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LEAKS, GAGS AND SHIELDS: TAKING RESPONSIBILITY

Gerald F. Uelmen*

I. INTRODUCTION

Discussions of the impact of publicity upon trials usually begin with an analysis of *rights*. The defendant has a right to a fair trial. The lawyer has a right to speak. The public has a right to know. As Newton Minow suggests in his keynote address, however, the fact that we have a right to do something does not mean it is the right thing to do. In exploring the *ethical* dimensions of trial publicity, I would like to focus on the concept of *responsibility*, rather than rights. How do we get the participants in a trial to accept responsibility for what they say to the media? How do we get the media to accept responsibility for what they report? My experience in high profile trials suggests that much of what the participants say and the media report is simply irresponsible. They act irresponsibly because the system frequently rewards their irresponsibility with high ratings or increased circulation, and rarely imposes costs or consequences upon it.

The ideal of fairness that drives our adversary system of justice assumes that a verdict must be based upon evidence that is admissible in a court of law.¹ The facts should be de-

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1. See *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (determining that defendant has right to verdict based solely on evidence and relevant law); *Estes v. Texas*, 381 U.S. 532, 549 (1965) (explaining that defendant is entitled to "his day in court, not in a stadium, or a city, or nationwide arena"); *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (deciding that verdict must be based solely on evidence developed at trial, "regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies"); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (determining that verdict in case is to be "induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print").

cided by a jury sworn to put aside any bias or prejudice, to consider only the admissible evidence, and to ignore the pressures of public opinion. But it has never been assumed that we can maintain our courts as air-sealed vacuums that will never be contaminated by public opinion.

The traditional safeguards we have relied upon to insure the ability of jurors to put aside bias or prejudice are *voir dire* questioning (to inspect the "baggage" jurors bring with them), challenges for cause (to remove jurors who are biased), changes of venue (to move the location of the trial) and sequestration (to insulate jurors from pervasive publicity). Contrary to popular impressions, these tools are not designed to supply us with jurors who are completely ignorant of a high profile case, but rather to assist us in finding jurors who remain skeptical, who are truly willing to suspend judgment until they have evaluated the evidence. Rather than enhancing these traditional safeguards to make them more effective, however, the modern trend is to devalue and dismantle them, on the grounds they consume too much time, are too expensive, or are too invasive and burdensome for jurors.²

Instead, we have focused our attention upon a largely futile effort to control the flow of information to the media. Rules have been formulated to prevent lawyers from commenting upon pending cases.³ Laws have been enacted to punish witnesses who sell their stories.⁴ Judges have formulated gag orders to silence trial participants, and occasionally have held reporters in contempt for refusing to identify their sources.⁵ Rather than suppress the barrage of publicity surrounding high profile cases, however, these efforts more often

2. STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* (1994); Albert W. Alschuler, *Our Faltering Jury, in* POSTMORTEM, THE O.J. SIMPSON CASE (Jeffrey Abramson ed., 1996); GEORGE P. FLETCHER, *WITH JUSTICE FOR SOME* (1995); HAROLD J. ROTHWAX, *GUILTY* (1996).

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

4. CAL. PENAL CODE § 132.5 (West 1995).

5. *In re Beth Willon*, 55 Cal. Rptr. 2d 245 (1996) (reversing trial court's judgment of contempt of television reporter and news director for refusing to furnish identity of person who provided information in violation of protective order); *Rosato v. Superior Court*, 124 Cal. Rptr. 427 (1975) (reversing in part trial court's judgment of contempt and remanding in part for newsmen's refusal to answer questions during court proceedings relating to possible violation of protective and seal orders); *Farr v. Superior Court*, 99 Cal. Rptr. 342 (1971) (finding newspaper reporter in contempt for refusing to provide names of persons who furnished him with copies of statement disclosing that the defendants planned other murders). In *Willon*, the *Farr* rationale was distinguished and

spur the media to a relentless pursuit of even more questionable sources of information.

The greatest danger to our ideal of fair trials has now become the nameless and faceless leaker of information whom we see quoted as "a source close to the investigation" or "a knowledgeable member of the defense team." Rather than seeking to suppress identifiable sources of information, our goal should be to encourage the flow of information to the public that is attributed to an identified source, who takes public responsibility for its accuracy and appropriateness. The public, including potential jurors, will then be better equipped to critically evaluate the information, and assess its reliability and credibility.

The approach currently utilized by our courts frequently diminishes the flow of information attributed to identified sources, and increases the flow of information coming from unidentified leaks. Current "shield laws" encourage the leaking of information by protecting the leaker from any consequences for his breach of confidentiality, and place no responsibility on reporters for lack of restraint in promising confidentiality to their sources. Somehow the irony has escaped us, that we encourage irresponsible breaches of confidentiality by guaranteeing to violators that we will protect the confidentiality of their breach! Those who have no respect for confidentiality that protects others are rewarded by our guarantee of absolute confidentiality for their treachery.

It is possible to identify the kinds of information that actually present a clear and present danger to the fairness of trials if prematurely released. This information will fall into very narrow categories of highly probative evidence that may be excluded at trial. Courts can and should issue protective orders to preserve the confidentiality of such information. Once protective orders are issued, courts should rigorously enforce them. Trial participants should be severely disciplined for unauthorized leaks of information included in protective orders. Courts can and should employ the contempt power to punish those responsible for the publication of such information, and shield laws should not protect the identity of those who leak it.

held to be inapplicable to cases decided after the shield law was incorporated into the state Constitution via the passing of Proposition 5 in 1980.

It is unrealistic, however, to attempt to purge trials of any trace of external publicity. The advocacy of lawyers and other trial participants cannot be confined to the courtroom. An objective of complete separation of a court of law from the court of public opinion is unattainable, and we should readily admit that it cannot be achieved. The level of public interest in high profile trials simply cannot be controlled, and the media will inevitably respond with whatever information is available. We cannot begin to fathom all the subtle ways in which public opinion seeps into a courtroom and affects the attitudes of every participant in a trial. The traditional tools of *voir dire*, challenges for cause, changes of venue and sequestration deserve greater respect and attention as our best safeguard against media intrusion. Acceptance of this reality, however, does not mean that we cannot achieve a more modest goal of delaying public disclosure of truly critical information until its admissibility has been determined in the courtroom.

