

University of Colorado Law School

## Colorado Law Scholarly Commons

---

Publications

Colorado Law Faculty Scholarship

---

1998

### Publicity in High Profile Criminal Cases

H. Patrick Furman

*University of Colorado Law School*

Follow this and additional works at: <https://scholar.law.colorado.edu/faculty-articles>



Part of the [Constitutional Law Commons](#), [Criminal Procedure Commons](#), [First Amendment Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal History Commons](#), [Legal Profession Commons](#), and the [Litigation Commons](#)

---

#### Citation Information

H. Patrick Furman, *Publicity in High Profile Criminal Cases*, 10 ST. THOMAS L. REV. 507 (1998), available at <https://scholar.law.colorado.edu/faculty-articles/635>.

#### Copyright Statement

Copyright protected. Use of materials from this collection beyond the exceptions provided for in the Fair Use and Educational Use clauses of the U.S. Copyright Law may violate federal law. Permission to publish or reproduce is required.

This Article is brought to you for free and open access by the Colorado Law Faculty Scholarship at Colorado Law Scholarly Commons. It has been accepted for inclusion in Publications by an authorized administrator of Colorado Law Scholarly Commons. For more information, please contact [rebecca.ciota@colorado.edu](mailto:rebecca.ciota@colorado.edu).

# HEINONLINE

Citation: 10 St. Thomas L. Rev. 507 1997-1998

Provided by:

William A. Wise Law Library



Content downloaded/printed from [HeinOnline](#)

Mon Jun 5 16:56:02 2017

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[Copyright Information](#)

# PUBLICITY IN HIGH PROFILE CRIMINAL CASES

H. PATRICK FURMAN\*

Congress shall make no law . . . abridging the freedom of speech.<sup>1</sup>

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury.<sup>2</sup>

No person shall . . . be deprived of life, liberty or property, without due process of law.<sup>3</sup>

## I. INTRODUCTION

Many may wonder about the wisdom of having a criminal lawyer discuss the ethical problems associated with high profile cases. Over the past few years, the performances of criminal lawyers on the public stage have been decidedly uneven with respect to professionalism and ethical behavior. We witnessed the spectacle of *People v. Simpson*.<sup>4</sup> There, it seemed that the lawyers spent more time in front of the camera than in front of the bench. Ironically, after the trial, half of the lawyers got their own television shows.<sup>5</sup>

The *Simpson* trial was an event which deserved to be labeled a trial only because it occurred in a courtroom. It is more accurately described as a long-running, made-for-television mini-series. On the other hand, since cameras were not allowed in the courtroom, we witnessed, or at least we heard and read about, the *People v. McVeigh*<sup>6</sup> and *People v. Nichols*<sup>7</sup> trials. In these trials, a smart and tough judge kept a reign on both the lawyers and the trial process.<sup>8</sup> The net result of these efforts were trials that most Americans viewed as substantively and procedurally fair.<sup>9</sup>

---

\* Clinical Professor of Law, Director of Clinical Programs University of Colorado School of Law, currently one of the attorneys for Patsy Ramsey, mother of JonBenet Ramsey. The author thanks the members of the *St. Thomas Law Review* for preparing footnote support for this speech.

1. U.S. CONST. amend. I.

2. *Id.* amend. VI.

3. *Id.* amend. V.

4. No. BA097211, 1995 WL 704381 (Cal. Super. Ct. Oct. 3, 1995).

5. See Bill Carter, *After the Verdicts. Will It Still Sell?*, N.Y. TIMES, Feb. 6, 1997, at B11.

6. No. 96-CR-68-M, 1997 WL 286677 (D. Colo. June 2, 1997).

7. No. 96-CR-68, 1997 WL 785580 (D. Colo. Dec. 23, 1997).

8. See David Gergen, *A War We've Begun to Win*, U.S. NEWS & WORLD REP., June 16, 1997, at 72, 72; see also *NBC Nightly News* (NBC television broadcast, April 1, 1997), available in 1997 WL 5386067.

9. See *NBC Nightly News* (NBC television broadcast, May 23, 1997), available in 1997

You may be even more puzzled by the fact that I am talking about the professional and ethical concerns raised by these performances given the uneven nature of the recent performances of criminal lawyers in high profile cases, both prosecutors and defenders. In addition, I am currently involved in a high profile case in my hometown, so I may be the worst possible person to speak about these issues.

Obviously, the recent occurrence of many high profile criminal cases—*Simpson*, *McVeigh*, *Nichols*, and JonBenet Ramsey—is one of the reasons this topic is important. Yet, it is important to put the problem in historical perspective in an effort to determine whether things really are worse than they used to be in the legendary “good old days.” Therefore, this Article will first discuss high profile cases from a historical perspective. Second, it will place the problem of high profile cases into a proper social perspective. The Article will discuss similar concerns about publicity and the press which exist in other professions and other aspects of life.

With these perspectives as guides, we can endeavor to determine the severity of the problem. The conclusion of this Article is not startling. Problems arising from how lawyers and the criminal justice system handle high profile criminal cases are not on a par with the Middle East crisis or finding a cure for cancer. However, they are very real problems, which reveal tensions, *sub rosa*, in our democracy, and which must be addressed if we are to avoid further erosion of public trust in our criminal justice system.

Finally, the Article will offer suggestions which, hopefully, can help alleviate some of the problems. Even though I have devoted most of my time over the past decade to teaching and not practicing law, I am not completely lost in the ivory tower. Lawyers can be solvers not just creators of problems.

Let us begin with a couple of quick “war stories” that illustrate some of the problems I perceive with media coverage of high profile cases and some of the sources of my own biases in the matter. When I was a young attorney many years ago, I was given the following advice by one of the many mentors I have been fortunate enough to have: You cannot win your case in the press. This particular mentor handled a number of high publicity cases, and he had a pet phrase that he used whenever a reporter asked him anything about a case. He would say: “I am sure that when all the facts are known, justice will be done.” I watched him say this many times,

and the effect on the reporter was almost always the same. The reporter would begin to furiously scribble down the quote, sure that he or she had a news nugget which was headline material. Then the reporter would scribble a little slower as he or she began to realize that the quote was completely innocuous and virtually meaningless. Finally, the reporter would look up with a touch of disdain, only to find that my mentor had fled the area and that no follow-up questions could be asked.

My own experience with the press bore out the apparent wisdom of this approach. I was involved with another attorney, whom I shall call "Bob," in a high profile murder case in a suburb north of Denver. The first hearing in the case was held in the courtroom in the county jail. The press was not allowed in this courtroom and was forced to watch the proceedings on a closed circuit monitor. Apparently, the quality of the picture and the sound on this monitor was extremely poor because, as we emerged from the jail, we were besieged by reporters calling out questions.

Neither my co-counsel nor I had any intention of answering questions from the press, and we headed quickly for Bob's car. All but one reporter realized that we were not going to help them out and turned back in search of other prey. One reporter, whom I shall call "Dave," stuck with us and informed me of the problems with the monitor. About the time we got to Bob's car, I learned that Dave was not seeking any inside information or even any quotes for his report. He merely wanted to know what had happened in court and for when the next court date was scheduled. This seemed an eminently reasonable request, so I stopped next to the passenger door to bring Dave up to speed.

Well, the other reporters saw Dave and I talking. Sure that they were being aced out of a scoop, they came rushing over like a pack of rabid vultures. The reporters shouting at their cameramen to "Hit the lights," "Make sure you get this," and "He's talking, he's talking." Bob got in behind the wheel of the car to escape this mad crowd, but he failed to unlock the passenger side door. I faced the reporters with my back to the car, one hand nervously jiggling the door handle in an effort to escape.

The crowd of reporters was throwing questions at me fast and furious. I was doing my best to maintain my composure in the face of idiotic questions: "Did he do it?"; "Has he confessed?"; and "Do you think he'll get the gas chamber?" To each of these inquiries I responded reasonably and professionally: "I cannot comment." Eventually, however, I lost my composure. A reporter from a local independent station, who shall remain nameless because I do not remember his name, shoved his microphone in my face, gestured for his cameraman to get in close, and asked me the

following: "Can you comment on why you cannot comment?"

The truth is, not only did I lose my composure, I lost my temper. My response was a loud, semi-profane assault on the intelligence and professionalism of the reporter accompanied by bulging veins and spittle.

That night on the news, this same reporter was describing the day's events in that calm and rational Walter Cronkite manner that every television news reporter imitates. Without any change of tone, without any description of the events immediately preceding my outburst, he said: "The attorney for the accused was contacted for comment following today's hearing." At which point, my bulging eyes, red face, slobbering spit, and loud, semi-profane assault on the intelligence and professionalism of the reporter appeared on the screen.

