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Defense Counsel as Advocate outside the Courtroom

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DEFENSE COUNSEL AS ADVOCATE OUTSIDE THE COURTROOM

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I did not go to law school to be a press agent for criminals, not even for alleged criminals. My job is to defend zealously the accused in court, to vindicate those rights and liberties affected by the criminal process, and, if possible, to secure a positive result for my client, such as an acquittal. Why should I also shoulder the additional responsibilities of being a spokesperson for my client? The answer is that if I am to do a good job as a criminal defense lawyer, I must on occasion be something of a public relations agent as well.

I frequently proclaim my client's innocence from the courthouse steps, or from any other location where there is likely to be a TV camera or a pocket notebook. I do so without the slightest apology. In the absence of gag orders and gag rules, I would do it more often. I have four reasons for this:

(1) To counteract the effect on the jury pool and the judge of the prosecution's public proclamations of my client's guilt;

(2) To counteract the effect in my client's community of the prosecution's public proclamations of my client's guilt;

(3) To vindicate my client's First Amendment right to free speech;

(4) To exercise my own First Amendment right to free speech.

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I. LEVELING THE PLAYING FIELD

Perhaps in an ideal world, the first two reasons would disappear. I suppose that in an ideal world, the police and the prosecution would take very seriously the presumption of innocence. There would be no post-arrest or post-indictment press conferences given by district attorneys, United States attorneys, police, or FBI agents congratulating themselves for just having scored a decisive blow against the criminal *menace du jour.* In an ideal world businesspeople would not be led out of their offices in handcuffs. In an ideal world the police and the prosecution would cooperate with defendants to ensure that no one knew that these presumptively innocent people stood accused of committing crimes by the august authority of the state.

We do not live in such a world. Prosecutors have become experts at exploiting the media whenever they have a case that is, or can be made to seem, the least bit newsworthy.

The first and most familiar problem created by the prosecution's use of media is the tainting of the jury pool. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."[1] That the impartiality of jurors has been compromised by the reporting of prosecution claims is sometimes hard to demonstrate. But it happens. It happens all the time.

Take, for example, an incident during the Bernhard Goetz trial. Two years had passed between the subway confrontation and the commencement of the criminal trial. During voir dire, I asked a juror whether she had any knowledge of this highly publicized case. She responded, "No." Finding this a little difficult to believe, I proceeded to ask her whether she thought my client should be convicted. Her answer: "Mr. Goetz should be convicted because he shot four kids in the back."

When there is publicity by the prosecution, it is the duty of the defense lawyer to try to level the playing field by countering that publicity. Rarely will this be completely successful. The prosecutors, after all, are—at least in theory—neutral public servants devoted only to justice and the public good. Defense lawyers enjoy a somewhat less lofty position in the public perception. They cannot expect the defense sound bites on the courthouse steps to have the

1. U.S. CONST. amend. VI.

same effect as the prosecution's press conference. Yet, we have to do our best or admit that we do not take seriously the Sixth Amendment right to an "impartial jury."

It is frequently suggested that pro-defendant speech is unnecessary because there are other remedies for excess anti-defendant speech. We can ask for a change of venue; we can voir dire the jury and have prejudiced jurors struck for cause; we can have the judge instruct the jury to ignore anything they have learned from the media. Unfortunately, these protections for the defendant are, individually and jointly, utterly insufficient.

There are two problems with venue as a cure for too much anti-defendant media attention. First, in some cases, the country simply is not big enough for any venue to have escaped prejudicial publicity. Technology has expanded the effective community far beyond the reaches of the old paper carrier on a bicycle. Where can Ted Kaczynski[2] find an untainted jury pool?

More importantly, the threshold for granting a change of venue is far too high to protect defendants, except in the cases of the most extraordinarily tainted jury pools. A high level of publicity alone is not enough to require a change of venue under the law.[3] A change of venue is not to be granted pursuant to Federal Rule 21(a) unless "there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial."[4] In the infamous case of *Sheppard v. Maxwell*,[5] the wife of the accused was bludgeoned to death. The publicity surrounding the case caused a furor, and a newspaper headline initiated the coroner's inquest.[6] Yet, this publicity was not enough for a change of venue at the trial court level.[7]

Voir dire of the jury, strikes for cause, and peremptory strikes do provide some protection for the defendant against tainted jurors, but not enough. Even at their best, voir dire and jury challenges go only so far. I am not entitled to a strike for cause just because a juror has heard a great deal about the crime—and almost all of it harmful to my client's interests. "[T]he Constitution

2. Theodore Kaczynski is suspected of being the Unabomber, believed to be responsible for a series of bombings that occurred across the United States beginning in 1978. Mark Gladstone, *U.S. Indicts Kaczynski Over Fatal Unabomber Attack in New Jersey*, L.A. TIMES, Oct. 2, 1996, at A17.

