CRIMINAL COVERAGE: NEWS MEDIA, LEGAL COMMENTARY, AND THE CRUCIBLE OF THE PRESUMPTION OF INNOCENCE

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The criminal defense bar has always had a complex relationship with the media. As director of the Center for Justice in Capital Cases and a nationally recognized expert in the field of death penalty defense, I have been involved in a variety of death penalty cases in which the media has been a major player. There are also competing parts of the Constitution to consider, namely, the First and Sixth amendments.

Generally speaking, publicity hurts a criminal defendant. There are already so many presumptions against anyone charged with a crime — particularly anyone charged with a violent offense. Most jurors walk into court with these presumptions: where there’s smoke, there’s fire; the police wouldn’t arrest someone who hadn’t done it; and, of course — he isn’t one of us, is he? I remember a time that I was in court with a client who was charged with a number of drug offenses — all possession charges, as I recall. He was a scruffy looking guy who worked in a dump, literally, and we were doing jury selection. My partner asked one of the jurors about her feelings about drugs. She pointed at the defendant and said, “That’s what happens when you use drugs. You look like that guy.” From the minute jurors see a defendant, whether in court or in the media, they begin judging him.

That said, without the media, abuses of power would never come to light. For example, even though it was a long time coming, former Chicago police commander Jon Burge would never have gone to jail for the torture of those he arrested² without the intervention of the press and the assiduity of a few lawyers and reporters.

¹. The author would like to thank the Wicklander scholars program at DePaul University College of Law for its support of this project, and the following current and former law students for their invaluable assistance with this project: Amanda Graham, Katie Kizer, Annie O’Reilly, and Evan Weitz.

². Burge was convicted on federal charges of obstruction of justice and perjury after his improper treatment of criminal suspects was exposed. Karen Hawkins, Jon Burge Sentenced To 4 1/2 Years In Prison: Convicted Of Lying About Police Torture, Jan. 21, 2011, http://www.huffingtonpost.com/2011/01/21/jon-burge-sentencing-vict_n_812081.html. In all, more than 100 men claimed that their criminal confessions and convictions had been tainted by torture at the hands of Burge. Sharon Cohen, Jon Burge Case: Final Judgment in a Notorious Police Abuse Scandal, ASSOCIATED PRESS, Jan. 29, 2011, available at
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This article identifies the practical tensions between criminal defendants and the media in today's world with the obtrusive twenty-four hour news cycle, pervasive legal commentators (I use the word "legal" advisedly) and the ethical implications of treating crime news as entertainment.

To explore these issues, I have taken a look at the literature relating to crime reporting and the media, reached into my own and others' experiences, and surveyed decision-makers in the system: judges, news editors and producers.

LAW AND PUBLIC RELATIONS

The issue of legal and law-related public relations services has obtained considerable attention in recent years. One recent example is a study by Michelle DeStefano Beardslee on the role of corporate lawyers in public relations battles that so frequently accompany legal disputes nowadays. Beardslee also discusses the ethical standards that ought to govern the lawyers' conduct in this arena. Her empirical research consisted of sending questionnaires to the chief legal officers of the firms listed in the S&P 500 (receiving responses from 28 percent) and conducting 57 interviews. One of their primary concerns was that a "bad" lawsuit could knock down consumer confidence and lead to a drop in value of the company's stock. Thus, Beardslee concludes, the public relations fallout from such a lawsuit is part of the "cost-benefit analysis conducted in determining how best to handle a legal controversy." Public relations executives are being consulted on how to get the other side in litigation to fold faster, which means that people are folding — even when they believe they could win in court several years down the line.

Lawyers On Trial

It is not just the parties that have something at stake in these cases: "those who conduct a trial are always on trial themselves." The lead defense attorney for my former client Casey Anthony poses a striking example. Anthony is the young mother who was accused of killing her two-year-old daughter Caylee. In the weeks leading up to and during her trial, lead defense attorney Jose Baez was the subject of lengthy commentary. Beyond attempting to deconstruct Baez's courtroom


4. Id.
5. Id.
6. Id. at 1269.
7. Id. at 1271.
8. Id. at 1273.
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performance, the media prodded at his past career experiences, his personal life and the impact of the Anthony ruling on his future.11

This type of irrelevant and often speculative reporting forces criminal defense lawyers to take this coverage into account in their strategy — using voir dire to ask potential jurors about what media coverage they have seen, requesting additional jury instructions that reiterate the prohibition on extrajudicial research, and so on. Unlike private firms with public relations budgets, most criminal defendants are poor, and thus the criminal defense attorney must conduct her own media management, in addition to actually trying the case.