I exaggerate a touch here, for effect, but not much. The point is this: The press, or at least this particular member of the press, was not interested in educating or informing the public. The press was not really all that interested in the case. The press was interested in a STORY and if the important facts do not tell a good story, then they will just shuffle the important facts to the side. To paraphrase Admiral Farragut:<sup>10</sup> Damn the facts, full story ahead.<sup>11</sup> This is not a revelation—the fact that the press prefers sexy, exciting headlines to the often boring important truth—but this was my own personal introduction to that well noted fact.

My favorite press response of recent vintage was uttered by a Boulder, Colorado prosecutor I know who was asked by a reporter about the deliberations in the second Oklahoma City bombing case, the *Nichols* trial.<sup>12</sup> This particular prosecutor is legendary for remaining unaffected by the press. No matter how big the case, or how persistent the reporter, he never says anything. Ignoring this reputation, a reporter for one of the local papers called during deliberations to ask for the significance of the fact that the *Nichols* jury had been out longer than the *McVeigh* jury.<sup>13</sup> My friend responded as follows:

You know I do not talk to the press. Never have, never will. But on this one occasion, I will break my cardinal rule and I will respond.

---

10. Admiral Farragut was a naval officer for the Union during the Civil War, who led the Union ships into New Orleans opening up the way for the advance of the Union Army. See BATTLES AND LEADERS OF THE CIVIL WAR 120, 138 (Ned Bradford ed., 1956).

11. Farragut's exact words were: "Damn the torpedoes! Full Speed ahead!" *Id.* at 580.

12. *United States v. Nichols*, No. 96-CR-68, 1997 WL 785580 (D. Colo. Dec. 23, 1997).

13. See Jo Thomas, *Nichols Guilty, but . . . ; Conspirator Acquitted of Murder*, L.A. DAILY NEWS, Dec. 24, 1997, at N1, available in 1997 WL 4063146; Kevin Murphy, *Bomb Trial Jury to Resume Deliberations Monday: Judge Declares They Can Serve Without Being Sequestered*, KAN. CITY STAR, Dec. 20, 1997, at A6, available in 1997 WL 3034062.

Furthermore, I will allow you to quote my response and attribute it to me. You ask me what I glean from the fact that the McVeigh jury is still out deliberating on the case. Here's what I glean. The jury hasn't decided yet. Nothing more. Nothing less.

I am completely convinced by my own experiences with the press, and those lawyers I know, that my mentor was absolutely right when he told me that I could not win my case in the press and that I should either come up with an innocuous line like his or just shut up. For the most part, I just shut up when the press calls. I am pleasant, but I do not say anything substantial.

However, every now and then a case, or one aspect of a case, puts this method to the test. Like it or not, there are cases in which the press involvement has become so intrusive that it does, in fact, affect not just community sentiment, but the day-to-day workings of the attorneys involved in the case and the very course of the case itself. In these cases, the image becomes as important as the substance—a bizarre and unsettling state of affairs to those of us who value reality. It is fine in Hollywood but not in a real courtroom.

Cases with a profile this high are rare, but these are precisely the cases on which the public judges us. Unfortunately, these are also precisely the cases which are most likely to tempt us into behaving out of character and unprofessionally. I fear that the *Simpson* case, the Oklahoma City Bombing cases, and the Ramsey investigation<sup>14</sup> are just such cases.

The tension between the constitutional right to inform the public about lawsuits<sup>15</sup> and the constitutional right to a fair trial in front of an impartial jury<sup>16</sup> is far more important than any single case, and the resolution of this tension has broad implications for our democracy. It is a problem we must address in order to help stem public dissatisfaction with the criminal justice system.

I believe that an effective and efficient criminal justice system is critical to the proper functioning of our democracy. George Washington said that "the due administration of justice is the firmest pillar of good government,"<sup>17</sup> and if that pillar crumbles, our democracy is considerably weakened. Like it or not, fair or unfair, the general public's perception of our criminal justice system is largely formed on the basis of high profile

---

14. See Debbie Howlett, *Girl's Killing Imbued With Questions*, USA TODAY, Jan. 6, 1997, at 3A, available in 1997 WL 6990514.

15. See U.S. CONST. amend. I.

16. See *id.* amend. VI.

17. THE WRITINGS OF GEORGE WASHINGTON 418 (John C. Fitzpatrick ed., 1939).

cases.

I also believe that a free and vigorous press is critical to the proper functioning of our democracy. The current babble of press voices is clearly far preferable to any sort of government control. The vigor of those voices, as disturbing and distressing as they may sometimes be, must be preserved and cherished.

I do not believe the media does a good job covering the criminal justice system. At best, the media does an adequate job. Considering how much better, informative, and helpful they could be, and how important the task is, I think it is fair to say that they do a bad job.

I believe that poor media coverage is contributing to a significant misunderstanding of the criminal justice system. Minor problems are blown out of proportion because a celebrity is involved or the case has caught the public's attention for some other reason. At the same time, major problems go unnoticed and unreported because they are not easily reduced to a sound byte for television. Far too frequently, even with the rise of the lawyer-journalist,<sup>18</sup> reports are being made by people who do not truly understand the topic about which they are reporting. Far too often, it seems that the focus of the media is on selling more papers, increasing the number of listeners, or attracting the right demographic audience to appeal to advertisers and not on actually understanding the criminal justice system and informing and educating the public.

I do not believe the media is entirely to blame for this state of affairs. Both the general public and lawyers must share the blame. I am not one of those who says that the public bears sole responsibility because, after all, if people were not interested in the more salacious side of these stories, the media would not report the stories that way. However, I do acknowledge that the public appetite for spectacle does contribute to the way these cases are covered. I also know that lawyers share some of the blame. Too often, as individuals involved in high profile cases, we have succumbed to the lure of the lights and given short shrift to, or completely cast aside, our professional responsibility. Similarly, as a profession, we have not done all we should to address the problem.

Finally, while I believe that some of the problem is an inevitable by-product of the fact that we live in a society which values individual freedoms and cherishes the freedom of the press as another of its pillars,<sup>19</sup> I also believe that we, as individuals and as a profession, can significantly

---

18. See Carter, *supra* note 5.

19. See U.S. CONST. amend. I.



improve the situation by individual and collective actions. As individual lawyers and as members of a profession, we must find the best possible way to balance the rights to free speech and a free press with the right to a fair trial.

## II. HISTORICAL PERSPECTIVE

In order to avoid, as best we can, the mistakes of the past, and in order to gain a more complete view of the problem, I believe it is important to look for a little historical perspective. Problems associated with press coverage and public comment on high profile criminal cases are not a new phenomenon.

In 1807, Aaron Burr<sup>20</sup> was tried for treason.<sup>21</sup> Prior to his trial, the President of the United States, Thomas Jefferson, publicly declared that the guilt of Burr was "beyond question."<sup>22</sup> The President also declared that if Chief Justice John Marshall, who was the presiding judge, were to allow Burr to escape punishment, "Marshall himself should be removed from office."<sup>23</sup> The Chief Justice declared that "it would be difficult or dangerous for a jury to acquit Burr, however innocent they might think him."<sup>24</sup> When the President of the United States and the Chief Justice, who also happened to be the trial judge, made these statements, I suspect it diminished the level of trust Burr had in the process. I would even bet that he might have suspected the fix was in. An unbiased observer might easily conclude that the lawyers said some things they should not have and that the press exacerbated the problem by reporting the comments. Keep in mind that this was 191 years ago. Clearly, this is not a new phenomenon.

In the end, however, it came down to the jury and not to the pretrial statements of the lawyers and observers. The jury returned a verdict as follows: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty."<sup>25</sup> It has been suggested that this unusual verdict was based

---

20. Aaron Burr was commissioned in the Continental Army during the Revolutionary War. After the war, he entered politics and became a candidate for Vice President in the 1800 elections. Burr's treason charge arose from his duel with Alexander Hamilton which led to his plan to lead a revolt with British assistance in the western lands. See GREAT AMERICAN TRIALS 79-80 (Edward W. Knappman ed., 1994) [hereinafter GREAT AMERICAN TRIALS].

21. This discussion of the Burr trial is largely based on *The Trial of Aaron Burr*, by J.J. Coombs. See generally J.J. COOMBS, THE TRIAL OF AARON BURR: FOR HIGH TREASON (1992).

