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The Prosecutor and the Press: Lessons (Not) Learned from the Mike Nifong Debacle

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Abstract

Using the Mike Nifong disciplinary case in North Carolina as a focal point, the author examines the disciplinary rules pertaining to public speech by attorneys during the pendency of an adjudicatory proceeding. The author argues that in light of the Supreme Court's 2002 decision in *Republican Party of Minnesota v. White*, certain provisions of Model Rules of Professional Conduct, Rules 3.6 and 3.8, may violate the first amendment, at least as applied to an elected prosecutor speaking during a political campaign. While former District Attorney Nifong made several statements to the media during the so-called "Duke Lacrosse" investigation that were clearly overzealous and impermissible even under the narrowest reading of the pertinent disciplinary rules, other public statements that Nifong made and was later disciplined for may have been protected by the first amendment, had the respondent raised a constitutional challenge in his North Carolina Disciplinary Commission proceeding. The author uses the Nifong disbarment case as a lens through which to examine current ethical restrictions on attorney speech, and to highlight provisions that might be vulnerable to a constitutional challenge.

I. Introduction

Former District Attorney Mike Nifong made several statements to the media during the so-called "Duke Lacrosse" case that were overzealous, and clearly contrary to a prosecutor's dual responsibilities to seek justice and to preserve a defendant's right to a fair trial. Notable among Nifong's more outlandish public comments were his characterization of the rape as "particularly abhorrent" and "reprehensible," his analogizing the case to a "cross burning," his expression of personal "confidence" and "satisfaction" that a rape had in fact occurred, and his criticism of the targets for refus[ing] to speak to investigators" upon "advice of counsel."¹ After a hearing, the North Carolina State Bar Disciplinary Committee ruled that these comments violated

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¹ North Carolina State Bar Disciplinary Commission Findings of Fact 7/10/07 ¶¶ 22, 29, 31, 42.

North Carolina Rules of Professional Conduct 3.6(a) (“substantial likelihood of materially prejudicing an adjudicative proceeding”) and 3.8(f) (“substantial likelihood of heightening public condemnation of the accused”).² The Commission ordered Nifong disbarred.³

After the disciplinary hearing, Nifong essentially acknowledged that the disbarment sanction was appropriate and agreed not to appeal.⁴ In all likelihood Nifong accepted this sanction because other misconduct charges against him – for failing to disclose exculpatory DNA evidence that showed the presence of multiple unidentified males on the rape kit specimen (in violation of North Carolina Rule 3.8(d)) and for lying to the court about his compliance with discovery requests (in violation of North Carolina Rule 3.3(a)) – were so serious that they probably would have led to disbarment even absent claims of improper statements to the media.⁵

The lack of an appeal in the Mike Nifong disciplinary case is unfortunate in at least one respect-- it deprives the Supreme Court of North Carolina of an opportunity to clarify the line between permissible and impermissible public comment by elected prosecutors during criminal investigations. Several of the statements District Attorney Nifong admittedly made to the media about the rape investigation, and that the Commission both alleged and found to be improper, seem to be entirely consistent with a prosecutor’s duty to inform the public about the priorities of his office, the nature and status of criminal cases, and the reasons for the discretionary law enforcement decisions that he has made. For example, Nifong was determined to have acted improperly in making a statement to the media that the alleged victim’s demeanor at the time of the medical examination was consistent with sexual assault;⁶ in asserting that he might consider filing charges against players present at the party who failed to come forward with information;⁷ in stating publicly that a medical examination revealed evidence consistent with rape;⁸ and in revealing to the media that the accuser was able “to identify at least one of her attackers.”⁹ These are the very types of statements that prosecutors across this country routinely make about pending criminal cases in order to keep their communities informed about threats to public safety and the ongoing enforcement activities of government officials. Not only might some of these latter statements have been permissible under a narrow reading of the pertinent disciplinary rules, but they may have been protected by the First Amendment.

Focusing on what Nifong did *wrong* in the Duke Lacrosse case is relatively straightforward, and has been undertaken by many others. His conduct throughout the investigation and prosecution of the Duke Lacrosse players was egregious and

² N.C. RULE OF PROF’L CONDUCT, R. 3.6(a) and 3.8(f) (2007).

³ Order of Discipline 7/10/07 ¶ 1.

⁴ Aaron Beard, *Prosecutor to be Disbarred For Duke Lacrosse ‘Fiasco’*, CHICAGO TRIBUNE, June 17, 2007, p. 6.

⁵ See Amended Compl. ¶¶ 219 and 230 (January 24, 2007); Conclusions of Law 7/10/07 ¶¶ (b) and (d).

⁶ Findings of Fact 7/10/07 ¶ 25.

⁷ Findings of Fact 7/10/07 ¶ 18.

⁸ Findings of Fact 7/10/07 ¶ 38.

⁹ Findings of Fact 7/10/07 ¶ 49.

reprehensible. Focusing on what Mike Nifong may have done *right* in the case, but was disciplined for nonetheless, is a far riskier and more difficult venture. In my view, there may have been two “rushes to judgment” in the Duke case; the prosecutor’s rush to condemn the students before considering and investigating alternative theories of what happened at the lacrosse party, and the Disciplinary Commission’s rush to disbar Mike Nifong for very badly mishandling a high profile criminal case. Because Michael Nifong did not raise a first amendment challenge to the discipline imposed on him for improper statements to the media, and because he accepted disbarment and waived his right to appeal, the North Carolina Supreme Court was deprived of an occasion to clarify the precise contours of Rule 3.6 and 3.8 as they pertain to public comments by elected prosecutors. My goal in this essay is to use the facts of the Duke Lacrosse case a focal point for examining restrictions on attorney speech, and to analyze those aspects of disciplinary rules 3.6 and 3.8 that may be vulnerable to constitutional challenge.

II. Statements to the Media: The Parameters of Rules 3.6 and 3.8

Two ethical rules commonly in effect in most jurisdictions constrain public comments made by a prosecutor.¹⁰ ABA Model Rule of Professional Conduct 3.6 prevents a prosecutor from making extrajudicial statements that he knows or reasonably should know present a “substantial likelihood of materially prejudicing an adjudicatory proceeding.”¹¹ ABA Model Rule 3.8(f) prevents a prosecutor from making extrajudicial comments that “heighten public condemnation of the accused.”¹² The scope and purpose of these two rules are different. Rule 3.6 applies to all attorneys and it is designed to safeguard adjudicatory proceedings. Rule 3.8(f) applies only to prosecutors and is designed to protect the interests of the accused in his reputation and privacy. Although it is beyond the scope of this essay, ABA Model Rule 8.4(c) (prohibiting conduct “involving dishonesty, fraud, deceit or misrepresentation”) may also come into play in certain circumstances if an attorney knowingly makes *false* statements to the media.¹³

¹⁰ For the purpose of this essay I will focus on the American Bar Association’s Model Rules of Professional Conduct, which have been adopted in whole or in part with some variations by forty-seven states. With respect to media comments, the rules in North Carolina are substantially in accord with the Model Rules for all relevant purposes. See N.C. RULES OF PROF’L CONDUCT, R. 3.6 and R. 3.8(f).

¹¹ MODEL RULES OF PROF’L CONDUCT, R 3.6(a). Some jurisdictions that otherwise follow the Model Rules deviate from this “substantial risk of material prejudice” standard and forbid only attorney speech that poses a *serious or imminent* threat of material prejudice to the proceedings, presumably a heightened threshold that prohibits an even narrower range of speech. See D.C. BAR APPX. A, Rule 3.6; ILL. SUP. CT. R. PROF’L CONDUCT, R 3.6(a); OK. R. PROF’L CONDUCT, R. 3.6. New Mexico prohibits extrajudicial comments by attorneys about pending criminal proceedings that create “a clear and present danger” of prejudicing the proceeding. N.M. R. PROF. CONDUCT, R 16-306.

¹² MODEL RULES OF PROF’L CONDUCT, R. 3.8(f).

¹³ For example, the North Carolina Disciplinary Commission’s Amended Complaint accused Nifong of violating Rule 8.4(c) by falsely suggesting to the media that DNA results may have been inconclusive because a condom may have been used in the attack, when Nifong had already received the emergency nurse’s examination report indicating that the alleged victim claimed no condom was used. Amended Complaint, ¶¶ 117-124. The final order of the Disciplinary Commission found no violation of Rule 8.4(c). Transcript of Hearing, June 16, 2007, Final Order, p. 5.