Casey Anthony, the Media, and Mob Mentality

By now, everyone has heard of the acquittal of Anthony. After the prosecution reversed its prior decision not to seek the death penalty in April 2009, I was asked to join the Anthony team, as my area of expertise is death penalty defense. For a year, my clinical students and I, as well as my investigator and mitigation specialist at the Center for Justice in Capital Cases at DePaul College of Law, worked on this case. We filed many motions attacking the request for the death penalty, and I argued, among other things, that the state of Florida should not be allowed to request the death penalty when they could not even identify cause of death of Anthony's little girl. I also filed a motion to preclude the death penalty on the basis of gender bias: that my client had stepped outside gender norms and that the ultimate punishment was being sought for that reason.12 I was forced to leave the trial team when the trial court refused to cover the clinic costs for travel, despite having found Anthony to be indigent.

It is amazing that Anthony got a fair trial, considering the fact that the trial judge granted nearly every request that the prosecution made,13 allowed untested "science" at their request,14 allowed them to go forward with a request for the death penalty,15 and got a biased, pro-death-penalty jury.16 Despite this, the jury got it right. They voted on

11. Id. See also Nathan Koppel, Jose Baez: From High School Dropout to Lawyer/Celebrity, WALL ST. J. LAW BLOG, July 17, 2011, http://blogs.wsj.com/law/2011/07/12/jose-baez-from-high-school-dropout-to-lawyercelebrity/?mod=google_news_blog (last visited July 17, 2011). It certainly has been my experience and that of many others whenever we have been involved in a high profile case that we get attacked in this way. In fact this happens even when the case is not high profile. In fact, as a death penalty defense attorney, I am often treated as though I committed the murder that my client is charged with.


16. Casey Anthony Jury Willing to Impose Death Penalty If Necessary, ABC NEWS RADIO, July 5, 2011, http://abcnewswireonline.com/national-news/casey-anthony-jury-willing-to-impose-death-penalty-if-necess.html. The U.S. Supreme Court has held that jurors must be "death qualified" — not so opposed to the death penalty as to be resistant to impose it as a sentence — to serve on a jury considering a case in which the death penalty is a possible penalty. See Adams v. Texas, 448 U.S. 38, 45 (1980) ("a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.")
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the evidence — on the fact that there was no cause of death, no showing of a homicidal means of death, let alone any evidence on who actually did kill Caylee if indeed her death was a homicide.

What is troubling is the public’s fascination with this case, the need to make Anthony a villain, and how the media helped feed this mob mentality. In particular, nearly all the TV pundits castigated my former partner and friend Jose Baez, literally raking his personal and professional life over the coals. They landed, heavily, on any witness who spoke up in Anthony’s favor, making witnesses extraordinarily difficult to find and interview because everyone was afraid of the backlash from the public and the prosecution. There were exculpatory witnesses who were intimidated to the point that they feared coming forward. (Word on the street? Helping Anthony is dangerous.) I was even physically assaulted myself while investigating this case. I have continued to receive hate mail of a type that is hard to imagine.

If only this level of public passion could be garnered for education reform, eliminating poverty and racial injustice, wars, fixing our economy — you name it. Instead, the nation was fixated on this case. I am sorry to say that there are hundreds of little girls who go missing every year. They are killed, kidnapped or otherwise treated abominably, but we don’t talk about them because they do not come from a white, middle-class, physically attractive family. And while violent crime is at its lowest in nearly 40 years, study after study has found that the media over reports on crime. It is cheap entertainment, you see, and entertainment is what we crave.

Lawyering in a High Profile Case

Partly because of the media’s preoccupation with the lawyer’s performance, legal counsel is now involved whenever legal issues might be discussed with journalists, at least in the corporate world. These days, a meeting on how to manage the spin on a particular story, according to one interviewee, will typically involve the company’s CEO, CFO, legal counsel and public relations officer, in addition to external counsel and external

17. See supra note 10, and accompanying text.
22. Beardslee, supra note 3, at 1280.
public relations executives.23 The suggestion is that lawyers are listening to public relations executives on issues of reputational damage, meaning that they view it as a valid concern regarding the legal domain.24

In this vein, one of the most important rules for protecting reputation is maintaining consistency in message.25 This is complicated to do as a criminal defense attorney because of the constitutional and confidentiality concerns that often trump any such media strategy.