22. ALAN M. DERSHOWITZ, *Introduction* to J.J. COOMBS, THE TRIAL OF AARON BURR: FOR HIGH TREASON (1992).

23. *Id.*

24. *Id.*

25. See FRANCIS F. BEIRNE, SHOUT TREASON: THE TRIAL OF AARON BURR 241 (1959).

on the fact that the jurors knew that certain evidence of a treasonous conspiracy had been excluded.<sup>26</sup> Perhaps the jurors believed Burr was guilty but were not convinced that the prosecution had proved his guilt beyond a reasonable doubt. Sound familiar? Several *Simpson* jurors made similar comments after rendering the verdict in that case.<sup>27</sup>

Another example occurred on October 1, 1910, when the offices of the *Los Angeles Times* were bombed, resulting in the death of twenty people.<sup>28</sup> The bombing was immediately dubbed "the crime of the century" in press reports from coast to coast.<sup>29</sup> The most famous detective in America, the founder of the Burns Detective Agency,<sup>30</sup> was hired to investigate the crime.<sup>31</sup> The investigation was accompanied by enormous national fanfare. A suspect was arrested in Indianapolis and put on a train to Los Angeles without ever being allowed to see an Indiana judge to contest extradition.<sup>32</sup> The authorities tried to keep secret the route of his return to Los Angeles because of fears that supporters of the suspect would try to stop the train and forcibly remove him from custody.<sup>33</sup> His return was front page news everywhere.<sup>34</sup>

His supporters printed up tens of thousands of buttons with his picture and captions stating that the prosecution was politically motivated.<sup>35</sup> In Los Angeles, 35,000 people marched in a parade supporting his innocence.<sup>36</sup> Politicians and lawyers met with him in the Los Angeles jail, and photographs of the men shaking hands appeared in papers throughout the country.<sup>37</sup> On the morning of October 11, 1911, as the trial began, more than one thousand people gathered outside of the jail, hoping to catch a glimpse of the defendant as he headed off for his first day in court.<sup>38</sup> Half of the courtroom was set aside for the press, and press members were al-

---

26. See *id.* at 242-44.

27. See ALAN M. DERSHOWITZ, *Epilogue to REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* 208 n.\* (1996).

28. The discussion of the *McNamara* case is largely based on GEOFFREY COWAN, *THE PEOPLE V. CLARENCE DARROW: THE BRIBERY TRIAL OF AMERICA'S GREATEST LAWYER* (1993), which is an account of the trial of Mr. Darrow on charges that he bribed a juror on the *McNamara* case.

29. See generally *id.*

30. See *id.* at 95.

31. See *id.*

32. See *id.* at 102-03.

33. See *id.* at 107.

34. See *id.* at 109.

35. See *id.* at 129.

36. See *id.* at 167-68.

37. See generally *id.*

38. See *id.* at 183.

lowed to set up the tools of their trade, including their communication equipment, right at their desks in the courtroom.<sup>39</sup> One of the defense lawyers, Clarence Darrow, was not only issuing press releases and generally currying favor with the press, he was literally in bed with the press—he was carrying on an affair with one of the reporters.<sup>40</sup>

Supporters of the defendant prepared and released a movie<sup>41</sup> setting forth his version of the events. National efforts were made to raise money for the defense.<sup>42</sup> The trial became an important issue in the ongoing mayor-al campaign in Los Angeles.<sup>43</sup> A nationally known author and reporter<sup>44</sup> became a confidant of the defense team and actually helped arrange negotiations between the prosecution and defense.<sup>45</sup>

The case I have just been describing is that of the *People v. J.J. McNamara*,<sup>46</sup> a prominent labor leader whose union was involved in a bitter struggle with the fiercely anti-union owner of the *Los Angeles Times*.<sup>47</sup> The coverage became even more pervasive when, during trial, Darrow himself was arrested on a charge of attempting to bribe a juror.<sup>48</sup> The *McNamara* case was settled with a whimper, with McNamara pleading guilty to reduced charges.<sup>49</sup> The public interest quickly moved on to other things, including the bribery trial of Clarence Darrow, which became the next “case of the century.”<sup>50</sup>

The defense strategy in the *McNamara* case was characterized as a scheme to sway public support in favor of the defendants, making the state

39. *See id.*

40. Clarence Darrow was regarded as one of the best attorneys in history. *See* GREAT AMERICAN TRIALS, *supra* note 20, at 308. Darrow represented a wide range of clients from labor leaders to corporate leaders. *See* GREAT AMERICAN TRIALS, *supra* note 20, *passim*. Darrow was the lead attorney for James and John McNamara. *See id.* at xix. Darrow was carrying on an affair with a reporter, Mary Field. *See id.* at xx.

41. An estimated 50,000 supporters watched the short movie, *A Martyr to His Cause*, during its week long premier run in Cincinnati. *See id.* at 192.

42. *See* GREAT AMERICAN TRIALS, *supra* note 20, at 252.

43. *See id.*

44. The author's name was Lincoln Steffens. *See* COWAN, *supra* note 28, at 209.

45. For a good account of the details of Lincoln Steffen's involvement, see generally *id.* at 209-34.

46. The *McNamara* trial started on December 1, 1911, before Judge Walter Bordwell in Los Angeles, California. *See* GREAT AMERICAN TRIALS, *supra* note 20, at 251.

47. J.J. McNamara was the Secretary-Treasurer of the International Association of Bridge and Structural Workers. *See* ATTORNEY FOR THE DAMNED: CLARENCE DARROW IN HIS OWN WORDS 491 (Arthur Weinberg ed., 1957). The owner of the *Los Angeles Times*, Harrison Gray Otis, used the newspaper as a public platform for his tirades against the unions. *See id.*

48. *See id.* at 252.

49. *See id.*

50. *See generally* COWAN, *supra* note 28.

the villain and a successful prosecution politically and socially unacceptable.<sup>51</sup> Sound familiar? This description is a pretty fair analysis of the strategy of the *Simpson* defense team.<sup>52</sup>

A description of another trial follows:

Chaos reigned outside the courtroom as the media and public jockeyed for position. An estimated 20,000 people converged on the small courthouse; throngs of spectators crammed into hallways and even broke the glass entrance doors. Inside the courtroom, a maximum of 260 people were allowed to be seated, a restriction that did not deter some 275 spectators and witnesses; 135 reporters, trial participants, and court personnel; and for a part of the proceeding, a panel of 150 prospective jurors, from cramming into the space.<sup>53</sup>

The noise in the courtroom became so great that the judge had difficulty hearing the questions posed by counsel.<sup>54</sup> When the guilty verdict was returned, the court clerk told the judge that he could not poll the jury because he could not hear them over the din.<sup>55</sup> The case was the 1935 trial of Bruno Hauptmann for the kidnapping and murder of Charles Lindbergh's baby.<sup>56</sup> It almost makes the *Simpson* circus seem tame. A month after the conclusion of the Hauptmann trial, the *New Republic* concluded that the trial was one in which "both the defendant and society were found guilty. The best thing one can say is that it is over. It was a microcosm showing us many of the faults of our system of justice—and indeed, of our society as a whole—in one vivid and humiliating example."<sup>57</sup> Mr. Hauptmann was convicted and Mr. Simpson was acquitted, but this comment from the *New Republic* applies with equal force.

Some may be thinking that this brief historical review means that there really is not anything we can do about it—that the problem has always been and will always be with us. To a certain extent, this is true. There is no system that is going to completely eliminate the tension between the need and right to report on matters of public interest and the need and right to fair trials with impartial jurors. Some may also think that this historical review demonstrates that little has changed over the last two hundred years, and since we have survived fine up until now, let us just

---

51. See *id.* at 118, 127.

52. For a list of and the biographies of the Simpson defense team, see generally FRANK SCHMALLEGER, TRIAL OF THE CENTURY: PEOPLE OF THE STATE OF CALIFORNIA VS. ORENTAL JAMES SIMPSON (1996).

53. JIM FISHER, THE LINDBERGH CASE 272 (1987).

54. See *id.* at 273.

55. See also GREAT AMERICAN TRIALS, *supra* note 20, at 390.

56. See *id.* at 386.

57. *Both Guilty*, NEW REPUBLIC, Feb. 27, 1935, at 82, 82.

leave it alone. Additionally, there is some truth to this proposition as well. I do not want to over-dramatize the problem. It is not as pressing as the problem of what to do about our relations with Iraq.

Yet, as I have already argued, it is an important matter. In addition, I believe there are some good reasons to believe that the problem is, in fact, worse than it used to be and that it will continue to get worse. One significant reason, which is obvious and well understood, is that the impact of today's media is so much more immediate. A radio or television story can reach the audience much more quickly than a newspaper or weekly news magazine. If I do something in court today in a high profile case, it will be beamed to millions of people before I get home. That sort of immediacy is more likely to impact my behavior in court than is the possibility that my performance may be reported in print tomorrow or next week.