Comment [5] to ABA Model Rule 3.6 contains a list of six topics that “ordinarily” will be considered “more likely than not” to have a material prejudicial effect on a proceeding. Essentially, this portion of the commentary creates a rebuttable presumption of prejudice when an attorney’s public comments concern the following six topics: (1) the character, reputation, credibility, or prior criminal record of a party, suspect, or witness; (2) the possibility of a plea of guilty, the contents or existence of a confession, or the 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; (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; and (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.¹⁴

Many of the off-limits topics set forth in Rule 3.6 are directed at public reference to evidence that may turn out to be inadmissible at trial, such as witness impeachment material, forensic tests, and confessions. The concern is that once such influential material finds its way into the public domain, the defendant may not be able to receive a fair trial from an impartial jury even if the evidence is later excluded.

In addition to these off-limits topics, ABA Model Rule 3.6 contains a so-called “safe-harbor” provision that allows public comment by attorneys on specified subjects, irrespective of whether they risk prejudicing an adjudicatory proceeding. After setting forth the general prohibition in paragraph (a), paragraph (b) of Rule 3.6 provides that “[n]otwithstanding paragraph (a),” a lawyer may discuss with the media the following seven subjects: the claim, offense or defense involved; information contained in a public record; that an investigation is in progress; the scheduling of any step in litigation; a request for assistance in obtaining evidence or information; a warning to the public of dangers; and [in a criminal case only], the identity of investigating officers, the identity, residence, occupation and family status of the accused, the fact, time and place of arrest, and any information necessary to aid in apprehension of the accused.

While Rule 3.6 is directed at public statements by lawyers that may prejudice the outcome of an adjudicatory proceeding, a separate provision of the Model Rules applicable only to prosecutors prohibits extrajudicial communications that would unnecessarily disparage the accused. ABA Model Rule 3.8(f)(“Special Responsibilities of a Prosecutor”) provides that:

“Except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose,” a prosecutor in a criminal case shall “refrain from making extrajudicial

¹⁴ MODEL RULES OF PROF’L CONDUCT, R. 3.6, Comment [5]. See *Attorney Grievance Commission v. Gansler*, 377 Md. 656, 682; 835 A.2d 548, 563 (2003) (reprimanding the State’s Attorney for making public comments about suspect’s arrest, confession and possibility of plea bargain).

comments that have a substantial likelihood of heightening public condemnation of the accused...”¹⁵

According to the 1994 ABA Report recommending this amendment to Model Rule 3.8, the revision was designed to prohibit “gratuitous comments” by a prosecutor serving only to increase “public opprobrium” toward the defendant.¹⁶ Examples of such piling on might include a description of graphic details about a particularly gruesome or heinous crime, the display of shocking or disturbing physical evidence, or reference to criminal associations or uncharged acts of the accused.

III. First Amendment Protections for Attorney Speech

Most chief prosecutors at the state level are elected officials, and political speech by candidates is “at the core of our first amendment freedoms.”¹⁷ It therefore seems beyond peradventure that prosecutors like Mike Nifong have first amendment rights. Although courts at one time condoned the right of the state to restrict speech of public employees,¹⁸ this position has since been abandoned in recognition that government employees do not shed their constitutional protections at the door when they enter the workplace.¹⁹

It is important to remember that the allegedly improper comments that Mike Nifong made to the media – and those for which he was disbarred – were made in March and April of 2006, in the middle of an ongoing political campaign. After serving over twenty-five years as an Assistant and then Chief Assistant District Attorney in Durham County, Nifong was appointed to the District Attorney’s position in April 2005, after his then boss was elevated to a judgeship.²⁰ Nifong had only one year in the head job to

¹⁵ MODEL RULES OF PROF’L CONDUCT, R. 3.8(f).

¹⁶ Gillers and Simon, REGULATIONS OF LAWYERS, STATUTES AND STANDARDS p.295 (Aspen 2007)

¹⁷ Republican Party v. White, 536 U.S. 765, 781 (2002). Even in *Gentile*, Justice Kennedy stated that in order to satisfy the First Amendment, restrictions on attorney speech must be “neutral as to point of view, applying equally to *all* attorneys participating in pending proceedings,” clearly contemplating that prosecutors were protected. *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1076 (1991). While Kennedy argued that a state may have a more compelling interest in regulating prosecutor speech than defense attorney speech for reasons of power disparities and greater access to insider information, he did not suggest that prosecutors are not entitled to First Amendment protection at all. *Id.* at 1056.

¹⁸ See *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216 (1892) (Holmes, C.J.). See also the concurring opinion of Justice Stewart in *Columbia Broadcasting v. Democratic National Committee*, 412 U.S. 94, 139 n.7 (1973), where Justice Stewart argued that the First Amendment protects private citizens, but does not limit the power of the state in controlling its own agents.

¹⁹ In the context of employment disputes, the Supreme Court has recognized that government employees have only limited rights to free speech in the exercise of their official duties. See *Connick v. Myers*, 461 U.S. 1381 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968). The *Pickering* line of cases suggests that in evaluating employment disputes (demotion, suspension, discharge) the court should balance the free speech rights of public employees with the state’s right to promote efficiency in the workplace. *Pickering*, 391 U.S. at 586.

²⁰ Benjamin Niolet, *Durham District Attorney Will Don a Judge’s Robe*, THE NEWS & OBSERVER (Raleigh, North Carolina), April 19, 2005, p. A1.

prove himself worthy of the office before facing his first election. The Democratic primary was a three-way race scheduled for May 2, 2006.²¹ At that time there were no announced Republican candidates for the position, and pundits assumed that the winner of the primary would win the general election in November.²² The alleged rape occurred on March 12, 2006 and the first indictments were returned on April 17, 2006, *right in the thick* of this heated primary battle.²³

There are several different classifications of speech, and each enjoys a different level of constitutional protection. So-called “fighting words,” or speech which poses a clear and imminent danger to public safety, enjoys no protection whatsoever.²⁴ Commercial speech may be regulated so long as the government demonstrates a “substantial interest” to be achieved by the regulation.²⁵ But where the government seeks to restrain religious speech or speech related to a political/public issue, such a restriction must withstand “strict scrutiny;” that is, the government must demonstrate that the restraint “is 1) narrowly tailored to serve (2) a compelling state interest.”²⁶ An ethical canon restricting an attorney’s speech upon threat of discipline is a prior restraint.²⁷ The courts entertain a “heavy presumption” that every prior restraint on protected speech is unconstitutional.²⁸

Attorney speech about ongoing cases serves a valuable public function. “The subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.”²⁹ At least in the context of attempts to regulate the *media’s* access to judicial proceedings, the Supreme Court has stated that “[i]t would be difficult to single out any aspect of government of higher...importance to the people than the manner in which criminal trials are conducted.”³⁰

Public speech by prosecutors serves several additional purposes not furthered by attorney speech generally.³¹ First, the public has a right to be kept informed about how a prosecutor is using public resources, and what choices are being made about enforcement priorities. As public servants, prosecutors have a fiduciary obligation to apprise their

²¹ Nifong won the primary, but with a plurality rather than a majority of the votes cast. Nifong earned 45% of the votes. His closest contender, another former prosecutor in the Durham County District Attorney’s office, was Freda Black. She earned 42% of the votes cast in the primary. Sharif Durhams and Eric Frazier, *Duke Case Will Go On: Incumbent Doesn’t See Win as Vindication for Actions in Rape Inquiry*, THE CHARLOTTE OBSERVER (North Carolina), May 3, 2006.

²² After substantial adverse publicity against Nifong over the summer of 2006, two write-in candidates, Lewis Cheek and Steve Monks, tried unsuccessfully to unseat Nifong in the November general election.

²³ See FF/CL ¶¶ 16-62.

²⁴ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942).

²⁵ *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 564 (1980).

²⁶ *See White*, 536 U.S. at 774-75; *Procunier v. Martinez*, 416 U.S. 396, 411 (1974).

²⁷ *See Mississippi Comm’n on Judicial Performance v. Wilkerson*, 876 So.2d 1006, 1011 (Miss.2004) (analyzing judicial canon as prior restraint).

²⁸ *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975).

²⁹ MODEL RULES OF PROF’L CONDUCT, R. 3.6, Comment [1].

³⁰ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980) (holding that the right of the press and the public to attend criminal trials is implicit in the guarantees of the First Amendment).