The real relationship between corporate public relations executives and lawyers is different to the perceived reality of their relationship, Beardslee argues. The perceived relationship is that they work separately, with the lawyers providing the public relations executives just enough information to write a press release.26 In reality, the two work hand-in-hand, with lawyers helping to craft the spin.27 Beardslee adds that the caveat, however, is that in spite of this more horizontal relationship between counsel and public relations, lawyers remain in control. Lawyers are the ones with the final say, and often the ones who make the decision to hire outside public relations consultants.28 In fact, Beardslee goes further and says that when a high profile lawsuit is on the horizon, lawyers should be in charge of managing legal public relations, in addition to the suit itself.29 She warns that if lawyers don’t step up, lawyers not involved in the case just might step into the breach, which would be undesirable.30

Beardslee advocates for two changes in the way we approach the relationship between law and public relations.31 First, she would target the American Bar Association Model Rules of Professional Conduct, by adding “reputation” as one of the factors in Rule 2.1, so that it would read:

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, reputational, and political factors, that may be relevant to the client’s situation.32

She would also add a comment to the Rule to highlight that public relations is a law-related service.33

Second, Beardslee recommends that law schools instruct their students about the importance of public relations and perhaps offer instruction on how to manage public relations executives.34

23. Id. at 1283.
24. Id. at 1284.
25. Id. at 1285.
26. Id. at 1293.
27. Id. at 1294–95.
28. Id. at 1287–89.
29. Id. at 1297.
30. Id. at 1299.
31. Id. at 1309–10.
32. Id. at 1309 (modifying ABA MODEL R. PROF. CONDUCT 2.1).
33. Id.
34. Id. at 1309–10.
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Perspective is Everything

Much of the public and nearly all of law enforcement have trouble imagining that the innocent get charged, let alone convicted. But former chief prosecutor in McHenry County, Ill., Louis Bianchi, for one, sees things differently now. "I'll always recognize the possibility that someone who was charged may be innocent," he told the Tribune the day after his own acquittal of corruption charges.\(^{35}\) Similarly, former Texas prosecutor James Fry has written about his experience with cognitive dissonance when he convicted the wrong man of rape.\(^{36}\)

That feeling is something those of us who defend cases are all too familiar with. It is virtually impossible to do what the law tells us to do — to presume innocence. The police wouldn't arrest an innocent person, would they? They must have done something wrong, right? Please don't misunderstand me: I understand these sentiments. Indeed, I must admit I have often shared them — having to work hard to afford my own clients that presumption, especially when I am representing someone who is a "bad guy," a gang member, for instance.

I remember when I had to face down my own prejudices. I was representing a young man who had confessed, before a court reporter, to a triple homicide. I forced myself to investigate the facts, in part because the police officers who extracted the confession had a brutal reputation. And I found to my dismay that I was representing an innocent, terrified man — someone with no previous arrests and no experience with the police. He knew at least one of the people who had committed this awful crime — he had been in the apartment when it started and had run for his life. After many hours of interrogation, he told the police that person's name, and then the police brought the other suspect into the police station. The other suspect saw my client, so my client backed off the statement. He was terrified for his life. Caught between a rock and hard place, he decided confessing was safer for him and his family, so that is what he did. The jury acquitted him after less than an hour.

I had not believed him when he told me he was innocent, I just felt professionally obligated to do my job and find out what really happened. After that experience, I have learned to fight those natural presumptions, and I hope that maybe, just maybe, other prosecutors will read what prosecutor Bianchi has said and realize that anyone can be charged. It is very easy to be charged but very difficult to overcome that presumption of guilt.

We all have to keep that in mind. Sometimes when it gets hard to speak up for my clients, when I feel the overwhelming opprobrium of the public, or when I get a bit tired, I think of Pastor Martin Niemöller's famous quotation: "First they came for the communists, and I didn't speak out because I wasn't a communist. Then they came for the trade unionists, and I didn't speak out because I wasn't a trade unionist. Then they came for the Jews, and I didn't speak out because I wasn't a Jew. Then they came for me and there was no one left to speak out for me."\(^{37}\)


\(^{36}\) See James A. Fry, *I put away an innocent man,* DALLAS MORNING NEWS, May 14, 2009:

- When I prosecuted Charles Chatman for aggravated rape in 1981, I was certain I had the right man. His case was one of my first important felony cases as a Dallas County assistant district attorney. Chatman was convicted in a court of law by a jury of his peers. They, like me, were convinced of his guilt.
- Nearly 27 years later, DNA proved me — and the criminal justice system — wrong. Chatman was freed from prison in January after DNA testing proved him innocent. He spent nearly three decades behind bars for a crime he did not commit — a stark reminder that our justice system is not immune from error. No reasonable person can question this simple truth.

\(^{37}\) There are various wordings of this quotation, using different persecuted groups. But the gist of the
Similar to the argument that "perp walks" are statements, Lidge also notes an interesting observation that appeared in a judicial opinion on extrajudicial prosecutorial comments, which may be applicable to attorneys representing parties in a matter as well as to those acting as media commentators.\textsuperscript{38} He writes, "the court noted that attorneys have a unique role in the criminal justice system and have more knowledge and understanding about what is going on in a particular case. Therefore, their speech has a 'degree of credibility ... that an ordinary citizen's speech may not usually possess.'\textsuperscript{39} This supports the idea that self-appointed legal experts must be held to a higher, or at least different, standard than other commentators in the media, because their opinion on legal matters is regarded as more valuable due to their legal education (and, often, their membership in the bar).