An appellate lawyer I know, who was involved in the preparation of briefs and motions at the trial stage of a very high publicity case, noted wryly to me that it was hard enough to do his job when he knew that his briefs would be read by opposing counsel and the trial court. He found it unnerving and distressing to know that the media scrutiny of the case would result in the distribution of his briefs on the Internet before he got home and several talk shows making his arguments the subject of scrutiny on national television by the time he finished dinner. To the extent that such scrutiny made him take great care with his briefs, all is well and good. To the extent that the scrutiny caused him to spend more time on the matter than was justified by the seriousness of the case itself, it was a waste of his time. To the extent that the scrutiny caused him to raise issues that were not legally important, but might be important in the court of public opinion, it was a waste of his time, the time of opposing counsel, and the court's time. The effect of the publicity is to lower the professionalism of the work.

Additionally, speed is not the only important difference between cameras and printing presses. Many believe that public disaffection for the war in Vietnam reached critical mass in large part because of the ghastly images beamed into American homes on the six o'clock news each evening.<sup>58</sup> When the war lost the support of Walter Cronkite and the C.B.S.

---

58. See James P. Terry, *Press Access to Combatant Operations in the Post-Peacekeeping Era*, 154 MIL. L. REV. 1, 10 (1997) ("[P]erceived unfair press criticism of the U.S. role [in the Vietnam conflict] was the most significant factor in the erosion of public support for the war."); Rana Jazayerli, *War and the First Amendment: A Call for Legislation to Protect a Press' Right of Access to Military Operations*, 35 COLUM. J. TRANSNAT'L L. 131, 137 (1997) ("[U]nrestricted access to the battlefields allowed for full graphic and disturbing aspects of the war in Vietnam.").

Evening News, this theory holds, middle America followed along.<sup>59</sup> It was not that the Vietnam War was more ghastly than World War I or the Civil War—in fact, the opposite may well be true<sup>60</sup>—but neither of those wars was beamed into our homes. It is not simply that television is more immediate, but it is more persuasive. Television personalities are paid more, television advertising costs more, and Americans watch more television precisely because it is such a powerful and persuasive medium.<sup>61</sup>

Another important difference is the sheer number of media outlets. Cable television has dramatically increased the number of channels available to viewers, and many of these channels cover news and current affairs.<sup>62</sup> Information is disseminated over the Internet with extraordinary and uncontrollable breadth and speed. Specialty magazines now cater to almost every conceivable lifestyle and interest. One of the consequences of this increase in the number of outlets is that there has been a massive increase in the number of pages and the hours of air-time which must be filled. My cable company provides an entire channel devoted to nothing but cooking, several channels devoted to nothing but sports, three music video channels, one of which shows only country music videos, and of course, *Court TV* and all of the talk shows that devote a large portion of their air time to criminal justice matters.

A reporter I know, who has been around the business for a long time, recently made a persuasive argument to me that these shows are now a mini-industry. In her view, the mini-industry really began, as an industry, during the *Simpson* case.<sup>63</sup> Some reporters covered nothing but *Simpson*.<sup>64</sup>

---

59. See Fred W. Friendly, *When War Comes, Whither the First Amendment?*, 33 ARIZ. L. REV. 273, 275-76 (1991).

60. THE WORLD ALMANAC AND BOOK OF FACTS 1997, 184 (1996) (total casualties in principal wars of the U. S.: Civil War—646,392; World War I—320,710; Vietnam War—211,471).

61. See Karen Martin Campbell, *Roll Tape—Admissibility of Videotape Evidence in the Courtroom*, 26 U. MEM. L. REV. 1445, 1445, 1500 nn.17-18 (1996); Anthony D. DellaCroce, "One Bourbon, One Scotch, One Beer": Each "Spirit" Should Have an Equal, But Limited, Opportunity to Advertise On Television, 5 J.L. & POL'Y 545, 551 n.29 (1997) (citing Patrick M. Fahey, Comment, *Advocacy Group Boycotting of Network Television Advertisers and Its Effects on Programming Content*, 140 U. PA. L. REV. 647, 648 (1991)); Michael J. Palumbo, Note, *Broadcast Regulation, Has the Marketplace Failed the Children: The Children's Television Act of 1990*, 15 SETON HALL LEGIS. J. 345, 398-99 (1991).

62. See Jarrod V. Henshaw, Denver Area Educational Telecommunications Consortium, Inc. v. FCC: *Reconciling Traditional First Amendment Media Jurisprudence With Emerging Communications Technologies*, 41 ST. LOUIS U. L. J. 1015, 1051 n.58 (1997); Marc Peritz, *Turner Broadcasting v. FCC: A First Amendment Challenge to Cable Television Must-Carry Rules*, 3 WM. & MARY BILL RTS. J. 715, 764 n.120 (1994).

63. See generally Phil Kloer, *Attorneyvision: Lawyers on the Air*, ATLANTA J.-CONST., Mar. 22, 1998, at B2.

Some shows covered nothing but *Simpson*.<sup>65</sup> Cameramen, make-up artists, and all the support staffs now have a vested interest in the continuation of the show. If the *Simpson* show gets canceled when the trial is over, this mini-industry needs a substitute. In the view of this reporter, one of the reasons that cases such as the *Nanny* trial<sup>66</sup> or the Ramsey<sup>67</sup> investigation received so much publicity is that the mini-industry that lives on these cases promotes a demand for coverage in order to justify its own existence.

As a result, a program will now spend an hour on a topic that previously would have received only a minute of coverage. Sometimes, of course, this is very good. There certainly are many important stories that previously went under-reported. In my view, however, the opposite is far more frequently true. The expanded coverage is bad because the topic that is now receiving an hour of coverage really only deserves a minute of consideration. In an effort to fill the air time, the viewer is often subjected to: (1) excruciating and unnecessary detail about the event; (2) needless repetition of the circumstances surrounding the event; (3) inappropriate (and sometimes wild-eyed) speculation about the meaning of the event; (4) predictions about the future which really amount to no more than guesses; and (5) loud displays of disagreement, which often seem staged between the "expert commentators" which do not advance anyone's understanding of the event.

This increase in the number of media outlets affects the way in which the criminal justice system is covered. It is simple economics: More reporters chasing the same number of stories alters the price. In this case, the price is the manner in which stories are investigated and reported. Both reporting techniques and the sorts of stories deemed worthy of coverage that were once confined to the wacky tabloids have become mainstream.<sup>68</sup> There used to be a demonstrable and significant difference between the tabloids and the mainstream media.<sup>69</sup> It is often hard to find the difference anymore. This blurring of the lines matters because it makes it that much more difficult to know who you can trust and who you cannot.

---

64. See generally *id.*

65. See generally *id.*

66. *Commonwealth v. Woodward*, No. CRIM. 97-0433, 1997 WL 694119 (Mass. Super. Ct. Nov. 10, 1997). See also, e.g., Michael Higgins, *Law Profs Propose an Ethics Code for Lawyer Commentators*, 84 A.B.A. J. 20 (1998); Terry McCarthy, *A Stunning Verdict: A Trial That Riveted Both Britain and America Ends in More Contention*, TIME, Nov. 10, 1997, at 67, 67.

67. See Dusty Saunders, *Egos Clash During Prime Cable Hour*, ROCKY MOUNTAIN NEWS, Mar. 5, 1998, at 2D.

68. See Lisa Levitt Ryckman, *Newspapers Must Preserve Role as Accurate Records*, Hamill Says, ROCKY MOUNTAIN NEWS, Feb. 7, 1998, at 5A.

69. See Roberta Rosenthal Kwall, *Fame*, 73 IND. L.J. 1, 27 (1997).

When we could clearly distinguish between "serious" journalists and tabloid checkbook journalists, we could try to avoid the latter and reduce the danger that something we said could harm our client or the criminal justice system. It is not so easy anymore.

The increase in the number of reporters and outlets chasing a story has another insidious effect. It increases the pressure to be first, to be the fastest.<sup>70</sup> The danger to traditional journalistic standards, like double-checking facts, is obvious.<sup>71</sup>

At the same time, control over more and more of our media has passed into the hands of traditional business people. It has been argued that the problem with newspapers begins with publishers who are business people rather than journalists.<sup>72</sup> These owners look too hard at the bottom line and do not understand, or perhaps do not care about, the place the media has in society.<sup>73</sup>

For all of these reasons, therefore, I believe that things are different and things are changing. The trials of Aaron Burr,<sup>74</sup> J.J. McNamara,<sup>75</sup> and Bruno Hauptmann<sup>76</sup> provide us with very important lessons. However, those lessons must be tempered with the knowledge that the new and changing ways in which the media cover the criminal justice system may demand new and different approaches to solving the problems created by the coverage.

### III. SOCIAL PERSPECTIVE

We have just examined the problem from the perspective of our profession over time. As long as we are attempting to put the problem into perspective, I think it also appropriate to examine whether other professions in our country suffer similar problems. This will help us determine whether the problem is confined to the law or is shared by other professions. My conclusion—that other professions have many of the same complaints and concerns about media coverage—supports the notion that lawyers are not solely responsible for the current state of affairs.