The public is more sophisticated and discerning in sorting out the available information than we generally give it credit for.⁶ It will usually be aided in that process by identification of the source of the information it is receiving. The message we should send to trial participants is not to be silent. The lawyers or police officers or victims standing on the courthouse steps in front of television cameras are not the gravest danger to our ideal of fair trials. The gravest danger is the faceless and nameless "leak." The message we need to deliver to trial participants is to stand up and take responsibility for public statements. The message we should send to the media is not to report less. It is to report responsibly, to resort to unidentified sources only when the information being reported is not protected by a court order and the source is lawfully entitled to release the information. And the

6. See Susan Walton, *Puzzling Evidence*, PSYCHOL. TODAY, Aug. 1987, at 10; Robert E. Drechsel, *An Alternative View of Media-Judiciary Relations: What the Non-legal Evidence Suggests About the Fair Trial-Free Press Issue*, 18 HOFSTRA L. REV. 1 (1989); Rita J. Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977). A recent Louis Harris poll for the Center for Media and Public Affairs disclosed a high level of public skepticism about news reports: 44% of respondents said the news media are "often inaccurate," and only one in three thought the "media deal fairly with all sides." SAN JOSE MERCURY NEWS, Dec. 14, 1996, at 12A [hereinafter November 1996 Poll].
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message we should send to our courts is to deploy traditional tools more effectively to insulate the finders of fact from external influences.

II. THE TRADITIONAL GOAL AND THE MODERN REALITY

The traditional goal that emerges from the official studies and reports addressing free press and fair trials⁷ is to announce the arrest in a high profile case much like the arrangements for a prize fight, with the public being exhorted to "stay tuned." "Full details will be divulged when the case comes to trial in two years." The police should refer all questions to the prosecutors, and the prosecutors and defense lawyers should simply respond, "no comment" when called by the press. When jurors are summoned, they will have little knowledge of the case. If any information has seeped through, the juror will be politely excused.

Was it ever like this? Many blame the pervasive presence of television cameras for the current problems of pretrial publicity, but high profile trials attracted enormous public attention long before television, and excesses of zealous reporting appear to have been the norm, rather than the exception.

Two months after Lizzie Borden was arrested for the murder of her father and step-mother in Fall River, Massachusetts in 1892, the Boston Globe ran a front page story claiming to summarize the testimony of twenty-five new witnesses who were available to link Ms. Borden to the crime.⁸ The story included an allegation that Lizzie was pregnant, and had argued with her father over the identity of her lover.⁹ "Affidavits" from these alleged witnesses had been leaked by a private detective assisting the Fall River police, apparently upon the payment of \$500 cash.¹⁰ The circulation of the newspaper soared. A follow-up story boasting of their journalistic coup was headlined: **"ASTOUNDED. All New England Read Story. Globes Were Bought By Thousands. Lizzie Borden Appears in New Light. Be-**

7. See, e.g., PAUL C. REARDON & DAVID L. SHAPIRO, *FAIR TRIAL AND FREE PRESS*, A.B.A. PROJECT ON MINIMUM STANDARDS FOR CRIM. JUST. 1-36 (1968).

8. FRANK SPIERING, *LIZZIE 99* (1984). See also EDMUND PEARSON, *TRIAL OF LIZZIE BORDEN* (Notable Trials Library 1989) (1937) (providing in-depth analysis of Lizzie Borden's trial).

9. SPIERING, *supra* note 8, at 99.

10. *Id.*

lief in Her Innocence Sadly Shaken. Excitement Runs High in Fall River. Police Think the Scoop is a Corker.”¹¹

When most of the affidavits were exposed as fabrications, the *Globe* published an apology.¹² The young reporter who wrote the story was indicted for tampering with witnesses and fled to Canada, where he died in an apparent suicide under the wheels of a train.¹³ The jury that was impaneled eight months later acquitted Lizzie Borden.¹⁴

In 1907, the trial of Harry Thaw for the murder of New York architect Stanford White provided a salacious menu of sexual escapades, as Thaw publicly proclaimed that White “ruined” his show-girl wife.¹⁵ The graphic reports of titillating testimony that filled American newspapers led President Theodore Roosevelt to demand that newspapers detailing “the full disgusting particulars of the case” should be banned from the U.S. mail.¹⁶ The defendant’s wealthy mother hired press agents to plant stories sympathetic to his cause, and even financed the production of a play dramatizing the events leading up to the murder with a slant favorable to her son’s cause.¹⁷ The *New York Evening Journal* elicited reader’s letters on the question, “Was Thaw Justified in Killing Stanford White?”¹⁸ The newspaper ran a daily tabulation, which finally totaled 2,054 Guilty, 5,119 Not Guilty.¹⁹ The jurors that ultimately acquitted Thaw on grounds of insanity received so much hate mail they formed a mutual protection society.

When the trial of Bruno Richard Hauptmann for the kidnap and murder of the infant son of Charles Lindbergh began in 1934, seven hundred reporters, photographers and commentators converged on a tiny New Jersey courtroom.²⁰ Although the judge banned cameras from the court, a clan-

11. *Id.*

12. *Id.* at 101.

13. *Id.* at 103.

14. *Id.* at 102-03, 175.

15. GERALD LANGFORD, *THE MURDER OF STANFORD WHITE* 19 (Notable Trials Library 1996) (1962).

16. *Id.* at 39.

17. *Id.* at 49-50.

18. *Id.* at 49.

19. *Id.*

20. David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 *REV. LITIG.* 627, 627 (1995).

destine newsreel camera was concealed behind a fan in the courtroom to capture footage for newsreels.²¹ Lawyers subpoenaed celebrity friends so they could get a seat in the courtroom.²² The prosecutor held daily press conferences, and announced at one that he would “wrap the kidnap ladder right around Hauptmann’s neck.”²³ He was said to have an uncanny knack of playing to the hidden newsreel camera.²⁴ The defense lawyer countered with press announcements that key evidence had been planted, and had business cards printed up with an embossed depiction of the kidnap ladder and a notation that he was “Chief Counsel, The Lindbergh-Hauptmann Trial.”²⁵ He defended his actions by saying, “[p]ublicity in cases of this kind is essential, especially in view of the vast amounts of publicity which issued from the prosecutor’s office from the moment this defendant was arrested.”²⁶ His words have a familiar ring!

All of these trials, and scores of other “high profile” trials in American history, were followed by the same sort of sanctimonious editorializing we have seen in the wake of the O.J. Simpson trial: the lawyers were castigated for turning the case into a “circus,” and the media was castigated for pandering to the public appetite for sensationalism. But the “traditional view” that lawyers should confine their advocacy to the courtroom seems to have very little American reality to back it up. The prevailing modern view seems to recognize that the public’s intense interest in high profile trials should be served, even if public opinion finds a way of seeping into the courtroom. The lawyer who ignores public opinion or disdains the opportunity to influence or shape it does so at the peril of his client. The courts already have available the tools they need to insulate courtroom proceedings from prejudicial publicity. Jurors are just as capable today as jurors in the past have been to separate the media spin from the evidence in court.

21. *Id.*

22. *Id.* at 628.

23. *Id.* at 630.