³¹ R. Michael Cassidy, PROSECUTORIAL ETHICS 116 (West 2005).

constituents of how they are managing the public duties entrusted to them. Second, a prosecutor's comments to the media may serve to promote public safety by warning the public of continuing dangers in the community, or cautioning them about particularly vulnerable activities or sources of risk. Third, public statements by prosecutors may assist in ongoing investigations by encouraging other witnesses or victims to come forward and report crime. Prosecutors often utilize the press to request public assistance in catching criminals who might otherwise remain at large. Finally, public dissemination of a prosecutor's activities is necessary to fulfill the deterrent aims of the criminal law; unless the public is notified about indictments and convictions, other would-be perpetrators may not be appropriately dissuaded from engaging in criminal activity.³²

Media statements by prosecutors – particularly while criminal investigations and trials are ongoing – pose several significant dangers. Intense media interests in criminal proceedings and the powerful effect of modern methods of communication can combine to turn previously “local” criminal investigations into worldwide public spectacles. A prosecutor's extrajudicial comments can jeopardize a defendant's rights to a fair trial by implanting suggestions of guilt in the minds of the public before the charges can be fully and fairly exposed in a court of law, thus undercutting the presumption of innocence to which all defendants are entitled. Statements to the media also risk irreparably destroying the defendant's reputation and ability to earn a livelihood. Even if the accused is subsequently acquitted of the charges, the taint left by the government's accusations of wrongdoing may never wash entirely clean. Finally, media coverage of the prosecutor's allegations may interfere with a defendant's Fifth Amendment right to remain silent. If the government's theory of its case is widely broadcast, the defendant may feel compelled to respond rather than remain silent and put the government to its burden of proof. For each of these reasons, some curtailment of a prosecutor's comments to the media may be necessary to safeguard the fairness and accuracy of adjudicative proceedings.³³

In *Gentile v. State Bar of Nevada*³⁴ the Supreme Court confronted this classic clash of values, and set out the permissible contours of ethical restrictions on non-commercial attorney speech.³⁵ *Gentile* was actually two majority decisions. Five justices, in an opinion written by Chief Justice Rehnquist, ruled that Nevada's “substantial likelihood of material prejudice” standard satisfied First Amendment safeguards. Rejecting a facial challenge to Nevada's disciplinary rule, the Rehnquist majority held that a “clear and present danger” need not be manifest before a state may constitutionally regulate attorney speech regarding ongoing cases. The Rehnquist majority ruled that lawyers “in pending cases” may be subject to ethical restrictions on

³² In addition to serving a deterrent function, the Supreme Court has recognized that publicity about ongoing criminal cases provides an outlet for “community concern, hostility, and emotion,” which is essential to achieve the cathartic effect of retributive justice. *Richmond Newspapers*, 448 U.S. at 571-72.

³³ See generally, Scott M. Matheson, *The Prosecutor, the Press, and Free Speech*, 58 *FORDHAM L. REV.* 865, 868 (1990).

³⁴ *Gentile v. State Bar of Nev.*, 501 U.S. 1030 (1991).

³⁵ MODEL RULES OF PROF'L CONDUCT, R. 3.6 – prohibiting attorney speech that poses a substantial risk of materially prejudicing an adjudicative proceeding – was amended in 1994 to comport with *Gentile*.

speech which an ordinary citizen or the press could not be,³⁶ because membership in the bar is a privilege burdened with conditions,³⁷ and because such a restriction may be necessary to ensure a fair trial.³⁸ Five Justices, led by Justice Kennedy, ruled that the Nevada disciplinary rule then in effect was unconstitutionally vague as applied to the petitioner (a criminal defense attorney), because Nevada's safe harbor allowed an attorney to state "without elaboration" the "general" nature of his claim or defense.³⁹ Justice Kennedy believed that this imprecise language failed to give the petitioner in *Gentile* fair notice of what was permitted and what was prohibited.⁴⁰ The "swing" vote was cast by Justice O'Connor; she joined the Rehnquist majority in approving the "substantial likelihood of material prejudice standard" and the Kennedy majority in finding the Nevada safe harbor provision impermissibly vague.⁴¹

Viewed through the lens of *Gentile*, the discipline of Mike Nifong may seem to satisfy first amendment standards. After all, the pertinent North Carolina disciplinary rule incorporates the "substantial likelihood of material prejudice" standard upheld by the Supreme Court in *Gentile*. But *Gentile* is far from the Supreme Court's final word on the subject of attorney speech. In its more recent decision, *Republican Party of Minnesota v. White*,⁴² the Supreme Court ruled in another closely divided 5-4 opinion that a Minnesota rule of judicial conduct applicable to judicial candidates violated the First Amendment. The disciplinary rule at issue applied both to sitting judges and practicing attorneys,⁴³ and prohibited a candidate for judicial office from "announcing his or her views on disputed legal or political issues."⁴⁴ Justice Scalia, writing for the majority, ruled that this judicial canon was a content-based restriction subject to strict scrutiny. Addressing Minnesota's decision to select judges by election, Scalia noted that "if the state chooses to tap the energy and the legitimizing power of the democratic process, it must accord the participants in that process...the First Amendment rights that attach to their roles."⁴⁵ "We have never allowed the government to prohibit candidates from communicating relevant information to voters during an election."⁴⁶ "The announce clause ...burdens a category of speech that 'is at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office."⁴⁷

³⁶ *Gentile*, 501 U.S. at 1070-1071.

³⁷ *Id.* at 1066. "[A]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' those rights may be subordinated to other interests that arise *in this setting*," emphasis supplied. *Id.* at 1073, quoting, *Seattle Times Co. v. Rhinehart*, 467, U.S. 20, 32-33 (1984).

³⁸ *Id.* at 1073-75.

³⁹ *Id.* at 1048-49.

⁴⁰ The 1993 amendment to Model Rule 3.6 deleted the words "general" and "without elaboration" found unconstitutionally vague by the Kennedy majority in *Gentile*.

⁴¹ *Id.* at 1081.

⁴² *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002).

⁴³ *Id.* at 768.

⁴⁴ *Id.*

⁴⁵ *Id.* at 788, citing *Renne v. Geary*, 501 U.S. 312 (1991).

⁴⁶ *Id.* at 782. "The role that elected officials play in our society makes it all the more imperative that they be allowed freely to express themselves on matters of current public importance." *Id.* at 781-782, citing *Wood v. Georgia*, 370 U.S. 375, 395 (1962).

⁴⁷ *Id.* at 774.

In *White*, Justice Scalia rejected the argument that the state's real or perceived goal in "impartiality" could satisfy its heavy burden of justifying its "announce" clause under strict scrutiny analysis. If impartiality means neutrality toward parties, the regulation was vastly under-inclusive, because it prohibited speech about disputed "legal or political issues," saying absolutely nothing about the parties to a dispute.⁴⁸ According to Justice Scalia, if the state's goal were to select judges with no preconceptions on legal issues, this could not be a compelling interest because it would be both impossible and undesirable to do so.⁴⁹ Justice Scalia recognized that lower courts had narrowed the reach of the Minnesota "announce" clause to "*disputed issues that are likely to come before the candidate if he is elected judge.*"⁵⁰ However, Justice Scalia did not think that this limiting construction saved the canon from constitutional infirmity, because "[t]here is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."⁵¹ Justice Scalia reasoned that if electing judges who have no prior opinions on legal issues is not a compelling state interest, pretending to preserve the "appearance" of this lack of preconception also could not reasonably constitute a compelling state interest.⁵²

The Court's decision in *White* has provided "enormous momentum" to attacks on the ABA's Model Code of Judicial Conduct, and the state rules derived therefrom.⁵³ There is now ample basis for doubting whether ABA Model Rules 3.6 and 3.8 could survive a similar constitutional challenge. First and foremost, five of the nine justices who participated in deciding *Gentile* are no longer sitting on the Court. Even former Chief Justice Rehnquist, who wrote in *Gentile* that membership in the bar entails some sacrifice of the privileges normally enjoyed by private citizens, joined the *White* majority in ruling that *members of the bar running for office* must be allowed to state their views on matters of public importance. After *White*, if states choose to select their prosecutors through the electoral process, they are going to have to tolerate a certain amount of campaign rhetoric (even case-based campaign rhetoric). To paraphrase Justice O'Connor's concurring opinion in *White*, if North Carolina has a problem with overzealous statements made by prosecutors to the media during a re-election campaign, it is a problem that the state has largely brought upon itself by the manner in which it has chosen to select its district attorneys.⁵⁴ Where core political speech at issue, the first amendment requires states to give "breathing space"⁵⁵ to the communication of information.

⁴⁸ *Id.* at 776.

⁴⁹ *Id.* at 777-778.

⁵⁰ *Id.* at 771, emphasis supplied.

⁵¹ *Id.* at 772, quoting Buckley v. Illinois Judicial Inquiry Bd. 997 F.2d 224, 229 (7th Cir. 1993).

⁵² *Id.* at 778.