**The Need for Court Intervention**

It takes a lot for the courts to address the issue of legal analysts run amok. In the Scott Peterson case, for example, it was not until media legal analyst Michael Cardozo — who had discussed the case on CNN, NBC, Fox News and other media outlet — began to assist the defense in preparing the defendant for his testimony that the court issued a gag order.\textsuperscript{40} As a result, media outlets issued statements that they would no longer be relying on Cardozo for their coverage of the trial.\textsuperscript{41} It doesn’t seem right that the situation must escalate to this level before somebody steps in to put an end to the farce.

Take, for example, the infamous “perp walk,” in which the defendant is in handcuffs and paraded in front of the media. Prosecutors and law enforcement use the perp walk for various ends, such as to show the public that law enforcement is doing its job, or that the defendant is being treated in a suitably humiliating fashion.\textsuperscript{42} Professor Ernest F. Lidge argues that the perp walk should be regarded as a “statement” (e.g., we are doing our jobs) and thus brought within the scope of ABA Professional Responsibility Rules 3.6 and 3.8, which instruct that lawyers shall not make statements that have a substantial likelihood of prejudicing an adjudication.\textsuperscript{43} Rule 3.8 is specifically addressed to prosecutors, forbidding them from “making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.”\textsuperscript{44}

In a decision rejecting a 1983 civil rights challenge to a perp walk, one court said the practice serves the legitimate function of educating the public as to the seriousness of law enforcement, thereby serving to deter others from committing crimes.\textsuperscript{45} Lidge exposes the


\textsuperscript{39} Id., quoting Attorney Grievance Comm. v. Gansler, 835 A.2d 548, 559 (Md. 2003).


\textsuperscript{41} Finz & Walsh.


\textsuperscript{43} Lidge at 59. See also ABA MODEL RULES OF PROF'L CONDUCT R. 3.6, R. 3.8(f) (2010).

\textsuperscript{44} R. 3.8(f).

\textsuperscript{45} Lidge, supra note 38, at 60, citing Caldarola v. Co. of Westchester, 343 F.3d 570 (2d Cir. 2003). But see Lauro v. Charles, 219 F.3d 202 (2d Cir.2000) (staged perp walk, in which defendant was moved out of the
absurdity of this conclusion when he observes that “not all perp walked defendants are guilty. Not all arrestees subject to perp walks have [subsequently] been convicted, and the accused individuals are entitled to a presumption of innocence under our criminal justice system.”46 Far from upholding the fairness and integrity of the system, the perp walk actually further conflates the charging stage with the verdict stage, undermining the importance of a hearing before a fair and neutral tribunal, which is supposedly central to our notion of justice.

Is Regulation a Solution?
There seems to be a growing consensus that regulation before the fact is more desirable than remedial measures after the fact.

Attorneys, of course, are already limited by various ethical and legal standards, which constrain their activities in litigation, and can be sanctioned for violating these precepts. This is justified on the grounds that attorneys, as officers of the courts, “should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.”47

Tanina Rostain took up this issue in 2006, with an analysis focusing on the effects that law consulting (as opposed to legal practice by members of the bar) has on “the interests and values that professional regulation is intended to protect.”48 Because trial consultants are not — and, indeed, resist — being regulated, they are free to limit the scope of their duties by contract.49 This makes them more affordable and more difficult to hold to account.

Rostain worries that consultants don’t see the law as an embodiment of social ideals and are not invested in upholding the structure as a whole.50 She suspects that they are inclined to view the law as a set of isolable rules, and the decision to abide by such rules as a cost-benefit calculation.51 She doesn’t think that regulation of consultants under the legal umbrella will work due to the closed nature of the profession.52 Nor does she think that legal consultants are likely to set up a regulatory body sua sponte.53 She says:

An alternative approach would be to regulate law consulting separately. It is difficult to imagine, though, where the political will to enact such regulation would originate. Historically, consultants have shown no interest in creating or participating in a regulatory regime, and there are no signs that this has changed. Without their collaboration, the imposition of a regulatory framework from above is not likely.54

46. Lidge at 60.
47. ABA Model R. Prof. Conduct (2000), Preamble.
49. Id.
50. Id.
51. Id. at 1400.
52. Id. at 1426.
53. Id.
54. Id.
The interesting question is whether the same concerns would apply to media "legal analysts" and what exactly would go into that calculus is unclear. The purpose of consultants remaining unregulated is that it provides them with the freedom to do things that lawyers cannot do, like talk to represented persons and offer unbundled legal services. Regulation of consultants would destroy what is profitable about the industry. Although regulation of legal analysts would certainly put some commentators out of business, it wouldn't destroy the industry as a whole.