24. *Id.*

25. *Id.*

26. Anderson, *supra* note 20, at 630.

III. WHY DO TRIAL PARTICIPANTS SEEK TO INFLUENCE PUBLIC OPINION?

Trial participants who speak for public consumption do so for a variety of reasons. Identifying those reasons will assist in assessing the value of public attribution of their statements. Start with the police conducting an investigation. They are ordinarily the first source of information about a pending case. What motivates them in deciding what information to provide to the media? First, they may want to reassure a nervous populace that a culprit has been identified or apprehended, to relieve community tension. While expressions of confidence they have the right person may be inconsistent with a presumption of innocence, prospective jurors are fully capable of understanding that police confidence in the guilt of an arrested person is not itself persuasive evidence of guilt. Second, police may want to enlist public assistance in ongoing investigative efforts to locate victims, witnesses or evidence. Third, they may want to influence public opinion about their own competence, to increase public confidence they are doing a good job. Fourth, they may want to enhance the prospect of a successful prosecution, by increasing public confidence in a suspect's guilt. Finally, they may be advancing some personal agenda by earning or returning media favor.

Prosecutors may share any and all of the motives of the police. Public apprehension may find greater relief with an announcement charges have been filed, than with a police announcement of an arrest. The need for public assistance may not end when the prosecution commences. Public confidence one is doing a good job becomes especially important to one whose office is elective. The enhancement of prospects for ultimate conviction may also become a more powerful motivator, since the prosecutor will be personally identified with the win or loss. And prosecutors will have personal agendas to earn or return media favor too. A high profile case may be a stepping stone to a judgeship, another elective office, or even a media career.

In addition to the motives they share with police, prosecutors may have tactical motives for releasing information that they believe will influence the way the case is handled by others. Their real purpose may not be to inform the public, but to convey a message to the judge, or to opposing counsel.

They may also be trying to increase the odds that questionable evidence will be admitted by the judge at trial. A trial judge is well aware that a claim that the defendant was prejudiced by the release of evidence prior to trial will be rendered "harmless error" if the evidence is later admitted.²⁷ The admissibility of evidence at trial is frequently a close question left to the discretion of the trial judge. Prosecutors know that the trial judge's eagerness to compile a trial record inviting affirmance by a higher court may push the judge in the direction of admitting evidence that was released prior to trial, to foreclose any claim that the pretrial release prejudiced the defendant.

Defense lawyers who are representing a client may believe that a variety of the interests of the client will be served by the public release of information. First, of course, they may want to enhance the prospects of a favorable disposition of the case, by creating public sympathy for their client or doubts about the prosecution's case. The opportunity to create sympathy for the defendant may be greater than the opportunity presented at the trial itself, since offering "good character" evidence at trial opens the door for the prosecution to offer evidence of "bad character."²⁸

The planting of doubts involves very traditional tools of advocacy. If a reporter calls and asks for a comment on a story that new evidence of your client's guilt has been exposed, the defense lawyer will want the story to include the reasons the evidence might be mistrusted, such as the bias of a witness or the possibility of a mistake. A revelation of damning evidence accompanied by the observation that the defendant's lawyer had "no comment" will simply enhance the credibility of the story. Second, the defense lawyer may

27. During the 1980s, there were at least 3100 claims by criminal defendants that pretrial publicity had prejudiced their right to a fair trial. Newton N. Minow & Fred H. Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. REV. 631, 636 (1991). Most of these claims were rejected, frequently on the grounds that the publicity was rendered harmless by subsequent admission of the same information as evidence at trial. The number of cases where a claim of prejudicial publicity led to a reversal of a conviction was never very high, and in recent years has sharply declined.

28. See, e.g., FED. R. EVID. 404(a)(1) (permitting prosecutor to rebut evidence of character offered by the accused). Character witnesses offered by an accused can also be cross-examined as to whether they "had heard" about specific acts of misconduct by the accused. *Michelson v. United States*, 335 U.S. 469, 477 (1948).

share a client's concern for his reputation or public image apart from the pending charges. A client who is never prosecuted, or who is prosecuted and acquitted, may have been ill-served by a lawyer who allowed public speculation about his guilt to go unchallenged. Security guard Richard Jewell, for example, was subjected to intensive media speculation regarding F.B.I. suspicions of his involvement in the bombing at Atlanta's Centennial Park during last Summer's Olympic Games.²⁹ Third, defense lawyers may want to send public messages to the police, the prosecutors, witnesses or the judge for some tactical reason.

Occasionally, defense lawyers are pursuing the public agenda of some organization other than their client. The role of the Communist Party in the defense of the Scottsboro Boys comes to mind.³⁰ And, of course, defense lawyers are certainly motivated by personal agendas, such as self aggrandizement. Not only is free advertising hard to resist, there may be a book deal or a screen play waiting in the wings, or even a new career as a television commentator. Most rarely of all, a defense lawyer may be financing the case by the sale of information. Such an arrangement creates a serious conflict of interest, but one that some courts have permitted the client to waive.³¹

While lawyers rarely welcome the defendant himself as a public spokesperson, the phenomenon of celebrity defendants

29. NBC announced a settlement for an undisclosed amount of a lawsuit brought by Richard Jewell following a national newscast in which Tom Brokaw speculated, "[t]hey probably have enough to arrest him right now, probably enough to prosecute him. But you always want to have enough to convict him as well." SAN JOSE MERCURY NEWS, Dec. 16, 1996, at 7C. The NBC statement on the settlement cited protection of its unnamed sources as "a major consideration." *Id.*

30. Gerald F. Uelmen, 2001, *A Train Ride: A Guided Tour of the Sixth Amendment Right to Counsel*, LAW & CONTEMP. PROBS., Winter 1995, at 13, 16. See DAN T. CARTER, SCOTTSBORO: A TRAGEDY OF THE AMERICAN SOUTH (1969) (providing a full account of the struggle between the NAACP and the International Labor Defense to control the defense case).

31. John Gibeaut, *Defend and Tell*, A.B.A. J., Dec. 1996 at 64. See Maxwell v. Superior Court, 30 Cal. 3d 606 (1982) (upholding waiver of a conflict of interest created by giving a defense lawyer media rights); Beets v. Scott, 65 F.3d 1258 (5th Cir. 1995) (upholding waiver of a conflict of interest created by giving a defense lawyer media rights). See also Gerald F. Uelmen, *Conflicts and Criminal Malpractice: The Titanic Cases*, CAL. ST. B.J., Dec. 1979 at 504 (examining defendant's waiver of a conflict of interest created by granting attorney exclusive literary and dramatic property rights to the defendant's life story in return for legal representation).

or corporate defendants hiring a public relations consultant to handle trial publicity is not unheard of. Their motive is rarely ambiguous. Investments of millions of dollars may depend upon "damage control." Consider, for example, the costly impact upon the career of rock star Michael Jackson posed by child molestation charges. While charges were never filed, confidential investigative reports were leaked to the media.³²

The O.J. Simpson trials brought to the limelight dozens of other trial participants with their own motives to influence public opinion. Family members of the defendant stepped forward to defend his character from personal attack, while family members of the victims were anxious to rebut any public disparagement of their loved ones. The "victim's rights" movement has done much to transform our concept of public justice into a system of private retribution, and we should not have any illusions that the voice given to previously voiceless victims will only be heard in the courtroom. The media have discovered that victims and their families are a compelling presence in trial coverage. Even witnesses may be motivated to capitalize on their new-found celebrity. The payment of cash to witnesses for exclusive rights to their "stories" has become a common practice of the tabloid media.³³ While the receipt of such payments has now been made criminal in California, there are reasons to doubt the enforceability of this prohibition.³⁴ In any event, the siren's song of instant celebrity may be a more powerful inducement to some witnesses than cash, especially if they see some way to convert their celebrity to cash later.