⁵³ George D. Brown, *Political Judges and Popular Justice: A Conservative Victory or a Conservative Dilemma?*, 49 WM. & MARY L. REV. at ___ (forthcoming 2008)(on file with author)(arguing that *White* has led to the further politicization of judicial campaigns, which should be considered a disturbing trend for federalists who care about the competence of the state judiciary).

⁵⁴ *White*, 536 U.S. at 792.

⁵⁵ *Brown v. Hartlage*, 456 U.S. 45, 61 (1982).

Moreover, the Rehnquist majority in *Gentile* did not really apply strict scrutiny to Nevada Rule 3.6, at least as that test was later construed and applied in *White*. Rehnquist's opinion in *Gentile* did not invoke the term "strict scrutiny," nor did it demand an explanation for the restriction that was "compelling." The Rehnquist majority in *Gentile* simply ruled that states strike a permissible "*balance*" between the interests of the speaker and the state's own interest in regulating the legal profession when they prohibit attorney speech that poses a "substantial likelihood of materially prejudicing a proceeding."⁵⁶ This is really not strict scrutiny at all. Where political speech is at issue, a proper application of strict scrutiny requires the state to demonstrate that the restriction serves a compelling state interest, and that it is narrowly tailored to serve that interest.⁵⁷ The court should not "weigh" the value of the speech, or "balance" the speaker's interest in making public comment against the state's interest in restricting it.

One reading of *Gentile* and *White* might suggest a relevant distinction between comments about pending cases, and comments about general legal issues likely to arise before a court in the future.⁵⁸ Under this view, the former might be regulated under a standard less exacting than the "clear and present danger" test, while the latter may not be. The Court in *White* appeared to leave room to regulate the speech of judicial candidates about litigation actually pending before them.⁵⁹ But I think that this distinction does not survive a close reading of *White* or its progeny, at least with respect to *elected* prosecutors commenting about pending cases or investigations. The respondents and dissenters in *White* relied upon a construction of "impartiality" that would include "open-mindedness;" that is, the state has a compelling interest in protecting the fairness of adjudicatory hearings by ensuring that judges are disinterested and willing to remain receptive to competing arguments.⁶⁰ They argued that the Minnesota "announce" clause furthered this interest in open-mindedness by promoting both an unbiased, disinterested judiciary and the public appearance of neutrality.⁶¹ After *White*, however, several federal courts have struck down so-called "pledges and promises" clauses of state judicial codes that prohibited judges from publicly stating their

⁵⁶ *Gentile*, 501 U.S. at 1075.

⁵⁷ *White*, 536 U.S. at 774-775, *citing* *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 222 (1989).

⁵⁸ *Gentile* suggests that greater restraint on attorney speech is allowed when a case is ongoing than when it is completed. 501 U.S. at 1074 ("the speech of lawyer representing clients in pending cases may be regulated under a less demanding standard than that established for regulation of the press.").

⁵⁹ *See White*, 536 U.S. at 770 (expressing "no view" on whether judicial canon prohibiting a candidate from "promising to decide an issue [in] a particular way" would violate the first amendment).

⁶⁰ *Id.* at 778 and *Id.* at 815 (Ginsburg, J. dissenting). Justice Scalia recognized that this third definition of impartiality *might* present a compelling state interest in limiting judicial speech during an election, but he did not proceed to consider whether Minnesota's canon was narrowly tailored to further this interest, because he did not believe that "open-mindedness" was the true purpose motivating the enactment. *Id.* at 778. A judicial candidate in Minnesota can state his position on legal matters both before running for election and after being elected by writing books and giving speeches. *See* MINN. CODE OF JUDICIAL CONDUCT, Canon 4(B). If impartiality in terms of "open-mindedness" were truly the purpose behind the "announce" clause, Scalia felt that such activity would have been limited as well. "A law cannot be regarded as protecting an interest of the highest order, and thus as justifying a restriction upon truthful speech, when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 780, *citing* *Florida Star v B.J.F.*, 491 U.S. 524, 541 (1991) (Scalia, J. concurring).

⁶¹ *See Id.* at 815-817 (Ginsburg, J. dissenting).

position on matters pending or likely to come before the court⁶² Relying on *White*, these courts have ruled that the “pledge or promise” provision before the court was not narrowly tailored to further the state’s interest in an impartial judiciary.⁶³ Where a judge stakes out his position on a certain legal subject through extrajudicial speech, this may present risks to the fairness of adjudicatory proceedings. To secure a fair trial for his or her client, a future litigant may have to move to recuse the judge who made the statements. Recusal hearings are fraught with costs to the state—including the consumption of scarce court time, the risk of error, and the delay from appeal. But those courts which have struck down “pledges and promises” clauses in state judicial canons since *White* have recognized that these risks do not justify prohibiting pledges or promises altogether, except perhaps specific promises about how a particular case will be decided.⁶⁴ The same is true of a prosecutor’s speech about pending cases during a campaign. Such speech may taint the views of potential members of the venire. It may make the trial judge’s task more difficult in weeding out potential jurors who have read about the case or already formed an opinion about the defendant. It may require a change of venue. But at a minimum, the lesson of *White* is that with regards to campaign speech, the mere *potential* of added burdens to the state is not a sufficiently compelling justification to survive strict scrutiny.

A second possible way to distinguish *White* from the Nifong matter is the type of election involved; that is, one might argue that judicial elections are different than elections in the legislative and executive branches of government, and that prohibitions on speech that might be permissible in one forum might be impermissible in another. Indeed, Justice Ginsburg in *White* accused the majority of taking an “election is an election” approach to constitutional analysis.⁶⁵ She argued that judicial elections are indeed different from elections for legislative or executive office, because the populace was not choosing a candidate who would act at their behest, but rather was choosing a magistrate who would act as a neutral, removed from “partisan fray.”⁶⁶ In his majority opinion Justice Scalia declined to address directly the question of whether the first amendment allows greater regulation of judicial campaigns than other elective offices,⁶⁷

⁶² Cf. ABA MODEL CODE OF JUDICIAL CONDUCT, Canon 3(B)(10) (“A judge shall not, in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises, or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office.”)

⁶³ See *Pennsylvania Family Institute, Inc. v. Celluci*, 489 F.Supp.2d 447, 456-57 (E.D.Pa.2007) (summarizing cases since *White* and issuing preliminary injunction against enforcement of Pennsylvania’s “pledges and promises” clause); See also *Family Trust Foundation of Kentucky, Inc. v. Kentucky Judicial Conduct Comm’n*, 388 F.3d 224, 228 (6th Cir.2004) (denying stay of injunction prohibiting enforcement of Kentucky “pledges and promises” clause, agreeing that such clause is a de facto “announce” clause in disguise).

⁶⁴ See *Indiana Right to Life, Inc. v. Shepard*, 463 F.Supp.2d 879, 889 (N.D. Ind. 2006) (“[T]here is no real distinction between announcing one’s views on legal or political issues and making a statement that commits or ‘appears to commit’ a judicial candidate with respect to cases, controversies, and issues that are likely to come before the court.” A canon that prohibited judges or judicial candidates from making commitments to “certain results in particular cases” would be more narrowly tailored to accommodate speech.).

⁶⁵ *Id.* at 805.

⁶⁶ *Id.* at 806-808

⁶⁷ *Id.* at 783.

but stated that “even if” this were true the Minnesota canon failed strict scrutiny.⁶⁸ Thus, the important lesson of *White* is that *if* there is a relevant distinction between judicial elections and legislative or executive elections, attorneys running for legislative or executive office (like Mike Nifong) are entitled to *more* deference than judges, not less.⁶⁹

In considering whether *Gentile* is still good law with respect to elected prosecutors following *White*, it may be helpful to consider a recent example of judicial speech that has been determined to be protected by the first amendment. In *Mississippi Commission on Judicial Performance v. Wilkerson*, the Supreme Court of Mississippi declined to impose sanctions on a sitting judge who made comments in a letter to the editor of a newspaper (and subsequently during a radio interview) taking a position against gay rights legislation.⁷⁰ The sitting judge indicated that homosexuality was a “mental illness” and that in his opinion gays “belong in mental institutions.”⁷¹ The Judicial Conduct Commission recommended that the judge be sanctioned for conduct “that cast(s) doubt on the judge’s capacity to act impartially.”⁷² The Supreme Court of Mississippi, citing *White*, declined to sanction the judge, ruling that the judge’s comments were constitutionally protected, and that the requested discipline would violate the first amendment.⁷³ The court rejected the state’s interest in “impartiality” of jurists as justifying the restraint on Wilkerson’s speech, because a motion to recuse any judge who revealed such anti-gay bias would more narrowly satisfy the state’s compelling interest in an impartial judiciary.⁷⁴ Quite simply, if such comments by a sitting judge about homosexuality are protected after *White*, it seems hard to imagine that many of the statements that District Attorney Mike Nifong made to the media about the Duke Lacrosse investigation would not be similarly protected had Nifong raised a first amendment defense in his disbarment proceeding.