---

70. See, e.g., R.K. Shull, *Are Tabloids Any Worse Than TV News and Talk?*, INDIANAPOLIS STAR, Oct. 16, 1997, at E7. See also David Lightman, *A Media Post-Mortem On Clinton Scandal Survey Finds News Coverage Infused with Unnamed Sources, Opinion*, HARTFORD COURANT, Feb. 19, 1998, at A8.

71. See Ryckman, *supra* note 68. See also Lightman, *supra* note 70.

72. See Ryckman, *supra* note 68.

73. See *id.*

74. *United States v. Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d).

75. See generally GREAT AMERICAN TRIALS, *supra* note 20, at 251-54.

76. *State v. Hauptman*, 115 N.J.L. 412 (1935).



The oldest profession—by which I mean politics and to which other commentators apply a different description—complains loudly and regularly about its treatment by the media. Obviously, much of the complaining simply comes from politicians with an agenda. When the press makes a conservative out to be foolish, the conservative politician complains about the liberal bias of the media. When the press makes a liberal politician out to be foolish, the liberal politician talks about the rise of right-wing radio. Neither politician engages in a great deal of self-criticism.

That said, I think there is a great deal of truth to the notion that the press does not do a good job covering political affairs. By affairs, I mean the issues which face our government, not the sexual escapades of the politicians. The press seems to do a thorough job covering the sexual escapades of the politicians, but whether it is a good is far beyond the scope of this discussion.

The complaints I have about the media's coverage of political affairs are strikingly similar to the complaints I registered earlier about the media's coverage of the criminal justice system. I worked in a United States Senatorial campaign in 1986, and we lost. So take my complaints with a grain of salt. However, it appears to me that the media is looking for sound bytes, sexy stories, and headlines. A discussion of the complex problem of how to ensure the long-term health of our social security system is reduced to name calling—the Republicans say the Democrats are trying to bankrupt us all and the Democrats say the Republicans are trying to let poor grandma die. Supporters of a woman's right to choose are portrayed as killers while opponents are portrayed as self-righteous demagogues who are trying to impose their perverted morality on the rest of us.

The polls I have seen suggest that most Americans are in the middle on these two issues. That is, most Americans want to preserve Social Security for those who need it, but they recognize that there are practical limits on how generous we can be with our retirees. Most Americans believe a woman has the right to choose but also believe that the right is not unlimited and that there are competing interests. For the purposes of this discussion, it does not matter whether you agree with these mainstream positions. The point is that the press does not really care about these mainstream positions. The press all but ignores the mainstream because it is not controversial enough, it is not sexy enough, or it does not create good sound bytes or banner headlines. The extreme positions, however, fit the description. So the press reports on the extremists and hopes for problems. This sort of reporting does a disservice to our political system and our political discourse.

I mentioned earlier that lawyers share the blame for the problems in the coverage of high profile cases. It goes without saying that politicians share the blame for the problems in the coverage of political affairs. Politicians are faster than a speeding bullet when it comes to leaping on a quote of an opponent, taking it out of context, and blowing it up into an entire campaign platform. It is a sick symbiotic relationship: The politicians need the press in order to get elected, the press needs the politicians in order to have stories to write about, and both often benefit—despite whatever noble instincts each may have—from superficial sound byte coverage that does not advance the goal of public understanding but does advance the goal of getting elected.

The medical profession raises some of the same complaints about the press. My father worked for a pharmaceutical company for many years and complained bitterly about press coverage. The creation and testing of new drugs is a long and difficult process. Some drugs which seemed miraculous when introduced have turned out to have side effects far more serious than their benefits. Rarely were the problems which arose the result of recklessness—much less intentional misconduct—on the part of the industry.<sup>77</sup> Yet, in my father's view, the media insisted on treating the "big drug companies" as evil and venal, seeking to bolster their ratings and profits by using the victims of these mistakes as props in a story.

The name William DeVries may not ring bells in many minds, but many years ago he and one of his patients were on the front pages of your local papers on a regular basis. Dr. DeVries was the Utah heart surgeon who implanted the first artificial heart into a human being.<sup>78</sup> Dr. DeVries and his patient, Dr. Barney Clark, were engaged in the medical profession's equivalent of the *Simpson* trial. The behavior of the press and the effects of the coverage on the parties involved in the operation show some striking similarities.

Dr. DeVries described a snowbound group of nearly three hundred reporters who descended on his Utah hospital to cover the operation and who overwhelmed the physical plant, disrupted regular routines, accosted patients who had no connection whatsoever with the surgery, and caused such problems that the hospital had to station police officers outside the intensive care unit.<sup>79</sup> Was this an important medical and social event? Yes.

---

77. See generally Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997).

78. See Jeff McGaw, *Candidate for Heart Transplant Dies at 49: Man-Made Unit Kept Upstate Man Alive*, HARRISBURG PATRIOT EVE. NEWS (PA), June 4, 1996, at A1. See also *Man Dies After Artificial Heart is Removed*, DALLAS MORNING NEWS, Mar. 26, 1996, at 27A.

79. See William C. DeVries, *The Physician, the Media, and the 'Spectacular' Case*, 259

Did it deserve network news and front page coverage? Yes. Did the story justify disrupting a hospital and endangering patient care? Clearly not.

Even a sports analogy may be appropriate here. I come from the Denver area, and we love our Broncos. The team is dissected by a huge corps of reporters from the local newspapers, radio, and television stations. We have more reporters covering the Broncos than we have covering the Legislature, Governor, Attorney General, and Supreme Court combined. We have reporters with vast experience, new reporters, men, women, ex-football players, and people who never played a single down. We have call-in shows, out-of-town experts, insta-cams, mini-cams, helmet-cams, every reportorial device known to humankind, and still the players believe that the coverage is lousy. In fact, the entire offensive line boycotted the media, refusing to talk to reporters for the entire season.<sup>80</sup> They relented and spoke with the media during Super Bowl week only when the National Football League threatened to fine each of them \$10,000.<sup>81</sup> Coincidentally, the Broncos won that game.<sup>82</sup>

The media, to their credit, are not oblivious to the problem. *Newsweek* discussed the media coverage of the Clinton-Lewinsky story in an article titled *Swept Away by the Swarm*.<sup>83</sup> The story raises, says *Newsweek*, "intriguing questions about the speed, substance and standards in a competitive environment that makes the world of Woodward and Bernstein look positively quaint."<sup>84</sup> Many people my age idolized Woodward and Bernstein; I know I did. They were investigative reporters, with the emphasis on investigation, who refused to accept the government line and who, through dogged determination and hard work, helped expose a corrupt President.<sup>85</sup> It seems that today's reporters, with rare exception, sacrifice this sort of legwork on the altar of speed. If you have to beat the competition onto the air, you do not have time to double-check your story. The result is incidents such as the following, described in the same *Newsweek* article. The *Dallas Morning News* reported late one evening that a secret service agent told one of Kenneth Starr's<sup>86</sup> investigators that he

---

J.A.M.A. 886, 888 (1988).

80. See Adam Scheffer, *Broncos Reinforce the Western Front Heavy Security Is the Ticket*, DENV. POST, Jan. 21, 1998, at B9.

81. See *id.*

82. See Adam Scheffer, *Superb! Broncos Take the Fifth Behind Elway, Davis*, DENVER POST, Jan. 26, 1998, at AA1.

83. Richard Turner, *Swept Away by the Swarm*, NEWSWEEK, Feb. 9, 1998, at 48, 48-49.

84. See *id.*

85. See *id.*

86. Special Prosecutor to the Clinton Administration. See Scott Harris, *Washington—As Usual, Rep. James E. Rogan Was On the Move*, L.A. TIMES, May 26, 1998, at B1.

had actually seen the President and Ms. Lewinsky in a "compromising situation."<sup>87</sup> The Associated Press distributed the story nationwide, it was reported in several other newspapers and became the lead story on *Nightline*. At midnight, the *Dallas Morning News* retracted the story.<sup>88</sup> Oops, sorry Mr. President. It is not as if there is not enough dirt to go around in this story. Examples of this sort from the *Simpson* case, the Ramsey investigation, and other high profile criminal cases are virtually endless.

#### IV. THE POSSIBLE SOLUTIONS

What are we to do? We worry that publicity surrounding high profile criminal cases is tainting the jury pool which may eventually try the case,<sup>89</sup> giving false impressions of the criminal justice system to the general public,<sup>90</sup> and sometimes impacting the day-to-day work of the attorneys involved in the litigation.<sup>91</sup> How can we lower this impact to an acceptable level consistent with the right and the desirability of a free and vigorous press?