When we sort through the myriad of motives that lead police, prosecutors, defense lawyers, defendants, victims and witnesses to become news sources, we can readily distinguish those objectives which are served by speaking for attribution, from those which are served by surreptitious leaks. The appropriate goals of assuaging public fears or enlisting public

32. See *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284 (1996).

33. Tabloid newspapers and television programs made cash payments to potential witnesses in the recent trials of O.J. Simpson, William Kennedy Smith, Pamela Smart, Jim Bakker and Amy Fisher, as well as the Michael Jackson investigation. See Scott C. Pugh, *Checkbook Journalism, Free Speech, and Fair Trials*, 143 U. Pa. L. Rev. 1739 (1995).

34. *Id.*; Gerald F. Uelman, *O.J. Court Pundits Beware*, CAL. CRIM. DEF. PRACT. RPTR., Feb. 1995, at 53.

assistance or projecting an image of competence will best be served by public announcements from a readily identifiable spokesperson. The questionable goal of enhancing the prospects for conviction or acquittal may be better served by leaks. The sleazy process of currying media favor will usually be better served by leaks, since giving anyone an "exclusive" in a statement for public attribution usually makes more enemies than friends. A well-placed leak makes a friend and leaves potential enemies not knowing whom to hate.

Criminal defense lawyers sometimes have to contend with a "sleaze" factor that police and prosecutors do not ordinarily face. Information from an unidentified source may sometimes have *greater* credibility than a public announcement from a criminal defense lawyer. The presumptions that apply to police and prosecutors might even be reversed for defense lawyers. The personal agendas are achieved by public statements, while the goal of undermining public confidence in a client's guilt, or preserving his reputation, are often effectively served by leaks. This offers no justification for leaking, however. It merely magnifies the harm the leak imposes by depriving the public of the means to assess the credibility of information. Lawyers remain advocates for their clients in the "court" of public opinion, and it is appropriate that the public take their advocacy role into account in assessing the credibility of their statements.

From an ethical perspective, it is hard to imagine a scenario in which the use of surreptitious leaks by a lawyer directly involved in a case can be justified. A defense lawyer may argue that his or her chief obligation is to advance the cause of the client, and the choice of whether to issue a statement for public attribution or to leak information to the press is simply a tactical choice driven by whichever better serves the interests of the client. But the defense lawyer's advocacy has always been limited by the constraints of what the law allows. The law certainly does not allow the surreptitious leaking of information that presents a clear and present danger to the fairness of the trial, nor does it permit leaking of information included in a protective order issued by a court.

While the law does allow a lawyer to be an advocate for his client in the public forum, there should be no hesitation to say that an advocate must "enter an appearance" in the court of public opinion, just as he must enter an appearance in

court. If we are going to recognize the right of a lawyer to enter the arena of public opinion on behalf of a client, why should we hesitate to demand that he identify himself as the source of information, so the public can accurately assess his credibility? The exceptional circumstances where public advocacy is permitted but the client's interest might be better served by anonymity do not justify vesting lawyers with discretion to speak anonymously that more frequently will be exercised to serve their own interests. For prosecutors, whose only appropriate justification for leaking can be the public interest, the balance is easier to cast: the public interest will always be better served by identification of the source of information.

It would be naiveté of the highest order to suggest that opening the door to public statements by trial participants will close the door to surreptitious leaking. Even when trial participants feel perfectly free to speak for attribution, they will have reasons to prefer to remain anonymous. The reasons to remain anonymous, however, will rarely be reasons that serve the public interest or the cause of justice. From an ethical perspective, attribution should be preferred, since it gives the public vital information necessary to evaluate the weight to be given the information. Concealing the identity of the source conceals the motives and agendas for its release. Those motives and agendas relate directly to credibility.

Too often, the choice of attribution or anonymity is left completely to the source. Few journalists apparently ponder the ethical consequences of that choice, or approach it from any perspective other than how best to get someone to "open up." The new Code of Ethics of the Society of Professional Journalists invites journalists to approach the choice of attribution or anonymity from an ethical perspective:

Identify sources whenever feasible. The public is entitled to as much information as possible on sources' reliability.

Always question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises.

.....

Avoid undercover or other surreptitious methods of gathering information except when traditional open methods

will not yield information vital to the public. Use of such methods should be explained as part of the story.³⁵

IV. IS RESPONSIBLE JOURNALISM AN OXYMORON?

Journalists are known to occasionally laugh at the concept of "legal ethics" as an oxymoron. It seems fair to ask whether "responsible journalism" is also an inherent contradiction. The real problem in defining a code of ethics to govern journalists is that there is no longer any agreement upon who is a "journalist," if there ever was. In 1926, when *Sigma Delta Chi*, the "Society of Professional Journalists," first promulgated a Code of Ethics, journalists were generally thought of as newspaper reporters. While ferreting out news stories was a highly competitive enterprise back then, newspaper reporters knew who their competitors were. They were the reporters who worked for other newspapers.

Today, consider all the sources of information about a pending trial. Most Americans rely for most of their news upon television news shows.³⁶ A debate continues to rage among journalists whether television news is a venture in journalism, or simply public entertainment. The print media divide themselves between "legitimate" press and the "tabloid" press. What distinguishes the tabloids is not just their means of gathering stories (they pay cash), but the nature of the stories that interest them. For them, "public interest" and "prurient interest" mean the same thing. Now the "tabloid" television shows have created a similar division between "legitimate" television news reporters and shows such as "Hard Copy" and "A Current Affair." And then what do you do with the "talk shows?" The outrageous is highly valued

35. SOC'Y OF PROF. JOURNALISTS, CODE OF ETHICS (DOCUMENT NO. 403) 1 (Soc'y of Prof. Journalists, Greencastle, Ind. Sept. 21, 1996) (the document will be faxed on demand).

36. A Louis Harris poll conducted from November 8 to 30, 1996 for the Center for Media and Public Affairs asked 3,004 adults what their most important news source was, with the following results:

Local T.V. News	34%
Network T.V. Newscasts	17%
CNN	10%
Local Newspapers	15%
Radio	8%
Television Morning Shows	3%
Major National Newspapers	3%
November 1996 Poll, <i>supra</i> note 6.	

because it provokes a reaction. Is Rush Limbaugh a journalist? Is Geraldo Rivera?