In her article "Pretrial Publicity in High Profile Trials," Susan Duncan conducts a comparative analysis of English and American approaches to pretrial publicity in high profile cases that proves interesting. She takes as her starting point the tension between concerns over jury taint and the need for public access to the judicial system. Both must be accommodated, and to do so she would advocate for regulation of traditional and non-traditional (i.e., blogging) media.

Duncan uses the Duke Lacrosse case to illustrate the problems with pretrial media coverage in a criminal case. In that case, a stripper accused three team members of rape. Later, she admitted she couldn't really be sure of the rape, and DNA tests exculpated the three men. The prosecutor, however, had already done his damage, alleging among other things that the rapes were racially motivated (the woman was black, the men white). In the age of the Internet, once an allegation is out there, it is very difficult to get rid of it; there tends not to be any requirement to update or correct stories. And even if there were, it is rare for something to truly disappear from the Internet.

56. Id. at 757.
57. Blogging is a self-publication phenomenon that has taken Internet communications by storm in the 21st century. In fact, as of July 1, 2011, there were at least 164,307,605 known blogs. BlogPulse, www.blogpulse.com (last visited July 1, 2011). Users create public blogs about topics that interest them and other users are able to post comments. Blogs have rapidly expanded to legal discourse, where one can even find "a thoughtful argument regarding why the United States Supreme Court should grant certiorari" in a given case. Brian A. Craddock, 2009: A Blawg Odyssey: Exploring How the Legal Community is Using Blogs and How Blogs Are Changing the Legal Community, 60 Mercer L. Rev. 1353, 1355-56 (2008).
58. Duncan, 34 Ohio N.U. L. Rev. at 759-60.
59. Id. at 760.
60. Id. at 761.
61. Id. at 760. The district attorney who pursued the case was disbarred in 2007 for his behavior in the case. N.C. State Bar v. Nifong, No. 06 DHC 35 (N.C. State Bar Discipl. Hrg. Comm'n July 31, 2007). See also Katherine E. Jean, What North Carolina State Bar v. Nifong Was Not, 13(3) N.C. Bar J. 46 (Fall 2008) ("After a five day trial, the DHC found and concluded that Nifong violated multiple Rules of Professional Conduct by making improper statements to the media, failing to comply with obligations imposed on him by statute and court order to provide discovery, and lying to the court. For this misconduct, Nifong was disbarred."); and L. Thomas Lunsford II, The Truth about Lawyer Discipline, 12(3) N.C. Bar J. 42 (Fall 2007) ("explain[ing] the process and ... dispel[ling] some of the most commonly held misconceptions" about the attorney discipline process in the wake of the Nifong case). He was also found guilty of criminal contempt for lying to a judge during the case, and sentenced to one day in jail. Julia Lewis, Nifong Guilty of Criminal Contempt; Sentenced to 1 Day in Jail, WRAL.COM, Aug. 1, 2007, http://www.wral.com/news/local/story/1763323/.
62. Duncan, at 762.
63. See, e.g., Romano v. Steelcase Inc., 30 Misc. 3d 426, 907 N.Y.S. 2d 650 (N.Y. Sup. Ct., Suffolk County 2010) (finding that private postings from plaintiff's Facebook and Myspace pages were discoverable, including deleted postings).
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Duncan regards all the traditional remedies as sorely lacking, and sees great unfairness in the usual tort remedies that are used to address invasions of privacy and the like. She thinks it is "fundamentally unfair to allow unfettered press-reporting at the expense of the legal system and the individuals involved, only to require the aggrieved parties to bear the cost of redressing the media's excesses." Voir dire doesn't always work to screen out media-biased jurors. Jury instructions are not followed. Gag orders may be issued for those involved in the proceeding, but this frequently leads to leaks or the press relying on rumor. Change-of-venue motions are rarely granted, and even where they are, they may have less remedial impact than they used to have in the pre-Internet era.

In England, the Contempt of Court Act attaches strict liability to the publication of any material addressed tending to interfere with the course of justice in particular proceedings. Violations of the law are punishable with up to two years in jail. There is, however, a public interest exception, under which publications are permitted where they are on issues of general public interest as long as the risk of prejudicing a particular proceeding is merely incidental to the discussion.

Duncan also discusses the possibility of adopting an ethical code for legal commentators. She outlines a voluntary code proposed by professors Erwin Chemerinsky and Laurie Levinson, and also mentions proposals by the National Association of Criminal Defense Lawyers and the American College of Trial Attorneys. Duncan says that these codes must remain voluntary due to First Amendment concerns, which she says "calls into question how effective they would be."