IV. Do Rules 3.6 and 3.8(f) Survive Strict Scrutiny after *White*?

If *White* controls, and the court applies strict scrutiny for the speech of elected prosecutors, then there is ample room to argue that no compelling government interest is served by certain provisions in Rules 3.6 and 3.8(f). A prior restraint will survive strict scrutiny only if “the restriction operate(s) without unnecessarily circumscribing protected expression.”⁷⁵

⁶⁸ *Id.*

⁶⁹ *Cf. Weaver v. Bonner*, 309 F.3d 1312, 1321 (11th Cir. 2002).

⁷⁰ 876 So.2d 1006 (Miss. 2004).

⁷¹ *Id.* at 1008.

⁷² *Id.* at 1009, *citing* MISS. CODE OF JUDICIAL CONDUCT, Canon 4(A)(1).

⁷³ *Id.* at 1013.

⁷⁴ *Id.* at 1015. “We find no compelling state interest in requiring a partial judge to keep quiet about his prejudice so that he or she will appear impartial.” *Id.*

⁷⁵ *Brown v. Hartlage*, 456 U.S. 45, 53-54 (1982).

A. Potential Infirmities in Rule 3.6

As noted above, one could argue that states may not restrict the political speech of elected prosecutors unless such speech presents a “clear” or “imminent” threat to ongoing judicial proceedings. Such an attorney disciplinary standard is already in effect in many states.⁷⁶ Moreover, even if the “substantial risk” standard of Model Rule 3.6 survives *White*, Comment [5] to Rule 3.6 essentially creates a presumption that certain topics pose a substantial likelihood of materially prejudicing an adjudicatory proceeding. Two of the topics listed in Comment [5] seem particularly suspect under true strict scrutiny analysis.

The first dubious “off-limits” topic is the “identity of witnesses.” What compelling government interest justifies precluding a prosecutor from identifying the witnesses to criminal proceedings? Arguably, public identification could invade the individual’s privacy, or subject a witness to possible intimidation prior to trial. However, even if those interests are compelling, this limitation is not narrowly tailored to serve either of them. Identifying a witness is presumptively prejudicial regardless of what type of a criminal proceeding the witness is involved in (e.g., larceny or rape), regardless of whether the witness has consented to their name being disclosed (e.g., a corporate whistleblower who has already given statements to the media), and regardless of whether the identification occurs six months prior to trial or six hours. Imagine the case of the victim of a vicious home invasion, beating, and robbery where the victim identified the perpetrator from the hospital bed. Read literally, ABA Model Rule 3.6(a) Comment [5] would prohibit the prosecutor from announcing to the media that “John Jones’ was attacked at gunpoint in his home last night and is in critical condition, but is expected to recover and be able to testify at trial.” Because the victim is also a witness, such a statement would violate the literal terms of the comment. While there may be circumstances where the prosecutor may choose for strategic or policy reasons to withhold the name of a crime victim,⁷⁷ there appears to be no categorical reason to preclude it in all circumstances. Certainly, the identity of the victim/witness will eventually be revealed in court.

Comment [5] also includes in the list of presumptively prejudicial material any public comment regarding the “identity or nature of physical evidence expected to be presented.” This too may be overbroad. A literal reading of the comment would prevent a district attorney from commenting that an alleged victim suffered severe physical injuries, assuming that this evidence was expected to be presented at trial (e.g., in an assault case that the alleged victim suffered a stab wound, or in a rape case that the alleged victim suffered scratching, bruising, and vaginal swelling). It would also prohibit a prosecutor from announcing to the media that, upon completion of a lengthy narcotics investigation, police had seized 200 kilograms of high purity cocaine. Or, that a terrorist plot aimed at JFK airport was thwarted and a truckload of explosives was uncovered. It

⁷⁶ *Supra*, note 11.

⁷⁷ Many state statutes prohibit law enforcement officials from releasing the name of sexual assault victims. *See, e.g.*, Cal. Pen. Code §293 (2007); N.Y. CLS Civ. R. §50-b (2007). Even in states that have not enacted such express prohibitions, prosecutors routinely decline to release the name of rape victims in order to encourage reporting and to protect the victim’s privacy.

would be rare indeed to find a prosecutor in this country who did not think that statements like these are critical to informing the public about dangerous activity afoot in the community. “The public has a right to know about threats to its safety and measures aimed at assuring its security.”⁷⁸

Certainly, it is not uncommon for prosecutors or police to display seized evidence at a press conference announcing an arrest or indictment, such as a large cache of narcotics, seized weapons, or other contraband. The only conceivable justification for prohibiting such speech is that, once the public learns of the presence of physical evidence, they may reach conclusions about the guilt of the defendant even if that same evidence is later suppressed or not introduced at trial. But again, the limitation on Rule 3.6 is not narrowly tailored to meet even this legitimate government objective. The limitation applies whether the prosecutor mentions physical evidence inextricably linked to the defendant (e.g. “the defendant’s fingerprints were found at the scene”) or generic evidence seized during the investigation but not necessarily tied by circumstances or forensics to a named defendant (“the perpetrator, in his haste to get out of the bank, left a bag of money at the door”). The rule simply does not distinguish between these two very different types of situations.

Furthermore, the rule says nothing about timing. If a statement about physical evidence seized is made soon after arrest and well before trial, it is unlikely to have any effect on the proceedings, even if the physical evidence is later suppressed.⁷⁹ Individual voir dire of potential jurors prior to trial may serve to screen out citizens who have heard or seen public reports of the case.⁸⁰ It is notable that the precursor to Model Rule 3.6, ABA Model Code of Professional Responsibility DR 7-107, allowed an attorney associated with a criminal investigation to make public comment “at the time of the seizure, [about] a description of the physical evidence seized, other than a confession, admission, or statement.”⁸¹

In addition, Rule 3.6 harbors several lurking vagueness problems. In the list of topics that “ordinarily” will result in substantial prejudice contained in Comment [5], subparagraph (1) refers to the character, reputation, or criminal record of a party, *suspect* or witness, and subparagraph (2) refers to the “existence or contents of any confession... or statement” given by a defendant or *suspect*, or their failure to give such a statement. These subparagraphs relate back to Rule 3.6(a); that is, statements about these topics are

⁷⁸ MODEL RULES OF PROF’L CONDUCT, R. 3.6(a) Comment [1].

⁷⁹ “That time soothes and erases is a perfectly natural phenomenon.” *Patton v. Young*, 467 U.S. 1025, 1034 (1984) (ruling that where trial took place four years after allegedly prejudicial publicity, trial court did not commit manifest error in finding the jury impartial.)

⁸⁰ See *Gentile*, 501 U.S. at 1044 (Kennedy, J.) (suggesting that length of time before trial and size of county population are important factors to consider in determining whether substantial likelihood of material prejudice standard is met).

⁸¹ See ABA MODEL CODE OF PROFESSIONAL RESPONSIBILITY, DR-7-107(c). Several state in their attorney discipline codes presently allow for comment on seized evidence. See, e.g., Iowa Code Ann. R. 32, DR-7-107; Neb. R. Prof’l Responsibility 7-107(c); N.Y.R. Prof’l Responsibility DR 7-107(c).

only unethical if they pose a substantial risk of prejudicing an adjudicatory proceeding.⁸² However, the word “suspect” is capable of at least two possible constructions. The word “suspect” could have been placed in the rule for timing reasons; during an investigation it is impermissible to discuss the confession of a suspect, and after an indictment it is impermissible to discuss the confession of a charged defendant. Or, the rule could be suggesting that it is impermissible to discuss the confession or criminal record of a suspect, regardless of whether or not that person ends up being indicted, if the comment about an un-indicted suspect poses a risk of prejudicing the proceedings against other defendants. Neither the rule nor its comments shed any light on which of these two constructions is correct.

Imagine the case of an armed bank robbery committed by three perpetrators. One of the suspects is shot and killed by police as he flees the bank and dies at the scene. Could the prosecutor, consistent with Rule 3.6, talk to the media about the prior criminal record or deathbed confession of that deceased accomplice? This is more than a rhetorical question. Mike Nifong made several statements to the media that were disparaging of the Duke Lacrosse team generally, including criticizing them for being “hooligans” and for failing to come forward with information. Yet only three of these players were indicted. When one reads the disciplinary opinion and the transcript of the hearing order, one cannot help but be left with the impression that the panel believed Mike Nifong had impermissibly tainted the reputation of the entire Duke Lacrosse program.⁸³ Is it permissible to discipline Nifong for comments related to suspects who were never indicted, and therefore could not have had their adjudicatory proceedings tainted? What “compelling” interest does the state have in preventing a prosecutor from discussing alleged “hooliganism” of varsity athletes at an elite university, or their tendency to stick together in the face of adversity?