Today's media markets even include "books" that are produced in less than ten days to exploit high-profile trials and their participants. Ten days does not allow much time to check the accuracy of sources. And then there's the Internet. Instant access to court pleadings and trial transcripts on-line gives everyone the same raw information that the journalists are working from.

The proliferation of the news media creates an enormous vacuum that must be filled. As one astute observer described it:

The networks are scrambling to produce the most profitable electronic news-magazine shows, and to be number one in the early morning. CNN's 24-hour coverage sets the frenzied pace—the insatiable search for guests, and sources and topics to fill air time and column space. That coupled with a dearth of time, staff, expertise and financial resources to do adequate research and verification, make the news and information media particularly susceptible to litigation journalism.³⁷

"Litigation journalism" is a term coined by Carole Gorney to describe the planned use of the news and information media to create a favorable environment for the positions of plaintiffs in civil lawsuits.³⁸ Her restriction of her definition to plaintiffs may reflect her own bias. Insurance Companies are probably the best-financed participants in litigation journalism. The use of media consultants and publicists is much more widespread in the civil litigation context than the criminal, for obvious reasons. Few criminal defendants have the resources to mount a major media campaign. In any event, the reality is that the proliferation of the media has enhanced the power of litigants and lawyers to manipulate the media. Today, there are many fertile fields in which to "plant" a story. Once planted, the competitive frenzy will insure its growth.

Serving the public "what it wants" has become a much more scientific process than it used to be. Newspapers could

37. Carole Gorney, *Model Rules and Litigation Journalism: Enough or Enough Is Enough?*, N.Y. St. B.J., Dec. 1995, at 6, 10.

38. Carole Gorney, *Litigation Journalism is a Scourge*, N.Y. TIMES, Feb. 15, 1993, at A15.

only roughly gage the public interest in a story by measuring their day to day circulation. For television, ratings provide instant gratification. CNN viewership increased 700% during the four days of each week that it covered the Simpson trial,³⁹ while Court TV's ratings were up 1,000% during opening statements in the trial.⁴⁰ These ratings, of course, had much to do with the unprecedented level of media attention the trial received.

It has been suggested that, just as bad money drives out the good, bad journalism drives out the good. Increasing costs and decreasing ratings have reportedly led network news shows to adopt the lower standards of local news programs, which in turn are pressured by the "general Gerardoization" of television programming.⁴¹ Alternative media thrive by exploiting the stories the mainstream media will not touch. Thus, voluntary restraints accepted by newspapers or television news shows may just create more opportunities for the tabloid media to exploit. When they do, the mainstream media feel compelled to at least do a story dumping on the tabloids for their irresponsibility. The tabloid story thus gets bootstrapped into a major media story.

The net result of media proliferation may simply be a declining loss of credibility for *all* media.⁴² Potential jurors may not be as strongly affected by news stories as previously believed. This may simply reflect the fact that Americans do not believe everything they read in newspapers or see on television, at least to the same extent they did in the past. A healthy public skepticism may be our saving grace. More and more jurors may show up at the courthouse who have heard or read about the case they will sit on, but can honestly say they don't really "know" anything about the case, because American media are no longer in the business of conveying knowledge. They are in the business of entertainment, and

39. Brian McGrory, *For Many, Simpson TV Trial is Irresistible*, BOSTON GLOBE, Jan. 28, 1995, at 1.

40. John Strahinich, *Court TV's Rising Star*, BOSTON GLOBE (MAGAZINE), Mar. 19, 1995, at 24.

41. John Leo, *Crime: That's Entertainment*, U.S. NEWS & WORLD REP., Feb. 6, 1989, at 53.

42. Forty-four percent of respondents said the news media are "often inaccurate." November 1996 Poll, *supra* note 6. Journalists were perceived as "more arrogant" than others by 42%, "more cynical" by 31%, "less compassionate" by 33%, and "more biased" by 34%. *Id.*

the public being entertained is smart enough to realize it. This is all the more reason to focus our energy on conveying to the public the information it needs to make a truly informed evaluation of the credibility of news sources, rather than a futile effort to control access to those sources.

The journalist's ethic of protecting confidential sources of information should not be left completely in the hands of each individual journalist to define. Other contexts in which confidentiality is protected by an evidentiary privilege require an express or implied promise of confidentiality to serve some publicly recognized goal. A communication to a priest, a physician or a lawyer would not be legally protected simply because the recipient promised confidentiality, if the confidentiality were not related to the publicly recognized goal of administering spiritual counseling, medical treatment or legal advice. Each of these privileges is also limited by exceptions, such as the one for communications to further a criminal venture.

As with any other professional, journalists should be subjected to limits upon their ability to guarantee confidentiality to news sources. One appropriate limit would be a caveat that sources such as lawyers, witnesses, police and other participants in pending court proceedings cannot be utilized as sources without attribution if doing so violates a valid protective order or a rule of professional conduct of their own profession.

When a valid protective order is breached, the responsibility of the journalist who published the protected information should not be limited to compelled disclosure of the source to be sanctioned. Sanctions should be directly imposed upon the offending news organization as well. In the 1990 prosecution of Panamanian leader Manuel Noriega, the U.S. Bureau of Prisons intercepted and taped confidential telephone conversations between Noriega and his lawyer.⁴³ The tapes were leaked to the Cable News Network.⁴⁴ U.S. District Judge William Hoevler learned of CNN's possession of the tapes, and warned the network that their use would violate a previous protective order issued in the case.⁴⁵ In what

43. Special to the New York Times, *CNN Is Sentenced for Tapes and Makes Public Apology*, N.Y. TIMES, Dec. 20, 1994, at B7.

44. *Id.*

45. *Id.*

can only be described as an egregious example of media irresponsibility, CNN aired segments of the tapes eleven times over two days.⁴⁶ Judge Hoeveler found CNN guilty of criminal contempt of court, and gave it a choice: pay a hefty fine, or make a public apology and be fined far less.⁴⁷ The network opted for broadcasting a public apology.⁴⁸ CNN also was assessed \$85,000 for the government's legal fees.⁴⁹ The identity of the leaker, however, was never disclosed.

V. GAG RULES AND PROTECTIVE ORDERS

"Gag Rules" are rules of professional conduct that attempt to regulate the conduct of lawyers in *all* cases. They are enforced through professional discipline imposed by the State Bar, rather than by individual judges in a particular case. A "Protective Order," also frequently called "gag order," however, is entered in a particular case by a judge to govern the conduct of participants appearing in the case.