3. Dobbert v. Florida, 432 U.S. 282, 303 (1977).

4. Sheppard v. Maxwell, 384 U.S. 333, 363 (1966).

5. 384 U.S. 333.

6. *Id.* at 339, 342-49.

7. State v. Sheppard, 135 N.E.2d 340, 343 (Ohio 1956).

does not require ignorant jurors, only impartial ones."[8] The problem is that jurors with an agenda may say they are impartial when they are anything but impartial. Perhaps more frequently, jurors may think they can be impartial, even when prejudice has infected them in ways too deep and too subtle for them to recognize.

The final remarks I have about leveling the playing field concern judges. It is officially presumed—and for most purposes, properly presumed—that judges are above being influenced by the media. Nevertheless, every practitioner knows that this view of judges is, to some extent, a fiction. Judges are human. They are influenced in the ways that other people are influenced. Judges may be better at guarding against such influence than are most of us. They may take great pains to avoid the effects of such influence on their official acts. Nevertheless, the human psyche is far too complex for even the best and the wisest to entirely control all of the subtle effects of information that finds its way into our memories. Perhaps I am mistaken, but I believe that particularly strident press broadsides against my clients have had an effect on judicial behavior. Properly placed corrective accounts by defense counsel can sometimes turn such pro-prosecution stridency into a reasonably balanced story. Such action cannot hurt potential jurors or judges.

II. DEFENDING THE CLIENT'S NAME IN THE COMMUNITY

My client has just been arrested and a prosecutor's news release has painted the accused individual as the scheming perpetrator of a serious crime. My investigation shows that the prosecution's case is, to put it generously, tissue thin. Should I keep silent while my client's reputation in the community, perhaps built up over many years, is destroyed? Should I stand aloof while knowing that my client's spouse is shunned by neighbors, and my client's children are taunted by schoolmates? Is it sufficient that a year from now the accused will be acquitted by a jury, or that in two months, my client's indictment will be dismissed? I cannot and do not sit by idly. I tell the community, in the most effective way I can, that there is no case against my client. Unless I do this, how can I say that I am a guardian of my client's interests?

8. Knapp v. Leonardo, 46 F.3d 170, 176 (2d Cir. 1995), *cert. denied*, 115 S. Ct. 2566 (1995).

III. VINDICATING THE CLIENT'S RIGHT OF FREE SPEECH

The First Amendment does not cease to apply to those accused of crimes. There is, of course, no law prohibiting them from speaking, although jail regulations can sometimes make it a little difficult logistically. It is, however, a terrible blunder for criminal defendants to exercise their speech rights themselves with respect to the accusations against them. The prosecution is not shy about using a defendant's statements to the press against the defendant in court. Even the most innocent of defendants may, through inartful word choice, give the prosecution ammunition.

Through me, my clients can exercise First Amendment rights that would otherwise effectively disappear for the duration of trial—a time in which my clients may feel that their speech rights are more important than at any other time in their lives.

IV. EXERCISING THE ATTORNEY'S FIRST AMENDMENT RIGHTS

My final argument in favor of defense attorney activism in the media arena is different from my earlier arguments. Only my client's interests justify my speaking to the media. I do not do so for the purpose of vindicating my own First Amendment rights. But I do think that my own First Amendment rights are relevant. They are relevant when it is alleged that some other values, embodied in local rules or court orders, trump my right to speak on my client's behalf. First Amendment values are among the most important values in our constitutional framework. When the "ordered liberties" march in order, the First Amendment liberties are surely in the very front rank.

The interest in a fair criminal trial is also an interest of great importance. It is, however, a factual question whether muzzling defense counsel in the public square gives rise to a fairer trial. My view is that when defense counsel talks to the press, it almost always redresses an imbalance in the public perception, which is created, directly or indirectly, by the prosecution. A fairer trial results. But if there is a factual question about due process, trial fairness, or attorney speech, the First Amendment rights of both the client and the attorney weigh in favor of speech. As my clients do not lose their First Amendment rights when charged, neither do I waive my First Amendment rights when I elect to defend those accused of crimes.