The public records safe-harbor in Rule 3.6(b) is also subject to a vagueness objection. Rule 3.6(b) contains a list of matters that an attorney “may state” to the media during a pending judicial proceeding, “notwithstanding” the prohibitions in paragraph (a). That is, if the subject of a media statement falls within the safe harbor of paragraph (b), an attorney may discuss it even if the matter poses a substantial likelihood of materially prejudicing the proceeding.⁸⁴ One of topics listed in the safe harbor provision of Rule 3.6(b) is “information contained in a ‘public record.’” If the matter which the prosecutor discusses with the media is already in the “public record,” it does not constitute an ethical

⁸² See *Devine v. Robinson*, 131 F.Supp.2d 963, 970 (N.D.Ill. 2001) (“read in the context of the entire rule, subparagraph (b) is easily understood as relating back to subparagraph (a).”)

⁸³ See Transcript of Disciplinary Commission Hearing dated June 16, 2007, “Order of Discipline”p.19 (describing the victims of Mike Nifong’s misconduct as “the three young men to start with, their families, *the entire lacrosse team and their coach*, Duke University, and the justice system in North Carolina and elsewhere”)(emphasis supplied).

⁸⁴ See MODEL RULES OF PROF’L CONDUCT, R. 3.6 Comment [4] “Paragraph (b) identifies specific matters about which a lawyer’s statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibitions of paragraph (a). See also *Devine v. Robinson*, 131 F.Supp.2d at 970 (stating that a plausible interpretation of Illinois Rule 3.6 is that if subject matter falls both within safe harbor provision and list of matters ordinarily likely to present a risk of serious prejudice, the comment is permissible).

violation for the prosecutor to repeat the matter to the press. For example, it is ordinarily improper for a prosecutor to refer publicly to the prior criminal record of the accused.⁸⁵ But if the prosecutor files a written bail request in court which details the defendant's criminal past in support of an argument for dangerousness, that past has become part of a "public record" and is thereafter open for official comment.

But what does "public record" mean? Does it mean information contained in an official, publicly available *government* record? Or does it mean information that is already in the *public domain*, regardless of how it got there? This is a critical distinction. One could certainly argue that the government does not have a compelling state interest in preventing a prosecutor from repeating what is already in the public domain. The cat is already out of the bag. On the other hand, one could argue that the mere act of *repeating* a contention publicly made by others strengthens the public's perception of the credibility of the allegations, especially when the emphasis comes from a government official with inside information about the case.

In the Nifong case, the North Carolina Disciplinary Commission had the opportunity to address this important distinction, but failed to do so. For example, the disciplinary complaint alleged that Nifong violated Rule 3.6 by revealing to Newsweek in April, 2006 that the examining nurse at Duke University Hospital concluded that the accuser had suffered injuries consistent with sexual assault.⁸⁶ The Disciplinary Commission included this count in one of its findings of improper comment by Nifong,⁸⁷ even though the same statement was recounted by Assistant District Attorney David Saacks in an Application for a Nontestimonial Identification Order (cheek swabbings for DNA) submitted to the Durham Superior Court on March 23, 2006.⁸⁸ Nifong defended the disciplinary complaint on this count by alleging that the nurse's conclusions were matters contained in a public record, but the Disciplinary Commission in its final order failed even to discuss this defense.⁸⁹

Similarly, Nifong was disciplined for commenting to the media on the status of DNA tests that were being performed on items taken from the accuser, the alleged crime

⁸⁵ See MODEL RULES OF PROF'L CONDUCT, R. 3.6(a), Comment [5](1).

⁸⁶ Complaint ¶ 65.

⁸⁷ Findings of Fact ¶ 39, and Conclusions of Law ¶ (a). Sane Nurse examiner Tara Levicy met with Durham Police investigators on March 16, 2005 to

⁸⁸Durham County Superior Court Nontestimonial Identification Order, March 23, 2006 (on file with author). The SANE nurse examiner report, completed on March 14, 2005, noted that the alleged victim had non bleeding scratches on her heel and knees, and "diffuse edema of the vaginal walls,' i.e. swelling. See <http://johnsville.blogspot.com/2006/06/duke-lacrosse-scandal-nifong-lies.html> (last visited January 24, 2008). The SANE nurse met with investigators on March 16, 2006 and March 21, 2006 to further explain her examination report and to review her assessment of the alleged victim's appearance and demeanor in the early morning hours after the purported attack. In these interviews, the SANE nurse told the investigator that the accuser's swelling, scratches, statements of pain, hysterical demeanor, and tenderness to the touch were in her view consistent with sexual assault. See Stuart Taylor Jr. and KC Johnson, UNTIL PROVEN INNOCENT 33-35, 47 (2007). The Application for Nontestimonial Identification Order dated March 23, 2006—after these interviews were conducted but before Nifong's public statements on this subject—purported to summarize both the SANE examination report and the subsequent interviews.

⁸⁹ Motion to Dismiss and Answer ¶ 56.

scene, and samples taken from suspects pursuant to judicial order. In May 2006, Nifong stated to a television news reporter, “My guess is that there are many questions that many people are asking that they would not be asking if they saw the results” and that “They’re [DNA reports] not things that the defense releases unless they unquestionably support their positions.”⁹⁰ In fact, DNA tests results at that time *did not* “unquestionably” support the defense position. Between May 4 and May 9, 2006, DNA Security learned that two false fingernails seized from the house where the lacrosse party occurred (one in the bathroom trash and one in a bedroom of the house on a computer) each harbored DNA that was not inconsistent with DNA samples taken from Duke lacrosse players.⁹¹ The report from DNA Security was turned over to defense attorneys on May 12, 2006, and on that very afternoon counsel for one of the defendants held a press conference to announce to the media that no DNA from any lacrosse player was found on specimens taken from the accuser’s person at the hospital.⁹² Nifong defended the above statements to the media on the grounds that the DNA aspect of the investigation had “*already* become a subject of media attention” and he was just responding to questions the media “asked about information received from other sources.”⁹³ However, the Commission’s final order sanctioned Nifong for these public comments, without ever addressing whether they was justified by matters already in the public domain.⁹⁴ Undoubtedly the Commission was motivated by the potentially misleading nature of Nifong’s DNA comments, especially in light of later revelations that he had suppressed exculpatory evidence by directing DNA Security personnel to omit from their report the fact that DNA from four unidentified males (not lacrosse players) was found on rape kit items swabbed from the accuser on March 14, 2006.⁹⁵ But Nifong was not charged with making false or misleading public statements about DNA, he was charged with making statements that posed a substantial risk of prejudicing proceedings, a charge that contains a specific safe harbor for matters already in the public domain. It is difficult to ascertain how an oblique reference to the existence of information *not* released by defense counsel risks prejudicing future adjudicatory proceedings, where the information is not identified with specificity and where there has already been substantial public discussion of the general topic.

⁹⁰ Findings of Fact ¶ 61.

⁹¹ See *North Carolina v. Evans*, Finnerty & Seligmann, 06 CRS 5581-5583, 4331-4336, Defendants’ Motion to Compel Discovery: Expert D.N.A. Analysis, p 9-10 (December 13, 2006).

⁹² Aaron Beard, Associated Press “*No Link to Duke Players after 2nd Test*,” May 14, 2006 BRADENTON HERALD, p. 5. See Stuart Taylor Jr. and KC Johnson, UNTIL PROVEN INNOCENT 219-223 (2007). This statement by defense counsel followed defense appearances in early April after a first round of tests performed by the State Bureau of Investigations (SBI) revealed no semen, blood or saliva in vaginal swabs taken from the accuser. See NBC Today Show, April 11, 2006, 2006 WLNR 6110285 (statement by defense attorney Wade Smith that “no DNA from any young man tested was found anywhere on or about the body of this woman.”)

⁹³ Motion to Dismiss and Answer ¶ 44.

⁹⁴ Findings of Fact ¶ 61; Conclusions of Law ¶ (a). The final order of discipline further glosses over this difficult “public domain” issue by concluding that Nifong’s impermissible comments were made in “May, 2006” without reference to any particular date in May. Findings of Fact ¶ 61.

⁹⁵ Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications; A Fundamental Failure to “Do Justice,”* 76 FORD. L. REV. 1137, 1359-1360 (2007).