The principal "gag rule" governing the conduct of American lawyers is the Model Rule promulgated by the American Bar Association, which has been widely adopted by many State Bar organizations.⁵⁰ The question of the validity of the rule under the First Amendment of the U.S. Constitution came before the United States Supreme Court in 1991, in a case from Las Vegas, Nevada.⁵¹ A lawyer named Dominic Gentile had been retained to represent Grady Sanders, the owner of a vault used to store the drugs and money seized by narcotics officers of the Las Vegas Metropolitan Police Department.⁵² When four kilograms of cocaine and almost \$300,000 in travelers' checks were reported missing from the vault, a grand jury investigation was launched which led to the indictment of Grady Sanders.⁵³ There was great press interest in the case, and law enforcement officials thought it was important to maintain public confidence in the police department by allaying suspicions that police detectives who

46. *Id.*

47. *Id.*

48. *Id.*

49. Special to the New York Times, *supra* note 43, at B7.

50. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

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

52. *Id.* at 1039-40.

53. *Id.* at 1039, 1044.

had unlimited access to the vault were responsible.⁵⁴ During the course of the investigation, the Deputy Police Chief announced that the two detectives who had access to the vault had been “cleared,” and it was leaked to the press that they had passed lie detector tests.⁵⁵ (It later turned out that the lie detector tests had been administered by a man who was arrested for distributing cocaine to an F.B.I. informant.⁵⁶)

After his client was indicted, Dominic Gentile held a press conference.⁵⁷ At the press conference, he charged that the accusations against his client were part of a police cover-up.

When this case goes to trial, and as it develops, you’re going to see that the evidence will prove not only that Grady Sanders is an innocent person and had nothing to do with any of the charges that are being leveled against him, but that the person that was in the most direct position to have stolen the drugs and the money, the American Express Travelers’ checks, is Detective Steve Scholl. There is far more evidence that will establish that Detective Scholl took these drugs and took these American Express Travelers’ checks than any other living human being. And I have to say that I feel that Grady Sanders is being used as a scapegoat to try to cover up for what has to be obvious to people at Las Vegas Metropolitan Police Department and at the District Attorney’s Office.⁵⁸

Dominic Gentile’s prediction turned out to be quite accurate. Grady Sanders was found not guilty by a jury, based on a defense that pinned the blame on police detectives.⁵⁹ Nonetheless, Gentile was brought before the State Bar of Nevada on charges that he violated a rule based on the American Bar Association’s Model Rules of Professional Conduct.⁶⁰ That rule prohibited lawyers from making any statements to the press “if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”⁶¹ The only thing the rule permitted

54. *Id.* at 1040-41.

55. *Id.*

56. *Id.* at 1041.

57. *Gentile*, 501 U.S. at 1030.

58. *Id.* app. A at 1059 (quoting petitioner’s opening remarks at the February 5, 1988 press conference).

59. *Id.* at 1047-48.

60. NEV. SUP. CT. R. 177.

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

a lawyer to state was "the general nature of the claim or defense," without elaboration.⁶² The State Bar concluded that Dominic Gentile had violated this rule, and they reprimanded him.⁶³ Gentile challenged this reprimand before the United States Supreme Court, arguing that his comments at the press conference were protected by the First Amendment guaranty of free speech.⁶⁴ Gentile's case was argued before the Supreme Court by Professor Michael Tigar of the University of Texas,⁶⁵ currently appearing in defense of Terry Nichols in the Oklahoma City bombing case.

The Gentile case split the United States Supreme Court right down the middle.⁶⁶ Chief Justice William Rehnquist articulated the traditional view, noting that lawyers are "officers of the court," and that status provides both an aura of greater credibility and a constitutional basis for greater regulation of their speech.⁶⁷ According to Chief Justice Rehnquist, "[b]ecause lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of the pending proceeding since lawyers' statements are likely to be received as especially authoritative."⁶⁸

The modern view was espoused by Justice Anthony Kennedy, who recognized that a defense lawyer must represent a client in the "court of public opinion" as well as the courtroom.

An attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client. Just as an attorney may recommend a plea bargain or civil settlement to avoid the adverse consequences of a possible loss after trial, so too an attorney may take reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment, especially in the face of a prosecution deemed unjust or commenced with improper motives.⁶⁹

62. *Id.* at 1061.

63. *Id.* at 1033.

64. *Id.* at 1033.

65. *Id.* at 1031.

66. *Id.* at 1031-32.

67. *Gentile*, 501 U.S. at 1071-74.

68. *Id.* at 1074.

69. *Id.* at 1043.

While Chief Justice Rehnquist's views of the appropriate role of defense lawyers won five votes to Justice Kennedy's four, one of Rehnquist's votes "jumped ship" when it came to the question of upholding the reprimand the State Bar dished out to Dominic Gentile.⁷⁰ Justice Sandra Day O'Connor switched sides and gave Kennedy a majority to hold that the Rule itself was unconstitutional, because it was too vague in defining what lawyers could say and couldn't say.⁷¹ Gentile, for example, could have reasonably believed that his press conference was well within the exception permitting a statement about "the general nature of the claim or defense."⁷²

After the *Gentile* case the American Bar Association modified the model rule the court struck down. First, the exception for statements describing the "general nature" of the claim or defense, which the court found unconstitutionally vague, has been changed. The rule now permits only the "claim, offense or defense involved" itself to be identified. Second, a new exception permits a lawyer to respond to protect a client from the undue prejudicial effect of publicity initiated by someone else. The lawyer can release as much information as necessary to "mitigate the recent adverse publicity."⁷³

California had no rule of professional conduct to regulate lawyers' statements before or during a trial until October 1, 1995. Citing what he described as the *Simpson* case "circus," State Senator Quentin L. Kopp of San Francisco sponsored a bill to require the State Bar to adopt a disciplinary rule governing trial publicity by lawyers. The California State Bar reluctantly recommended a rule that would give maximum First Amendment protection for lawyer's statements, by requiring a showing of "clear and present danger" that a lawyer's statement threatened a fair trial before it could be prohibited. The California Supreme Court rejected that recommendation, and instead promulgated the American Bar Association's modified model rule to take effect in California on October 1, 1995. In its entirety, that rule now provides:

- (A) A member who is participating or has participated in the investigation or litigation of a matter shall not make

70. *Id.* at 1081-82.

71. *Id.* at 1082.

72. *Id.*

73. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1994).

an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the member 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 member may state:

- (1) the claim, offense or defense involved, and, except when prohibited by law, the identity of the persons involved;
- (2) the 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 the public interest; and
- (7) in a criminal case, in addition to subparagraphs (1) through (6):
 - (a) the identity, residence, occupation, and family status of the accused;
 - (b) if the accused has not been apprehended, information necessary to aid in apprehension of that person;
 - (c) the fact, time, and place of arrest; and
 - (d) the identity of investigating and arresting officers or agencies and the length of the investigation.