England and Canada both impose severe restrictions on pretrial press coverage of cases.<sup>92</sup> A couple of years ago, following a series of high profile kidnappings and murders in Canada involving a couple who kidnapped and killed young women,<sup>93</sup> *Newsweek* had to alter its Canadian version so as not to violate Canadian press restrictions.<sup>94</sup> Interested Canadians who lived near the United States were sneaking over the border and getting their news in this country,<sup>95</sup> so at least some Canadians are as interested in lurid criminal cases as their American counterparts. England and Canada are generally open, democratic countries, and the restrictions

---

87. See Turner, *supra* note 83. See also Carl P. Leubsdorf & David Jackson, *Intermediary Talks with Starr's Staff: Witness or Witnesses Fear Subpoena About Seeing Clinton and Lewinsky, Source Says; Ex-Official: News' Story Essentially Correct*, DALLAS MORN. NEWS, Jan. 28, 1998, at 1A.

88. See Leubsdorf & Jackson, *supra* note 87; see also Turner, *supra* note 83, at 49.

89. See Norbert L. Kerr, *The Effects of Pretrial Publicity On Jurors*, 78 JUDICATURE 120, 121 (1994).

90. See Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1255-56 (1996).

91. See Kerr, *supra* note 89, at 121. See also Eileen A. Minnefor, *Looking for Fair Trials in the Information Age: The Need for More Stringent Gag Orders Against Trial Participants*, 30 U.S.F. L. REV. 95, 100, 101 nn.20, 21 (1995); Roscoe C. Howard, Jr., *The Media, Attorneys, and Fair Criminal Trials*, 4 KAN. J.L. PUB. POL'Y 61, 64-65 (1995).

92. See Neil Vidmar, *Pretrial Prejudice in Canada: A Comparative Perspective on the Criminal Jury*, 79 JUDICATURE 249, 252-53 (1996).

93. See Russell Watson, *Sex, Death and Videotape: Multiple Rape and Murder Trial of Paul Bernardo*, NEWSWEEK, May 29, 1995, at 53, 53.

94. See Eric B. Easton, *Sovereign Indignity? Values, Borders and the Internet: A Case Study*, SEATTLE U. L. REV. 441, 484 (1998).

95. See *id.* at 444.

on press coverage do not seem to threaten the general freedom of the citizens. These restrictions clearly serve the fair trial interest but violate fundamental American notions about the freedom of the press. In my judgment, Americans would not tolerate them, even if they were constitutional.

A second approach is to try to impose case by case restrictions on the press. In the 1975 case of *Nebraska Press Association v. Stuart*,<sup>96</sup> the trial judge, after finding a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial, entered an order preventing the press from reporting on five specific topics.<sup>97</sup> The topics included the defendant's confession and other statements, the identity of the victims of the alleged sexual assaults, and the contents of a note written by the defendant.<sup>98</sup> For a time, the press was barred from even reporting the existence of the gag order itself.<sup>99</sup>

All nine Justices on the Supreme Court held the gag order invalid, although it took them five opinions to do so.<sup>100</sup> While the Court held that the trial court was justified in its fear that pretrial publicity could impact the right to a fair trial,<sup>101</sup> the Court also held that the trial court erred in failing to consider alternatives and went too far in barring the press from reporting events which occurred in open court.<sup>102</sup> The Court stated that the trial court simply did not meet "the heavy burden of demonstrating, in advance of trial, that without prior restraint, a fair trial will be denied."<sup>103</sup> This is indeed a heavy burden.

In the Oklahoma City Bombing trials, Federal District Court Judge Richard Matsch barred cameras from the courtroom and made it crystal clear to the lawyers, witnesses, jurors, and court personnel that he was in charge of contact with the media.<sup>104</sup> While some lawyers and other participants in both trials sometimes appeared in the news, Matsch's rules about press contact were largely followed, at least once the trial began.<sup>105</sup>

---

96. 427 U.S. 539 (1976).

97. *See id.* at 543, 563.

98. *See id.* at 543.

99. *See id.* at 567. *See also* *Nebraska ex rel. Nebraska Press Assoc. v. Stuart*, 236 N.W.2d 794, 796, 798-99 (Neb. 1975).

100. *See* *Nebraska Press Assoc. v. Stuart*, 427 U.S. 539, 541, 570-72, 617 (1976).

101. *See id.* at 562-63.

102. *See id.* at 563-65.

103. *See id.* at 569.

104. *See* *United States v. McVeigh*, 931 F. Supp. 756, 760-61 (D. Colo. 1996).

105. *See generally* M. L. Stein, *Less of a Circus: Unlike the Chaotic Atmosphere of the O.J. Trial, Strict Discipline Was Maintained During the Timothy McVeigh Trial*, EDITOR & PUBLISHER, June 7, 1997, at 12, 12.

Matsch ran a tight ship in the courtroom.<sup>106</sup> There are a lot of reasons why most Americans were satisfied with both the process and the result in those trials. In my view, one of the most important reasons is that Matsch kept such tight control over the press and simply refused to let the coverage become more important than the event. I believe the Oklahoma City Bombing trials did a great deal to repair the damage that had been caused by cases like *Simpson* and the *Menendez* brothers.

The conclusion to be drawn from this is that a trial judge, while limited by the free speech considerations discussed in *Nebraska Press Association v. Stuart*,<sup>107</sup> still has some power to control the effect of the media in a particular case. I am not suggesting that trial judges always exercise this power. In addition, I am not suggesting that it is possible, or even desirable, to drive *Court TV* out of business. I am suggesting that whenever a judge believes that ongoing press coverage is going to damage the rights of a criminal defendant and of the people to a fair trial, that he or she can, and should, take action to prevent such damage.

I would note that Florida is in the forefront of the use of cameras in the courtroom.<sup>108</sup> The Criminal Law Symposium issue of the 1997 *St. Thomas Law Review* includes a panel discussion of the effect of cameras in criminal courtrooms.<sup>109</sup> Rikki Klieman, a *Court TV* reporter and former trial lawyer, spoke strongly in favor of cameras in the courtroom, arguing that they are merely an extension of the general right of public access to the courtroom.<sup>110</sup> Trial participants, she argued, quickly become accustomed to the cameras, and there is no perceptible effect on the behavior of these participants.<sup>111</sup> She may well be right in the "typical" televised case—to the extent there is such a thing—but I think she is dead wrong in the truly high publicity case. It seems clear to me from everything I saw, read, and heard about the *Simpson* case that the behavior of lawyers, witnesses, judges, and everyone else involved in the case was significantly, and for the most part adversely, impacted by the presence of cameras in-

---

106. See generally *id.*

107. 427 U.S. 539, 556-62 (1976).

108. See generally Chief Justice Gerald Kogan et al., *Television Coverage of State Criminal Trials*, 9 ST. THOMAS L. REV. 505 (1997) (Rikki Klieman and Honorable Stanley Weisberg are also authors of this article); see also Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historic Perspective*, 78 JUDICATURE 128, 132, 134 (1994).

109. See Kogan, *supra* note 108, at 505.

110. See *id.* at 505-07, 511-13, 516.

111. See *id.* at 505, 507; but see Christo Lassiter, *TV or Not TV—That is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 966 (1996) ("While subjective surveys invariably report that a majority of those responding indicate that cameras in court had no substantial impact on the proceedings, real cases prove that cameras do have a substantial impact.").

side and outside that courtroom.

In other words, it may well be that the only cases in which we really need to protect the criminal process from the press are those rare cases—like *Simpson*, *McVeigh*, and *Ramsey*—where the press is not merely present but is overwhelming. Again these are precisely the cases in which the participants are most likely to act unprofessionally because of the press. In addition, these are the very cases which the public is most likely to use in judging our criminal justice system. It is a sort of “Catch 22”—we only want to limit the press in those cases in which they want no limits.

A third approach to dealing with the problem of press coverage of high profile criminal cases is to try to impose restrictions on the attorneys themselves.<sup>112</sup> The most important consideration governing any such attempt is the Supreme Court of the United States decision in *Gentile v. State Bar of Nevada*,<sup>113</sup> and the most important effort to comply with that decision is American Bar Association Model Rule of Professional Conduct 3.6.<sup>114</sup>

Prior to *Gentile*, most states used some variation of American Bar Association Model Rule of Professional Conduct 3.6 to govern publicity in litigation.<sup>115</sup> That rule attempted to balance free speech rights with fair trial rights.<sup>116</sup> The basic rule precluded a lawyer from making an extrajudicial statement which a reasonable person would expect to be disseminated publicly if the lawyer knows, or should know, that the statement “is likely to create a grave danger of imminent and substantial harm to the fairness of an adjudicative proceeding.”<sup>117</sup> The Rule then listed a number of examples of statements which fit this description, e.g., a personal opinion as to guilt or innocence.<sup>118</sup> The rule also listed some examples of statements which normally would not fit this description and which would, therefore, normally be permissible.<sup>119</sup> For example, a lawyer was normally allowed to state, without elaboration, the general nature of a claim or de-

---

112. See generally Gabriel G. Gregg, Comment, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321, 1361 (1996); Catherine Cupp Theisen, Comment, *The New Model Rule 3.6: An Old Pair of Shoes*, 44 U. KAN. L. REV. 837, 837-38 (1996).

113. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991) (holding that Nevada Supreme Court Rule 177 was void for vagueness as interpreted by the Nevada Supreme Court).

114. MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 (1997).

115. See *Gentile*, 501 U.S. at 1068.

116. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 & cmt. (1990).

117. See, e.g., COLORADO RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1978).

118. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 & cmt.

119. See *id.*

fense.<sup>120</sup>

The viability of that version of Model Rule 3.6 was severely undercut by the decision in *Gentile*.<sup>121</sup> Dominick Gentile, a Las Vegas lawyer, was hired to represent a fellow named Grady Sanders in a high publicity case involving the disappearance of large quantities of cocaine and money from an undercover police operation.<sup>122</sup> It was Gentile's belief that the prosecution was politically motivated and that the prosecution was part of an effort to cover up various misdeeds of prosecutors and law enforcement personnel.<sup>123</sup>

Contacted by the press outside of the courthouse after his client's arrest, Gentile stated, among other things: "[T]he evidence will prove not only that Grady Sanders is an innocent person . . . but that the person that was in the most direct position to have stolen the drugs and money . . . is Detective Steve Scholl. . . . I feel that Grady Sander is being used as a scapegoat."<sup>124</sup> Gentile went on to detail some of the attacks he planned to make on prosecution witnesses and on the police investigation.<sup>125</sup> Gentile did, in fact, present this defense at trial.<sup>126</sup> As it turned out, Gentile's theory was correct, or at least it was viable enough to create a reasonable doubt, because the jury acquitted his client.<sup>127</sup>

After the acquittal, the Nevada Bar Association prosecuted Gentile for violating Nevada's then existing rule relating to pretrial publicity.<sup>128</sup> That rule, Nevada Supreme Court Rule 177, was virtually identical to the American Bar Association Model Rule in effect at the time.<sup>129</sup> The Nevada disciplinary authority concluded that Gentile had violated the rule, and the Supreme Court of Nevada affirmed.<sup>130</sup>

The Supreme Court of the United States reversed, holding that the rule itself did not violate the First Amendment guarantee of free speech but that Nevada's interpretation of the rule did.<sup>131</sup> The Court viewed Nevada's

---

120. *See id.*

121. *See Gentile*, 501 U.S. at 1048. *See also* Lynn S. Fulstone, Casenote, *Gentile v. State Bar of Nevada: Trial in the "Court of Public Opinion" and Coping with Model Rule 3.6—Where do We Go from Here?*, 37 VILL. L. REV. 619, 631-32 (1992).

122. *See Gentile*, 501 U.S. at 1039-42.

123. *See id.* at 1042-43, 1059.

124. *Id.* at 1059.

125. *See id.* at 1063-64. *See also* Gregg, *supra* note 112, at 1340.

126. *See Gentile*, 501 U.S. at 1047.

127. *See id.*

128. *See id.* at 1033.

129. *See id.*

130. *See id.*

131. *See id.* at 1033-34, 1036-37, 1058.



interpretation as "a ban on political speech critical of the government."<sup>132</sup> This sort of speech lies at the heart of the First Amendment's protections<sup>133</sup> and, since many of the allegations contained in Gentile's press conference had already been reported in the press and many of the allegations were proven up at trial, the Court found no substantial likelihood of material prejudice to the administration of justice.<sup>134</sup>

The Court made it clear that this sort of speech by an attorney deserved strong protection and would be analyzed quite differently from the commercial speech of attorneys seeking clients.<sup>135</sup> In response to the *Gentile* decision, the American Bar Association adopted a new Model Rule 3.6, and many jurisdictions followed suit.<sup>136</sup>

The new rule changed the pre-existing rule in a number of ways,

---

132. *Id.* at 1034.

133. *See id.*

134. *See id.* at 1039.

135. *See id.* at 1051-52, 1073-74.

136. *See* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 (1997). *See also* Gregg, *supra* note 112, at 1345-46. Rule 3.6 states:

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

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

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6.

some of which are cosmetic, some of which are substantive.<sup>137</sup> The new rule only applies to lawyers who are "participating . . . in the investigation or litigation of a matter."<sup>138</sup> The previous rule had no such limitation and, at least on its face, applied to all lawyers.<sup>139</sup> Thus, the new rule does not attempt to regulate the comments or conduct of lawyers who are asked to comment on cases in which they are not involved.<sup>140</sup> The role of lawyers who are recruited to be commentators is a topic to which we shall return.

The new rule eliminates the list of presumptively harmful statements that were contained in the old version.<sup>141</sup> The new rule slightly modifies the list of presumptively permissible statements with the effect of making that list slightly less specific.<sup>142</sup> These two changes will likely result in more claims of unethical comments being analyzed on a case-by-case basis. However, the Comment following the new Rule does list a non-exclusive set of statements which will ordinarily be harmful, and this list is virtually identical to the list of presumptively harmful statements in the existing Rule 3.6.<sup>143</sup> A change in the list is that the new Rule includes, as a presumptively harmful statement, a statement that a criminal defendant has been charged with a crime, unless that statement also includes a statement that charges are merely accusations and that the defendant is presumed innocent.<sup>144</sup>

The new Rule changes the language describing what sort of speech is proscribed. The old Rule proscribed speech which was "likely to create a grave danger of imminent and substantial harm to the fairness of an adjudicative proceeding."<sup>145</sup> The new Rule proscribes speech which "will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."<sup>146</sup> The difference between the "grave danger" language of the old Rule and the "substantial likelihood" language of the new Rule may prove to be insubstantial. The "substantial likelihood" language was approved in *Gentile v. State Bar of Nevada*<sup>147</sup> but was equated with speech that "creates a danger of imminent and substantial harm."<sup>148</sup> The Court it-

---

137. See Gregg, *supra* note 112, at 1350-53, 1355-57.

138. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 & cmt.

139. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 (1990).

140. See Theisen, *supra* note 112, at 854.

141. See Gregg, *supra* note 112, at 1354.

142. See *id.*

143. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 cmt. (1997).

144. See *id.*

145. See, e.g., COLORADO RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1978).

146. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6.

147. 501 U.S. 1030, 1036-37 (1991).

148. *Id.* at 1036.

self noted that the difference may be "mere semantics."<sup>149</sup>

The new Rule creates a whole new category of protected speech which could be called the "fair reply." Pursuant to subsection (c), a lawyer may make a statement which a reasonable lawyer would believe is required to protect the client from the substantial undue prejudicial effect of recent publicity that was not of the lawyer's or client's doing.<sup>150</sup> In other words, if the other side (or, apparently, anyone else) tips the publicity playing field against you unfairly, you are entitled to comment in an effort to balance the field again. The limitation on the reply is that counsel cannot say more than is necessary to mitigate the damage.<sup>151</sup>

This provision may seem eminently sensible as an effort to protect the right both to a fair trial and to free speech, but I fear that it is fraught with practical danger. It will be far too easy for one side in a dispute to claim that "there was some unfair publicity so I had to respond," with the result that the responses and counter-responses escalate into the sort of all-out press war that adversely impacts the right to a fair trial, discredits the system and the profession, and distracts counsel from the real tasks at hand.

Following the Rule, there is an extensive Comment which begins by noting the difficulty in striking a balance between the right to a fair trial and the right to free speech.<sup>152</sup> The Comment frankly recognizes that there are times when the two interests necessarily collide.<sup>153</sup> The Comment also points out that criminal trials are likely to be the most press sensitive of all cases.<sup>154</sup>

The bottom line here is that the American Bar Association Model Rule 3.6 probably goes as far as we can, consistent with *Gentile*, in limiting pretrial statements by counsel. Lawyers are trained to find ways to distinguish our particular case from coverage by an adverse rule of law or decision of the court, trained, if you will, to find loopholes. The truth of the matter is that a lawyer can make an awful lot of pretrial statements, while still avoiding a violation of the ethical restrictions.

By way of example, it is likely that under the new rule, a judge is powerless to stop many of the *Simpson* type excesses. The Rule proscribes speech which "will have a substantial likelihood of materially prejudicing

149. *Id.* at 1037.

150. *See* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6.

151. *See id.*

152. *See* MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 cmt..