Duncan ultimately advocates for a version of the English contempt law that would extend to bloggers, although she notes that the proposal would be met with stiff opposition on First Amendment grounds. She also suggests that a voluntary code for bloggers might be possible but is skeptical about our ability to agree on the terms of such a code given the numerous and disparate membership of the blogging community. She also proposes a public interest exception, which she would define to include matters that "those to whom the publication was directed could reasonably be said to have a right to be informed about."

64. Duncan, at 766.
65. Id. at 766-67.
66. Id. at 767.
67. Id.
68. Id. at 768.
69. Id. at 769.
70. Id. at 774 (discussing Contempt of Court Act, 1981, c. 49, (Eng.)).
71. Id. at 777.
72. Id. at 776.
73. Id. at 783.
74. Id. See infra notes 89-94 and accompanying text for a discussion of this proposed code.
75. Id. at 783. See also Jean Heilwege, No Comment: Professors, Legal Groups Consider Ethical Codes for Legal Commentators, 34 TRIAL 16 (July 1998).
76. Id.
77. Id. at 787.
78. Id. at 793.
79. Id.
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One can’t help but feel that Duncan’s desire to “redefine socially beneficial conduct,”\textsuperscript{80} while utterly sympathetic, is unrealistic. Duncan herself comes to this conclusion.\textsuperscript{81} To the defense lawyer, it is self-evident that “[t]he value of the public learning prejudicial and irrelevant information about a defendant (or even individuals not named as defendants) should not be defined as socially beneficial conduct.”\textsuperscript{82} Convincing others of this, however, is another question altogether.

Taken together, the message from the literature is that the extensive media coverage of legal disputes is inescapable. Further, the current law and codes of conduct are inadequate to deal with the needs of counsel to talk to the media. The fact that legal commentary is unregulated makes it more difficult to conduct trials fairly, but the prospects of regulating legal commentary under the current First Amendment doctrine are bleak.

LEGAL COMMENTATORs AND ANALYSIS:
TITLES TO BE USED LIGHTLY?

I have been involved in some high-profile death penalty cases, and as a result, I have confronted the pervasive intrusion of the news media into the criminal justice system. In these cases, news media begins to mirror the tabloids.\textsuperscript{83} In states where cameras are allowed in trial courts,\textsuperscript{84} this influence is even more pervasive. This influence may have profound effects on the nature of prosecutions, lead to allegations of poisoning of potential jury pools,\textsuperscript{85} affect the quality of the defense, and possibly impact judicial decision making.\textsuperscript{86} Chief Justice Roberts has expressed concern that cameras in the courtroom will lead to “grandstanding” by attorneys.\textsuperscript{87} Cameras in the courtroom have also given rise to legal commentators, most of whom have a partisan, political view, and frankly are willing to do anything at all to be on television.\textsuperscript{88} Putting on a show for the news media provokes commentators and encourages further misrepresentation of criminal cases.

We saw the acceleration of the commentator phenomenon during the murder trial of O.J. Simpson. This case led to various proposals for standards for commentators in the legal profession. For example, professors Chemerinsky and Levenson proposed a vol-

\textsuperscript{80} Id. at 794.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
\textsuperscript{88} See, e.g., Nancy Grace removing a lawyer from her show who disagreed with her approach to coverage of a specific case. “Nancy Grace Kicks KTRS’ McGraw Millhaven Off Show,” Youtube, http://www.youtube.com/watch?v=2luB5kw8ymA (Nancy Grace says, “You’re off. Cut his mic.”).
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untary code because they believed that a mandatory, government-imposed code would violate the First Amendment. Their proposal included the following elements: a duty of competence; a duty with regard to confidences; a duty to avoid conflicts; duties relating to the business of being a commentator; and the duty to remain a lawyer. Other proposals were also made around the same time from the American Academy of Trial Lawyers and the National Association of Criminal Lawyers. However, these proposals have remained just that: proposals. On the other hand, Professor Kevin C. McMunigal discusses a trend by criminal defense teams to instigate media campaigns about particular cases and the ethical implications of such a strategy. Yet, all that appears to exist on the question of legal commentators since those proposals in the mid-to-late-1990s is a single student note.

It is beyond the scope of this article to discuss the First Amendment implications of restrictions on attorney-commentator speech, but it is important to note the special influence that an attorney has when she comments on litigation, which should result in some kind of concomitant responsibilities.