(C) Notwithstanding paragraph (A), a member may make a statement that a reasonable member would believe is required to protect a client from substantial undue prejudicial effect of recent publicity not initiated by the member or the member's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.⁷⁴

The efficacy of this new rule remains to be seen. It has been suggested that the problem of ambiguity that led the Supreme Court to invalidate the previous version of the rule has not been cured.⁷⁵ I believe that even if the new rule had

74. CAL. RULES OF PROFESSIONAL CONDUCT Rule 5-120 (1995).

75. Gabriel G. Gregg, *ABA Rule 3.6 and California Rule 5-120: A Flawed Approach to the Problem of Trial Publicity*, 43 UCLA L. REV. 1321 (1996);

been in effect during the *Simpson* trial, everything that was said by the lawyers would have been protected by the "mitigation" exception which permits lawyers to respond to harmful information released from another source.⁷⁶ The real harm such a vague rule perpetrates, however, is that it compounds the problem of "leaks." Lawyers who lack clear guidance under the rule, rather than take a chance of facing bar discipline, will make their statements to the press as anonymous confidential sources protected by newperson's shield laws, rather than as identifiable persons speaking in public. To that extent, the public is the loser.

Although Judge Ito never imposed a "gag order" in the *Simpson* criminal trial, California trial courts have frequently utilized gag orders to silence trial participants in high profile trials. Often, "leaks" have occurred despite the gag orders. The most celebrated example of this pattern occurred during the trial of Charles Manson for the Tate-LaBianca murders in Los Angeles.⁷⁷ Early in the proceedings, Judge Charles Older entered an order prohibiting any attorney, court employee or witness from releasing for public dissemination the content or nature of any testimony to be given at trial.⁷⁸ A statement obtained from witness Virginia Graham was leaked to William Farr, a reporter for the Los Angeles *Herald Examiner*.⁷⁹ The statement revealed that defendant Susan Atkins had revealed the Manson family plans to travel cross-country by bus, randomly murdering a series of celebrities, including Elizabeth Taylor and Frank Sinatra.⁸⁰ Farr published a story recounting the statement under the headline, "LIZ, SINATRA ON SLAY LIST - TATE WITNESS."⁸¹

The story appeared the day before the witness was called, and much of the statement was excluded from evidence.⁸² Although the jury was sequestered, the judge or-

Christopher A. Brown, *The Worsening Problem of Trial Publicity: Is "New" Model Rule 3.6 Solution or Surrender?*, 29 IND. L. REV. 379 (1995).

76. GERALD F. UELMEN, *LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON* 76 (1996).

77. *Farr v. Superior Court*, 99 Cal. Rptr. 342 (1971). See VINCENT BUGLIOSI (WITH CURT GENTRY), *HELTER SKELTER, THE TRUE STORY OF THE MANSON MURDERS* 373-74, 399, 486-87 (1974).

78. *Farr*, 99 Cal. Rptr. at 344.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

dered that the windows of the bus in which they were transported to and from court be covered so as to avoid jurors seeing the newspaper headline.

At a subsequent hearing, Farr revealed that copies of the Virginia Graham statement had been leaked to him by three different sources, including two of the attorneys of record in the case.⁸³ While he refused to identify the attorneys, he produced a list of six which he said included his two sources: Prosecutors Bugliosi, Kay and Musich, and Defense Attorneys Kanarek, Shinn and Fitzgerald.⁸⁴ Each of the six attorneys was called to the witness stand, and each of the six denied under oath that he was a source of the document.⁸⁵ Farr was jailed for contempt, and eventually released after a reviewing court concluded further incarceration could not be justified by any realistic hope he would identify his source.

After the *Farr* case, California media promoted an initiative measure to incorporate a broad shield law into the California constitution. Adopted as Proposition Five in 1980, it now appears as Article I, Section (2)(b), which provides:

A publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service, or any person who has been so connected or employed, shall not be adjudged in contempt by a judicial, legislative, or administrative body, or any other body having the power to issue subpoenas, for refusing to disclose the source of any information procured while so connected or employed for publication in a newspaper, magazine or other periodical publication, or for refusing to disclose any unpublished information obtained or prepared in gathering, receiving or processing of information for communication to the public.⁸⁶

A subsequent clause extends the same protection to radio and television news reporters, in virtually identical language. The California Supreme Court has ruled that the immunity thus conferred is not absolute: it can be overcome by a defendant who shows a reasonable possibility that the information sought would materially assist his defense.⁸⁷ But where

83. *Id.* at 345.

84. *Farr*, 99 Cal. Rptr. at 345.

85. *Id.*

86. CAL. CONST. art. I, § 2(b) (1995).

87. *Delaney v. Superior Court*, 50 Cal. 3d 785 (1990).

the identity of a source is sought by the court, in order to enforce a protective order by punishing one who has leaked information, the courts have held an even higher standard must be met: the court must determine there is a "substantial probability" of future violations or leaks that will impair the defendant's ability to obtain a fair trial if the source remains unidentified.⁸⁸

The federal courts have frequently upheld broad gag orders, but recent rulings have recognized some limits of overbreadth. In the 1984 prosecution of former F.B.I. Agent Richard Miller for espionage, for example, the U.S. Court of Appeals for the Ninth Circuit ruled that the court "must determine which types of extrajudicial statements pose a serious and imminent threat to the administration of justice" in the case, and then fashion an order specifying the proscribed types of statements.⁸⁹

There is little justification for gag orders that totally restrain lawyers from discussing or arguing a case in public.⁹⁰ Gag orders should limit the dissemination of specific information, the premature release of which would endanger the fairness of the trial. The public is well aware that when lawyers appear on talk shows or hold press conferences, they are still representing the interests of their clients—or at least they should be! For that very reason, public statements of lawyers are given *less* credibility than statements from other sources, and again, they should be. Chief Justice Rehnquist was simply wrong when he asserted, in his *Gentile* opinion, that the public statements of lawyers are likely to be received as "especially authoritative."⁹¹ My experience suggests just the opposite is true.

Another potential restraint upon extrajudicial commentary by lawyers is the risk of civil liability for defamation. While California Civil Code § 47 grants immunity to partici-

88. *In re Beth Willon*, 55 Cal. Rptr. 2d 245 (1996).

89. *Levine v. United States Dist. Court*, 764 F.2d 590 (9th Cir. 1985). *Cf. In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979).

90. *But see* 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 (1995) (urging the use of a two-tier approach to trial participant gag orders—stringent restraints on trial participant speech prior to trial, but reduced limitations once the jury has been impaneled and the trial has begun).

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

pants in litigation for statements made in official proceedings, the protection has not been extended to out of court communications to the press.

