld by the Nevada Supreme Court, and by four Justices of the U.S. Supreme Court, probably says more about where these jurists stand on the "support of police" versus "defendant's rights" political spectrum rather than anything else. I do not think the conclusion that *Gentile* was the victim of retaliation is far fetched for most laypersons to imagine. Such a possibility, however, is rarely discussed in law journals, chiefly because legal scholars have such a hard time pulling themselves away from doctrinal analyses to discuss politics and ideology.

I have long argued that the criminal justice system plays an important

62. *Id.* at 1884–85 (citing Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859, 863–67).

63. *Id.* at 1885–86 (citing Peter Margulies, *Advocacy as a Race to the Bottom: Rethinking Limits on Lawyers' Free Speech*, 43 U. MEM. L. REV. 319, 324, 377 (2012)).

64. *Id.* at 1887.

65. *See id.* at 1884.

66. *See id.* at 1887.

67. *Id.* at 1884, 1887.

68. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1076 (1991) (Rehnquist, C.J., dissenting).

69. Tarkington, *supra* note 1, at 1880.

70. *Id.* at 1938–40.

ideological role in the structuring and management of society.⁷¹ It is, after all, a system of control and a system that replicates power relations in society. Power relationships in this society are organized by an ideology. This ideology, which the philosopher Stuart Hall calls “the consensus,”⁷² determines values and behaviors of people and institutions, and ultimately policy and power.⁷³ While there are privileged ideals, classes and people, power relationships in the United States are not top down and dictatorial.⁷⁴ “The consensus” is contested space. A society’s definitions of, attitudes about, and responses to crime, indeed the entire criminal justice apparatus, is central to the formation and maintenance of “the consensus.”⁷⁵

Defining given conduct as a crime allows a society to determine norms and structure the boundaries of morality and immorality. Thus, denoting conduct as criminal has tremendous power, as “[i]t has the power to draw lines and to mobilize people against [criminal behavior].”⁷⁶ Naturally, the state wishes to monopolize the process of defining crime,⁷⁷ but it cannot do so. Crime is determined through a semiotic, discursive process where “different groups compete to have their definition of crime predominate.”⁷⁸ I have previously summarized the way that this process plays out:

[W]hile the definition of crime is worked and reworked through a semiotic process of articulation controlled by no one, the state has a clear advantage. The state and the dominant groups that control the state are able to articulate their definition of crime more frequently and with greater authority. Yet, this advantage held by the state is not the same as instrumental control. The definition of crime remains a politically contested reality. Crime then, is not what the state

71. See generally Kenneth B. Nunn, *The Trial as Text: Allegory, Myth and Symbol in the Adversarial Criminal Process—A Critique of the Role of the Public Defender and a Proposal for Reform*, 32 AM. CRIM. LAW REV. 743 (1995) [hereinafter Nunn, *The Trial as Text*] (explaining how public thoughts and discourse on crime and the criminal justice system shapes society and the criminal justice system itself); Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER, RACE & JUST. 381 (2002) [hereinafter Nunn, *Surplus Criminality*] (explaining how the “War on Drugs” has unfairly targeted African Americans and impacted African American communities); Kenneth B. Nunn, *Foreword: New Explorations in Culture and Crime—Definitions, Theory, Method*, 17 FLA. J. OF L. AND PUB. POL’Y vii (2006) (explaining how crime, and the definition of crime, shapes culture).

72. Nunn, *The Trial as Text*, *supra* note 71, at 761.

73. *Id.* at 761–64.

74. See *id.* at 762 (“Unlike social contract theories, Hall’s consensus does not arise spontaneously from the body politic. Consensus . . . is *produced*. The production of consent must be understood as a semiotic process.”).

75. See *id.* at 764 (“[C]rime as a category helps determine the borders of the consensus and the consensus helps provide legitimacy to the state’s definition of crime.”).

76. Nunn, *Surplus Criminality*, *supra* note 71, at 429.

77. See *id.* at 430.

78. *Id.*

wants it to be, but what it is socially constructed as.⁷⁹

Due to the power that is inherent in the consensus, and the fact that that power is accessible to others (counter-definers⁸⁰), the consensus must be carefully managed by the authorities of the state.⁸¹ The criminal justice apparatus, and indeed the entire illusion of a hierarchical and complex society managed only by the consent of the governed (rather than coercion) loses its supremacy if people come to believe widely that the system is not fair and that it plays favorites.⁸² Consequently, there are three ideological considerations that are relevant to the foregoing analysis and that are implicated in the *Gentile* case: (1) those identified as criminals must be prosecuted and punished; (2) the police and prosecutors must be held up as beyond reproach; and (3) the first two considerations must be viewed as the natural order of things and not as something forced or conspiratorial.

Clearly, if *Gentile* was right and his client was a scapegoat for police malfeasance, and that the police and prosecutors in the case, although they had substantial evidence of police wrongdoing, were engaged in a cover up, that would not do. That possibility is not one that authority figures, whether they be judges, police officials, prosecutors, public officials or legal scholars, could afford to admit. So it is better, in *Gentile* and other cases, to stick to the doctrine and leave politics and ideology alone.⁸³

CONCLUSION

Professor Tarkington has produced an elegant doctrinal solution to the problem of attorney pretrial speech. I support it, I will cite it, and hopefully one day I will be able to use it in a court of law. Doctrinal scholarship certainly has its place. I wish to use this opportunity, however, to encourage legal scholars and practitioners to aim higher. Legal scholarship should not merely appeal to ivory tower intellectuals. The law is a living system and academic lawyers are also advocates who can help shape the way that law grows and changes. Thus, legal scholarship should have an advocacy dimension as well. As such, it should confront and grapple with reality and not avoid it.

79. *Id.* at 431–32.

80. “Counter-definers” are “dissidents, radical academics, minority group spokespersons,” etc., who produce alternative definitions of crime. *Id.* at 431.

81. *See id.* at 428, 432 (“If the state were to go against the consensus [in defining crime] . . . it would simply undermine its own legitimacy in the eyes of those who are governed.”).

82. *See id.* at 432.

83. Although Kennedy comes close to the truth of the matter when he asserts that the chief issue in the case “is the constitutionality of a ban on political speech critical of the government and its officials.” Apparently, he didn’t get the memo. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1034 (1991).