The Forces Behind Selective Coverage

So how is it that publicity becomes pervasive in one case and not another? In some situations, where someone involved in the case — such as the offender and/or the complaining witness — are already famous, the answer seems obvious. Examples include the many criminal cases against Lindsay Lohan,[98] or numerous cases both before and after the death of Michael Jackson,[99] of which the criminal case against his physician is the latest example.[100] But other cases take on lives of their own, like that of my former client, Casey Anthony,[101] or the notorious Susan Smith.[102]

There is no question that when publicity is present, there is what is colloquially referred to as “heat” on the case,[103] which makes the case much more challenging for all

90. Id. at 692.
91. Id. at 695.
92. Id. at 696.
93. Id. at 698.
94. Id. at 718.
103. See, e.g., Mantra Public Relations, Connie Francis, Mantra Public Relations Case Studies (n.d. [2002]).
concerned. If, for example, the prosecution comes to believe that a reduction in charges or a dismissal is appropriate, it is harder to take that action in the glare of the media. It is also very difficult for a judge — particularly a judge who runs for election — to remain impervious to the public scrutiny. As one of my clients once told me, "A judge don't get in no trouble for locking up somebody, but he sure get in trouble for letting him go." In other words, it is much "safer" politically to accede to the prosecution's requests and look "tough on crime." Indeed, there have been many unfortunate examples of the role that criminal cases can take in judicial campaigns. 104 From the defense perspective, the addition of publicity often makes a trial more of an uphill battle. It requires far more extensive jury selection procedures, 105 risks juror misconduct 106 and makes getting rulings favorable to the defense more difficult. 107

A Survey of Judges

In order to find out what journalists and judges think about issues of media in criminal cases, I sought to survey both of these groups. While my efforts to learn the journalists' perspectives were somewhat thwarted, 108 I was able to survey a sufficient number of judges to make some observations. 109 This section will discuss what are tentatively the "results" of

http://www.mantrapublicrelations.com/publicity_case_studies.html#02_c_frankis (visited Oct. 10, 2011) (describing the PR firm's planned efforts to garner media attention to a breach of contract lawsuit brought by singer Connie Francis against Universal Music as an effort "to heat things up again prior to the case being presented to a jury."). The case, Franconero v. UMG Recordings, Inc., No. 02-CV-01963 (S.D.N.Y. filed Mar. 11, 2002), is still pending.


108. I sent the survey to the offices of three national journalists' associations, one Chicago journalists' association and dozens of journalists directly, but received very few responses. Unlike judges, journalists do not necessarily have a moral stake in the integrity of the judicial system — their interest is in bringing information to the public, and, many media critics would argue, to attract readers and/or viewers.

It may also be that any journalist who receives a survey about the journalist's coverage of legal proceedings from a criminal defense attorney might assume that the study will be overly critical, and perhaps unfairly biased. This assumption is not irrational on some level. In a way, journalists and defense lawyers are often adversaries. The criminal defense lawyer is constantly fighting a negative portrayal of her client in the media, thus giving rise to a tense battle outside the courtroom during a high-profile case.

109. I sent a survey to several hundred judges who are members of the American Judges Association. Most of the questions dealt with legal ethics and judicial concerns about the Internet. I received 52 responses, and was able to conduct phone interviews with a couple of participants. All participants had the option to participate in an interview.
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the judicial survey, but will not attempt to make scientific or statistically significant findings. Instead, the surveys serve an anecdotal function and allow a mere glimpse into the opinions of people who work in the legal field.

The survey responses showed generally consistent views among judges about the media and the courts. About half of the judges responded that they read legal blogs generally, while 75 percent said they do not read blogs covering specific cases. Nearly 70 percent stated that it is "never" appropriate to read a blog about a case over which they are presiding. Almost 90 percent of the judges disagreed with the statement that the Internet has rendered change of venue a useless remedy. On the other hand, almost 75 percent of the judges felt that imposing regulation on legal commentary and media coverage of high-profile cases would abridge First Amendment freedoms and/or have a chilling effect on journalism.

**Policy Implications and Proposals for Reform**

If not change of venue, and if not regulation, what is the solution to this issue of media influence in criminal cases?

And what can we do about the segment of the media industry that turns the criminal justice system into entertainment? About the sea of talking heads that churn ratings at the expense of judicial integrity?

Below I have set forth several proposals that would balance the media's access and coverage of courtroom proceedings with the need for integrity in those proceedings.

**Ongoing Voir Dire**

In some high profile cases, judges have sequestered the jury, thus making it impossible—or at least far less likely—that the jury will do its own research, or be tainted by media coverage and other outside influences. This is a very expensive proposition, however, and simply isn’t practical in every case.111

We need universal recognition that there should be quality, complete and preferably attorney-conducted voir dire pre-trial. Going further, judges should conduct ongoing voir dire throughout especially high profile trials. Each juror could be told at the beginning of the trial that the attorneys and/or the judge are going to periodically ask them questions about how things are going throughout the trial. Then, during the trial, each juror could be brought into chambers, individually, and asked about how things are going, how they have avoided media coverage of the case, and reminded that they can’t talk to anyone about the case. This process might even prevent people from doing their own Internet investigation by communicating the judicial stance that such conduct is inappropriate and intolerable. Reminding jurors of their duty in this direct conversational way could be enough to ensure that they take the court’s instructions seriously.