Thus far, only the state of Maryland appears to have grappled with the appropriate definition of “public record” in its safe harbor provision of Rule 3.6. In *Attorney Grievance Commission of Maryland v. Gansler*, an elected State’s Attorney was disciplined for misconduct in several high profile murder cases.⁹⁶ During the course of four investigations and prosecutions, Gansler made a variety of comments to the media during press conferences relating to physical evidence collected at a crime scene, confessions obtained from suspects, the prior criminal records of the accused, and plea agreements offered to the defendants. All of these topics are presumptively prejudicial under the Maryland version of Model Rule 3.6 Comment [5]. The Attorney Grievance Commission of Maryland brought misconduct charges against Gansler, and found after a hearing that all these comments violated Maryland Rule of Professional Conduct 3.6. On review, the Maryland Court of Appeals held that the safe harbor provision in Maryland Rule 3.6, allowing comments about information that could be found in “public record,” was sufficiently vague to justify many of the prosecutor’s comments. Many details concerning seized evidence, confessions, and prior criminal records had already been leaked by others (presumably the police) and reported in newspapers before the district attorney commented on them. The court noted that the broad interpretation of the public records safe harbor would allow comment *both* on any matters that had previously been discussed in a public forum, including newspaper and television reports, as well as all information available from official government records and court records.⁹⁷ The Court therefore reversed the professional discipline of Gansler with respect to several counts of the misconduct complaint. It affirmed a finding that Gansler violated Rule 3.6 in only two respects; by stating his opinion regarding the guilt of several defendants and by commenting on *previously undisclosed* confessions, evidence, and guilty plea offers. The Court noted that for future cases, however, they were going to restrict the public record safe harbor under Rule 3.6 to that information accessible in public governmental records.⁹⁸ They stressed that extrajudicial comments, especially those made by prosecutors, directly thwart the goal of having the defendant tried by an impartial jury which has heard as little as possible about the case.

B. Potential Infirmities in Rule 3.8(f)

Turning to the limitations on extrajudicial comments posed by Rule 3.8(f), it is also doubtful whether this provision would survive strict scrutiny if challenged on first amendment grounds after *White*, at least as applied to an elected prosecutor speaking during a campaign. Is protecting the reputation of the *accused*, over and above the integrity of the proceedings, a compelling government interest? If the defendant is *innocent*, on obviously compelling state interest in limiting a prosecutor’s speech lies in protecting an accused from an erroneous guilty finding that may result if public sentiment becomes inflamed prior to trial. But that interest is served by Rule 3.6, which looks at the potential effect of speech in the adjudicatory proceedings. If the defendant is *guilty*, no compelling government interest is served by protecting the defendant from public opprobrium for his conduct. Retribution is one of the legitimate aims of the criminal law,

⁹⁶ *Attorney Grievance Commission of Maryland v. Gansler*, 835 A.2d 548 (Md. 2003).

⁹⁷ *Id.* at 567.

⁹⁸ *Id.* at 568-69

and retribution is served when citizens band together to condemn behavior that violates societal norms.⁹⁹

Conceivably, the state might have an interest in protecting innocent defendants, later found innocent through acquittal or the dismissal of criminal proceedings, from having their reputations impaired before they reenter society. But, in this situation, vindication by acquittal or dismissal is at least one step towards repairing any damage to reputation resulting from indictment and media comment. More importantly, however, the innocent defendant has a potential civil recourse against the prosecutor who disparages his reputation in the media under 42 U.S.C. §1983 (deprivation of a liberty interest under color of state law).¹⁰⁰ The Supreme Court could consider the availability of this remedy a sufficiently adequate deterrent to obviate the need for prior restraint of a prosecutor's speech. On October 5, 2007 David Evans, Collin Finnerty, and Reade Seligmann filed a civil complaint against Mike Nifong, as well as thirteen other state and municipal employees and entities including the Durham Police Department.¹⁰¹ Nifong himself is named in eight counts of this complaint, including federal claims under 42 U.S.C. §1983 for improper public statements, and state tort claims for malicious prosecution, obstruction of justice, and intentional infliction of emotional distress.¹⁰² The complaint, which requests unspecified compensatory and punitive damages, is presently pending in United States District Court for the Middle District of North Carolina. The enormity of the potential civil recovery against Nifong and the City of Durham may itself act as such a powerful deterrent to future acts of false, misleading or defamatory speech by prosecutors across this country as to make the prior restraint of Rule 3.8(f) unnecessary.

Note that Rule 3.8(f) prohibits speech that tends to heighten public condemnation of the accused *unless* such speech is both "necessary to inform the public of the nature and extent of the prosecutor's action" *and* serves "a legitimate law enforcement purpose." Unless condemning speech meets both of these tests, it is prohibited. The problem with this language is that it turns strict scrutiny on its head. Rule 3.8(f) demands that a bar disciplinary committee assess the importance of the speech in determining whether it is unethical. But under *White*, where political speech is concerned the court will demand a compelling reason for the restriction, not a compelling reason for the speech. Political speech is presumed to be at the core of first amendment protections, and the court does not undertake an individual weighing of the value of words spoken in the electoral

⁹⁹ See Emile Durkheim, *THE DIVISION OF LAW IN SOCIETY*, p.62-63 (W.D. Halls, Transl., 1984) ("[Punishment] serves only very incidentally, to correct the guilty person or to scare off any possible imitators... Its real function is to maintain inviolate the cohesion of society by sustaining the common consciousness in all its vigor.")

¹⁰⁰ See *Buckley v. Fitzsimmons*, 509 U.S. 259, 274 (1993) (prosecutors are entitled only to qualified good faith immunity in suits involving conduct which is not quasi judicial in nature, and this includes allegedly inflammatory statements to press.); *Marx v. Gumbinner*, 855 F.2d 783, 791 (11th Cir.1998) (prosecutor could be civilly liable for due process violation under §1983 for conduct in issuing defamatory press release).

¹⁰¹ See *Evans et al v. City of Durham et al.*, Civ. Action No. 07-739 (United States District Court, M. D. N. C., October 5, 2007)(available at http://media.mgnetwork.com/ncn/pdf/071005_duke.pdf).

¹⁰² *Id.*

context. By allowing only extrajudicial condemning speech that is “necessary,” the rule risks chilling political speech that is protected by the first amendment.

Imagine a murder case where the defendant killed multiple victims in a particularly horrific manner. Assume further that the trial and sentencing are complete, that the defendant’s first appeal has been exhausted, and that the defendant is serving a mandatory life sentence in prison. The District Attorney, who personally handled the case, is up for re-election. She grants a television interview in which she describes the case as the most difficult of her career, she replays some of the more horrific elements of the crime, reveals that she still has nightmares about them, and she characterizes the defendant as an “animal” and “pure evil” and deserving of the full condemnation of society. She also urges the legislature to reinstate the death penalty in her jurisdiction. The trial and sentencing are over; these comments cannot reasonably be viewed as posing a substantial risk of prejudicing adjudicatory proceedings. But if Rule 3.8 imposes restrictions on prosecutors above and beyond those imposed by Rule 3.6,¹⁰³ these comments certainly seem to heighten public condemnation of the accused. What “compelling” state interest possibly justifies censoring that speech? After all, the defendant is entitled to a fair trial, “not a friendly public.”¹⁰⁴

In *Gentile*, the Supreme Court ruled that the “substantial likelihood of material prejudice” standard of Nevada Rule 3.6 satisfied the first amendment because it was viewpoint neutral and it “merely postpones the attorneys’ comments until after the trial.”¹⁰⁵ If Rule 3.8 is read to limit prosecutor’s speech *without regard* to whether it poses a risk to the fairness of the proceedings, it may not satisfy rigorous constitutional scrutiny. In fact, one of the members of the ABA Ethics 2000 Committee thought that this 1994 addition to Rule 3.8 was “of doubtful constitutional validity.”¹⁰⁶ Ohio, the state most recently adopting the Model Rules, rejected 3.8(f) after prosecutors in that state expressed a similar concern.¹⁰⁷ Many states that otherwise follow the ABA Model Rules

¹⁰³ MODEL RULES OF PROF’L CONDUCT, R. 3.8(f). The ABA Comment on Rule 3.8(f) states that this rule is “supplemental” to other rules governing attorney speech, but also says that comments that do not violate the safe harbor of 3.6(b) or the fair reply provision of 3.6(c) do not violate 3.8(f). Thus, a prosecutor who makes a statement to the press about information contained in a public record (such as the prior criminal history of the accused) presumably cannot be disciplined under Rule 3.8(f) even if this statement heightens public condemnation of the accused, if the public comment otherwise complies with the safe harbor provision of Rule 3.6(b). But there is an ambiguity here. What does Rule 3.8(f) add if the safe harbor of Rule 3.6(b) and (c) are allowed? In *Devine* the United States District Court in Illinois declared there “may” be no conflict between these rules. *See Devine v. Robinson*, 131 F.Supp.2d 963, 971 (2001). But what about the traditional rule of statutory construction that the more specific rule trumps the more general? Rule 3.6 applies to all attorneys, and Rule 3.8 applies only to prosecutors. If there is a conflict, traditional rules of statutory construction would suggest that the more specific provisions of Rule 3.8 should govern.