153. *See id.*

154. *See id.* at 71.

an adjudicative proceeding in the matter.”<sup>155</sup> Once the *Simpson* jury was sequestered and theoretically unable to read or hear comments by counsel, it could be argued that the sorts of statements made by the attorneys in the *Simpson* case would not violate the model rule. It is quite clear that whatever power might once have existed to control non-participating lawyers is now gone. There certainly is no way a judge or ethics committee can sanction a non-participating lawyer for commenting on a case, unless his or her behavior violates some other rule of professional conduct.<sup>156</sup> The publicity rule makes no effort to regulate the speech of these lawyer-commentators, nor does the First Amendment allow for such regulation.<sup>157</sup> Finally, the “fair reply” doctrine enshrined in the new rule would have given every lawyer involved in the *Simpson* case a safe harbor for almost everything which was said since the publicity was immediate and pervasive.<sup>158</sup>

In sum, I see the situation this way: Blanket restrictions on the press are significantly limited by the First Amendment and the *Nebraska Press Association v. Stuart*<sup>159</sup> decision. Case by case restrictions on the press must meet an extremely high burden and are of limited help. Ethical restrictions on lawyers must pass First Amendment and *Gentile* analysis and are also of limited help.<sup>160</sup> So what are we to do? The following comments are devoted to some modest suggestions.

## V. A FEW MODEST SUGGESTIONS

It does virtually no good to simply whine about these problems. I have four suggestions, three of which are relatively small procedural suggestions which are not earth shaking but which, if vigorously pursued, could noticeably improve the status quo. The fourth suggestion—that we all take more personal responsibility and simply behave more professionally—is more of a sermon than a suggestion. However, it is, in fact, the only real solution to the problem.

---

155. *Id.* at 69.

156. See Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303, 1306, 1312-14, 1317 (1996); Erwin Chemerinsky, *Trial Over, Simpson Analyst Re-Evaluates Educating the Public is Noble, but How Commentators Do It Needs Scrutiny*, 81 A.B.A. J. 100, 100 (1995).

157. See *Gentile v. State Bar*, 501 U.S. 1030, 1056-57. See also L. Cooper Campbell, *Gentile v. State Bar and Model Rule 3.6: Overly Broad Restrictions on Attorney Speech and Pre-trial Publicity*, 6 GEO. J. LEGAL ETHICS 583, 604 (1993); Chemerinsky & Levenson, *supra* note 156, at 1316.

158. See MODEL CODE OF PROFESSIONAL CONDUCT Rule 3.6 & cmt.

159. 427 U.S. 539 (1976).

160. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1070-72 (1991).

First, we must, as individual lawyers and as a profession, do a better job educating those who report on our affairs. Our state bar association regularly informs local reporters, both print and electronic, that we will make available qualified and experienced lawyers who can help the reporters make sense out of a story and who are available for comment in most situations. The Colorado District Attorneys Council and the Colorado Criminal Defense Bar try to make qualified people available as well. National organizations—the American Bar Association and the National Association of Criminal Defense Lawyers for example—do the same.

The media has made some efforts to make better use of lawyers. At both the local and national level, it is far more common than it used to be to see lawyers being used either as full-time reporters covering the justice system or as commentators covering a particular case.<sup>161</sup>

There is much room for improvement. We should, as a profession, redouble our efforts to provide the necessary resources to the media so that the media can report fairly and accurately on legal affairs.

Second, we must, as individual lawyers and as a profession, do a better job educating those among us who are commenting on cases, either on a regular or irregular basis. As a profession, we can provide some training to those of us who are being asked to comment and, as individuals, we can follow some simple guidelines to ensure that we do a good job.

The Colorado Bar Association regularly sponsors meetings between members of the press corps and members of the legal profession. The goal of these meetings is to improve bar-press relations by introducing the media to the good people who are available and by introducing prospective commentators to those members of the media who are likely to need their services. Our bar association also provides some training to lawyers who are being asked to comment on cases. Pursuit of efforts like these can improve the quality of the commentary and the coverage. We need to improve these efforts.

Third, and closely related to the second suggestion, we should, as a profession, engage in a dialogue with each other to consider our proper role when we are asked to comment on a case. Most lawyers who agree to comment on a case do so with the best of intentions. These lawyers seek to improve the public understanding of the case or controversy in the public eye. While it is flattering to be asked, and it may help business, the real reason most lawyers go on the air is to help answer genuine questions, explain the results, and thereby improve public understanding of and trust in

---

161. See Chemerinsky & Levenson, *supra* note 156, at 1311.

our justice system.

The National Association of Criminal Defense Lawyers has taken the first steps at trying to create a set of ethical guidelines to assist lawyers who are asked to provide legal commentary. This initial work is largely based on two excellent law review articles by Professors Erwin Chemerinsky and Laurie Levenson.<sup>162</sup> Even if we are powerless to control what lawyers say and how they say it, such a dialogue can only help educate us all and, hopefully, serve to temper some of the more outrageous behavior.

Alas, good intentions are not enough. Even the best-intentioned lawyer can succumb to stage fright, stage panic, and stage stupidity. Stage fright occurs when you get nervous upon suddenly realizing that your comments are going to be memorialized forever and that your law school professor, your current colleagues, and everyone who knows you, including your mom, will have the opportunity to see and hear you and then dissect your every tic, inflection, and word for the rest of your life. Even those with a great deal of expertise sometimes experience this painful affliction. The affliction manifests itself most commonly by causing incredibly stupid words to fly out of your mouth in incomplete sentences that are only marginally related to the question being asked.

Stage panic is a variation of stage fright that causes the speaker to unreasonably—even irrationally—assume that he or she is competent to answer the question posed. Good reporters, like skilled cross-examiners, know how to make use of silence. A good reporter will ask a question which falls far outside your area of expertise or which cannot really be fairly answered given the facts which are presently known. You know that you should simply say, "I don't know," or, "It's really hard to answer that at this time." However, when you give that answer, the good reporter just waits, knowing that lawyers abhor silence the way nature abhors a vacuum and that we are irresistibly impelled towards filling that silence. Even media savvy lawyers fall into this trap and say something which, like the one question too many you ask of a witness, is a mistake the moment it is uttered—the moment, in short, when it is too late to do anything about it.

Like the one question too many in cross-examination, these words are now part of the record. You cannot take them back. The more outrageous your comment and the more you wish you could take it back, the more likely it is that the comment will appeal to the media and be replayed endlessly, over and over. The replays will stop only when somebody else suc-

---

162. See *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996); *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997).

cumbs to stage panic or stage fright and issues an equally inappropriate statement which pushes your foul-up out of the headlines because it is newer and the viewing audience wants fresh meat.

Stage stupidity needs little explanation. It is merely our general stupidity expressed in a public forum for all the world to see. We have all done it. I have already described to you one of my early experiences with stage stupidity—with the reporters in the parking lot of the jail.

My final suggestion is based on the notion that the only cure for these afflictions—stage fright, panic, and stupidity—may be to not speak in the first place. Shutting up should certainly be everyone's "default setting." If you are not sure whether you should speak, then do not. If you think you should speak, double check with at least one lawyer friend and one person with common sense. Your lawyer friend will try to talk you out of going on the air if for no other reason than simple jealousy. The person with common sense will try to talk you out of going on the air because, as a matter of common sense, it is usually a bad idea.

You may also want to check with your mom. My mom, upon viewing my first appearance on national television, called and left a message on my machine as follows: "Pat, you've gained weight, but you looked very professional. Have you quit smoking? I thought I saw an astray on your desk. Now what is this case all about?" Moms have a way of putting matters in perspective like no one else can.

## VI. CONCLUSION

We must fight off what I acknowledge is a strong urge to talk with the press. It is always flattering to be approached by a reporter and to think that you might see your own name in the local daily or your own smiling face on the ten o'clock news. A word of warning here: I represented a young man in a Southern Denver suburb who was accused of two murders. When a picture of the two of us appeared in the *Denver Post*, he was identified as me, and I was identified as he. Needless to say, my parents were amused by the inaccurate caption, particularly since the young man was accused of killing both his parents.

We must persuade others within hearing of our voice to do the same. Prosecutors should persuade police officers, judges should persuade court staffs, defense lawyers should persuade their staffs, and everyone should persuade witnesses. Do not talk until it is over. This can be very frustrating for the people who want to get their version out, but we need to make that effort. We must persuade the press that we are not trying to hide anything, that we are not giving a scoop to a competitor, that we value a

free press just as highly as we value a fair trial, and that we are not trying to muzzle them. We are only trying to ensure that two important constitutional rights are appropriately balanced. We must make every effort to persuade the public of the importance of a fair trial, even in the face of an almost overwhelming level of public cynicism about the criminal justice system.

It is not enough, in my view to shrug off the problem by saying: "Oh, that was just the *Simpson* case. That's a one in a million case. Don't judge the system by that case." It is not enough to say that because, even if it is true, the fact remains that the public, the press, elected officials, all of us are, in fact, affected by that trial. Even if we know that the *Simpson* trial is not an entirely accurate picture of the justice system, we know that it is not an entirely inaccurate picture either, and we are all judged by it.