112. Studies have shown that jurors are more likely to be comfortable and provide honest answers when counsel, rather than judges, do the questioning. See Susan E. Jones, Judge-Versus Attorney-Conducted Voir Dire, 2 L. & Human Behavior 131 (1967).
Updating Jury Instructions

We should adapt jury instructions to reflect the realities of individual research and the “Googling” curiosity that plagues potential jury pools. A user-friendly jury instruction to address this issue might be:

In today’s electronic world, it is natural that you would want to do your own research on a case that you hear about. Typically, that’s perfectly acceptable. However, when you’re a juror, you cannot conduct any outside research, such as “Googling” the case. There are reasons why. There is certain evidence that I have ruled you should hear, but if you do outside research, then the integrity of the trial is compromised as you may be exposed to so-called “facts” that cannot be proven, that are rumor or conjecture, or that are otherwise too unreliable for a court of law. As a juror, you have to break your normal habits. You cannot do these things in court. If there’s something that’s confusing you, however, you can send a note to me (the judge) during trial.113

This type of instruction acknowledges the realities of the information-saturated world that we live in and reminds jurors that these realities must be suspended during their service. Perhaps this kind of frank discussion with jurors will lead them to be more critical of cases in the media in the future, as well.

Removing the Media’s Access to Discovery

Another possible reform would be to restrict anything released in discovery strictly to the parties. Simply because something is present in discovery materials does not mean it is intended, or allowed, for use at trial. However, many states do not keep discovery sealed. In Florida, for example, the state’s “Sunshine Laws” allow for inspection and in some cases copying of government and public records.114 In some situations, this means that the news media can access important and sensitive discovery materials through the use of these laws. Once this information gets out in the news and social media, it essentially becomes evidence in the minds of the potential jury pool, before jury selection has even begun. While open government laws are noble and useful tools for the general public, some thoughtful restrictions would do a lot to protect the accused’s right to a fair trial.

Holding the Media Accountable

There must be recognition in the legal community of the news media’s ability to turn serious criminal cases into spectacles. Mainstream media outlets such as CNN, Fox News and MSNBC may be so focused on what “sells” that they often fail to see the ramifications of their troublesome commentary.

Headline News commentator Nancy Grace is a striking example of the damage that the media can inflict. In 2006, Grace interviewed Melinda Duckett, the mother 2-year-old Trenton Duckett who had gone missing two weeks before. Within 24 hours after the Grace’s grueling and highly accusatory interview, Duckett shot herself in the head.115 Despite suspicion that the interview contributed to the suicide,116 CNN still chose to air the

113. For an examination of various states’ and proposed jury instructions on this issue, see Eric P. Robinson, Jury Instructions for the Modern Age, 1 REYNOLDS CTS. & MEDIA L. J. 307 (2011).
114. FLA. STAT. § 119.01 (2005).
116. See, e.g., Sam Knight, CNN Guest Kills Herself After Gruesome Questions, THE TIMES (LONDON), Sept. 14, 2006, http://www.timesonline.co.uk/tol/news/world/us_and_americas/article638867.ece. See also Nancy Grace Says ‘Guilty’ Likely Made Mother Commit Suicide, ABC GOOD MORNING AMERICA,
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pre-recorded interview.117 Duckett's family filed a wrongful death suit against Grace and the network,118 but such after-the-fact judicial remedies are not enough, something more preventative is necessary.

Duckett's story is only one tragic example of prioritizing profits over the damage of sensational legal commentary. To effectively implement reforms, the media must take responsibility when its profit-driven coverage takes a human toll. We in the legal community have the power to hold such irresponsible media responsible — not through wrongful death lawsuits, but through policies that prevent these kinds of things from happening in the first place. As advocates, we must lobby the legislatures, the Federal Communications Commission, and the public to take a stand against news media that choose ratings and profits over humanity.

CONCLUSION

In the age of Facebook, Twitter and Google-turned-colloquial-verb, there is little room to dispute that news and Internet media can influence judicial proceedings. Particularly in criminal cases, where the accused has the most at stake — his personal liberty and potentially his life — yet has little to no control over the media representation of his case, the consequences can be severe, even fatal. It is therefore incumbent on all legal professionals to work towards remedying the effects of that media can have on the accused's constitutional rights. Discourse about the problem must continue. More importantly, the struggle to reach a solution is imperative to the future of our criminal justice system.

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