¹⁰⁴ *See* Plaintiff’s Memorandum of Law in Opposition to Motion to Dismiss in *Devine v. Robinson*, 131 F.Supp.2d 963 at p. 13.

¹⁰⁵ *Gentile*, 501 U.S. at 1076.

¹⁰⁶ *See* AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, minutes of meeting October 15-19, 1999, Available at <http://www.abanet.org/cpr/e2k/minoct99.pdf>.

¹⁰⁷ *See* letter of Mario County Prosecuting Attorneys to Task Force of Ohio Supreme Court, Dated February 1, 2006 (stating that “Proposed Rule 3.8 goes far beyond that which is necessary to protect the defendant’s right to a fair trial and is thus of questionable constitutional validity”), on file with author.

do not include a restriction on extrajudicial prosecutor speech similar to Model Rule 3.8(f).¹⁰⁸ Like Ohio, they may have rejected Rule 3.8(f) due to constitutional concerns, or simply because regulating speech of government lawyers is so fraught with the difficulties of line-drawing that it is politically impractical.

Between March 27 and March 31, 2006, Mike Nifong declared to a television news reporter that “what happened here was one of the worst things that’s happened since I have become district attorney.”¹⁰⁹ He also stated that “when I look at what happened, I was appalled. I think that most of the people in the community are appalled.”¹¹⁰ These statements to the media did not name any suspects. They did not refer to physical or forensic evidence, the character or reputation of alleged perpetrators, or the expected trial testimony. They were simply expressions by a sitting district attorney, running for re-election, about why he viewed the allegations in the case as serious, why the public should be equally concerned about them, and why he had chosen to prosecute the case personally rather than assign the case to a staff member. Nevertheless, the disciplinary commission in North Carolina concluded that these comments “heightened public condemnation of the accused,” and included them in its litany of reasons for disbaring District Attorney Nifong.¹¹¹ It certainly would have been prudent for Nifong to have included the words “allegedly” before the words “happened” in this public comment;¹¹² however, that omission alone cannot translate protected speech into unprotected speech, especially when it occurred prior to the return of DNA results when Nifong may have still entertained a good faith belief that a sexual assault in fact had occurred. I am convinced that the former District Attorney had a first amendment right to make these particular public comments, and that if Rule 3.8(f) is read to preclude them, it is most certainly overbroad.¹¹³

¹⁰⁸ See Ala. Rules of Prof’l Conduct Rule 3.8, Alaska R. Prof’l Conduct 3.8, Conn. Rules of Prof’l Conduct 3.8, Fla. Bar Reg. R. 4-3.8, Haw. Rules of Prof’l Conduct Rule 3.8, KRPC 3.8, Ky. SCR 3.130, Rule 3.8, MRPC 3.8, Minn. Rules of Prof’l Conduct 3.8, Miss. Rules of Prof’l Conduct Rule 3.8, N.M. R. Prof. Conduct 16-308, Ohio Prof. Cond. Rule 3.8, ORPC 3.8, Tenn. Sup. Ct. R. 8, Rule 3.8, Tex. R. Prof Conduct 3.09, Utah Rules of Prof’l Conduct Rule 3.8, Vt. Prof. Cond. Rule 3.8, W. Va. Prof. Cond., Rule 3.8, Wis. SCR 20:3.8.

¹⁰⁹ Findings of Fact ¶ 33.

¹¹⁰ *Id.*

¹¹¹ Conclusions of Law ¶ (a).

¹¹² See ABA MODEL RULE OF PROFESSIONAL CONDUCT, R. 3.6 Comment [5].

¹¹³ The former District Attorney did not directly challenge North Carolina Rules 3.6 or 3.8 on First Amendment grounds, either as applied to him directly or as facially overbroad. See Motion to Dismiss and Answer Dated 2/28/07. With respect to the statement referenced above, Nifong claimed that he did not intend to heighten public condemnation of the accused and did not intend to substantially prejudice the proceedings. “Defendant made the statements outlined in paragraphs 12 through 175 of the Amended Complaint at a time when there was an ongoing investigation relating to the facts contained in the affidavit attached to the Application for Nontestimonial Identification Order, a copy of which is attached hereto and incorporated herein by reference as Exhibit ‘A.’ The statements made between March 27, 2006 and April 3, 2006 were made at a time when no individual suspects had been identified and were an effort by the defendant to reassure the community that the case was being actively investigated by the Durham Police Department in an effort to obtain assistance in receiving evidence and information necessary to further the criminal investigation.” *Id.* at p.4 ¶10.

It is also troubling that Rule 3.8(f)'s prohibition of speech that "heighten(s) public condemnation of the accused" is silent as to the state of mind that must be present before a violation may be found. Must the prosecutor *know* that his media statements serve no legitimate purpose, *know* that they are not necessary to inform the public about the nature and extent of his actions, and either *know* or *intend* that they will heighten public condemnation of the accused? One member of the ABA Ethics 2000 Commission suggested that the threshold for discipline under Rule 3.8(f) should be a "knowing" violation, consistent with Rule 3.6.¹¹⁴ But the rule was never amended in accordance with this suggestion.¹¹⁵

Imagine that upon indicting an alleged serial child rapist the prosecutor states that, "Pedophilia is a scourge in our society. Preying on innocent children is the worst form of evil, and fighting it will be the highest priority of my office. I will do everything in my power to ensure that these heinous criminals are segregated from society." Imagine further that the prosecutor thinks that there are two legitimate law enforcement purposes for this comment; first, to deter would-be criminals from sexually molesting children, and second, to inform the public in an election year about how he will exercise his discretion in employing scarce law enforcement resources. If a bar discipline board disagrees with the prosecutor that the reasons for his public comments are necessary or legitimate, but the speaker nonetheless held them in good faith, may the speaker be sanctioned for these comments? That is, are "necessity" and "legitimacy" to be determined after the fact by the disciplinary board, or from the subjective point of view of the speaker?

This lack of clarity about the state of mind requirement for a 3.8(f) violation could seriously chill campaign speech for elected prosecutors. For example, a prosecutor may feel that it is a "legitimate law enforcement purpose" to explain to the electorate the reasons for his charging decisions and why he is making the prosecution of certain heinous offenses priorities in his community, but nonetheless refrain from such speech for fear that a disciplinary panel may consider them to have no legitimate purpose other than to heighten public condemnation of the accused. That is, they may be hesitant to engage in public discourse about ongoing criminal cases for fear that bar overseers will examine the justification for their speech from a purely objective perspective after the fact. Candidates should not have to speculate at their peril about the contours of a prior restraint of political speech. Equally worrisome is the possibility that disciplinary committees interpreting Rule 3.8(f) may not consider campaign speech to have *any* "legitimate law enforcement purpose" whatsoever. If a prosecutor's freedom to campaign is to be respected, it would appear that the threshold for a violation of 3.8(f) should at a minimum be gross recklessness, which is consistent with the "knew or should have known" standard of Rule 3.6. The rule's silence on this critical intent issue clearly poses a serious problem after *White*.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT, R. 3.6(a) requires that a lawyer "know or reasonably should know" that his comments will be disseminated and will pose a substantial risk of material prejudice to the proceeding.

¹¹⁵ See AMERICAN BAR ASSOCIATION CENTER FOR PROFESSIONAL RESPONSIBILITY COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT, minutes of meeting October 15-19, 1999.

V. Conclusion

The questions generated in this essay are not intended to condone or excuse the actions of District Attorney Mike Nifong in the Duke Lacrosse investigation. His mishandling of this rape case deserves the derision it has received from scholars, judges, and leaders of the bar. But the profession paints with too broad a brush when it condemns so many of Nifong's statements to the media as impermissible under present disciplinary rules. *Gentile* is no longer the only game in town when it comes to an attorney's statements to the media. The Supreme Court's decision in *Republican Party of Minnesota v. White* requires that when dealing with elected officials and political speech, disciplinary rules must be both narrowly tailored and narrowly construed in order to survive first amendment scrutiny. The North Carolina Disciplinary Commission's decision in the Nifong matter failed to recognize many of the nuances of Rule 3.6 and 3.8 that deserve serious consideration.