In *Shahvar v. Superior Court*,⁹² the court declared a lawyer who faxed a copy of a pleading to a news reporter could be held liable for libel. A subsequent amendment of § 47 protects the receiving news reporter, but still leaves the door open to hold lawyers liable. In a recent ruling arising in the aftermath of the investigation of singer Michael Jackson for child molestation, the court ruled that §47 offered no immunity for lawyers engaged in "litigating in the press."⁹³ After a psychological evaluation of the child victim was leaked to the press, Jackson's attorneys publicly accused the victim's attorney of extortion.⁹⁴ The accusation was held to be actionable as libel, even though it was made "in anticipation of litigation."⁹⁵ Interestingly, the court noted that *prosecutors* would have broader immunity than defense lawyers under § 47, because they are protected by an "official duty" privilege.⁹⁶

Because a public official's duty includes the duty to keep the public informed of his or her management of the public business, press releases, press conferences and other public statements by such officials are covered by the 'official duty' privilege, although similar statements by private litigants are not covered by the litigation privilege.⁹⁷

On the other hand, prosecutors may be subject to more stringent rules of professional conduct than defense lawyers. In addition to the general proscription of extrajudicial statements governing all lawyers subject to A.B.A. Model Rule 3.6, prosecutors may be subject to the "Special Responsibilities of Prosecutor" defined in Model Rule 3.8, which provides:

The prosecutor in a criminal case shall, except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused.⁹⁸

92. 30 Cal. Rptr. 2d 597 (1994).

93. *Rothman v. Jackson*, 57 Cal. Rptr. 284, 294 (1996).

94. *Id.* at 287.

95. *Id.* at 291, 295.

96. *Id.* at 294.

97. *Id.*

98. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8 (1994).

Unlike Rule 3.6, which addresses the potential impact upon a trial, Rule 3.8 addresses the phenomenon of "public condemnation" directly. And at the federal level, stringent limitations on press statements by federal prosecutors are imposed by the Code of Federal Regulations.⁹⁹

As carefully constructed as gag orders and gag rules may be, they are rarely enforced by the court's unquestioned power to punish those who violate court orders for contempt of court. Those who are subject to the orders and rules are well aware that, if the information they want to have published is leaked to a reporter, their identity as the source of the leak will be protected. Thus, responsibility for the statement is easily evaded. Shield laws function to "trump" the gag rules and gag orders, by permitting journalists to refuse to reveal their sources without facing the consequence of a contempt of court charge.

VI. SHIELD LAWS AS TRUMP CARDS

The overbreadth of gag orders is rarely challenged, largely because the lawyers and others who are subject to the orders can achieve their goals without a direct challenge to the orders. They can simply leak the information with impunity. News organizations are generally precluded from directly attacking gag orders themselves, on the ground they lack standing to do so.¹⁰⁰ When a court occasionally seeks to enforce a gag order by requiring disclosure of the source of leaked information, the focus becomes the privilege of the news reporter, rather than the validity of the gag order. The recent prosecution of Richard Allen Davis for the murder of Polly Klaas provides a classic example.

After extensive pretrial publicity necessitated a change of venue from Sonoma County to Santa Clara County, the Santa Clara County Superior Court issued an expansive protective order prohibiting the release of any evidence that had not been ruled admissible by the court, as well as any comments about testimony already heard or expected.¹⁰¹ While jury selection was progressing, a local television reporter an-

99. U.S. Department of Justice, Statements of Policy, 28 C.F.R. § 50.2 (1995).

100. Radio and Television News Ass'n of S. Cal. v. United States Dist. Court, 781 F.2d 1443 (9th Cir. 1986).

101. *In re Beth Willon*, 55 Cal. Rptr. 2d. 245 (1996).

nounced that a video taped confession by the suspect would be offered in evidence, describing it in some detail and commenting on its significance.¹⁰² The source for the story was identified only as "a source close to the investigation."¹⁰³ Most of the contents of the confession had already been made public.¹⁰⁴ The trial court subpoenaed the reporter, and demanded the identity of the source, in order to enforce its protective order and "to ensure that no future violations occur."¹⁰⁵

When the reporter invoked the protection of California's Shield Law, she was held in contempt.¹⁰⁶ On review, the Sixth District Court of Appeal reversed the contempt order, holding that there was no evidentiary basis to support the conclusion that the disclosure was necessary to protect the defendant's right to a fair trial.¹⁰⁷ The material reported was already in the public domain, of minimal significance to the case, and remediable by effective voir dire.¹⁰⁸ But rather than base its ruling on the invalidity of the original protective order, the court imposed a standard of prejudice to be met even *after* a gag order has been violated.

Accordingly, where a violation of a protective or 'gag' order has already occurred, a court should determine the necessity of disclosure of the newsperson's source by addressing two principal considerations in light of all the relevant circumstances: (1) If the newsperson does not disclose the identity of the source, is there a substantial probability if future violations, or 'leaks', that will impair the defendant's ability to obtain a fair trial? And (2) Are there reasonable alternatives to disclosure that will protect the interests asserted by both the newsperson and the defendant?¹⁰⁹

Assuming a valid protective order, burdening its enforcement by requiring a showing of substantial probability of *future violations* if it is not enforced seems extravagant. The problem in this case, of course, was that the original protec-

102. *Id.* at 249.

103. *Id.*

104. *Id.*

105. *Id.* at 250.

106. *Id.* at 250-51.

107. *In re Beth Willon*, 55 Cal. Rptr. 2d. at 250.

108. *Id.* at 258-60.

109. *Id.* at 258.

tive order was itself extravagant. If the protective order itself is supported by adequate findings that disclosure of the information protected would imperil the defendant's right to a fair trial, requiring disclosure of the violator should not depend upon a showing of actual need for deterrence. That merely creates a presumption that a violator remains immune from punishment unless we can establish not only his past violation, but his readiness to engage in future violations.

The first step for a court called upon to compel disclosure of the source of a leak should be to ascertain that there is a valid protective order which was violated. If there was, a source subject to the protective order should not be protected by a privilege at all. The issuance of a protective order should require a compelling showing that the release of the protected information would create a clear and present danger to the fairness of pending judicial proceedings, however.

This more demanding standard would, of course, mean that fewer protective orders would be issued, and those that were issued would be narrowly drawn. Certain types of information have a general tendency to create prejudice, and would be frequent candidates for inclusion in protective orders:

- (1) a defendant's prior criminal record, or observations about his character;
- (2) statements, admissions, confessions, or alibis attributable to a defendant, or the refusal or failure of the accused to make a statement; and
- (3) reference to investigative procedures such as fingerprints, polygraph examinations, ballistic tests, or laboratory tests, or to the refusal of the defendant to submit to such tests or examinations.

Protective orders ordinarily need not encompass arguments about the evidence, since such arguments can be countered with contrary arguments in public as well as in the courtroom. The mere fact that certain types of information have a "tendency" to create prejudice should not justify the issuance of a protective order, without a specific showing of the danger of prejudice in a particular case. If protective orders were subjected to demanding scrutiny, trial participants would remain free to speak, with full attribution, regarding many aspects of the case that are now encompassed within gag rules or gag orders. If they trespassed into protected ar-

neas, they could be quickly called to account. But if they deliberately sought to evade the protective order by the surreptitious leaking of protected information, no privilege should protect their identity. A Shield Law should not be elevated into a "trump card" that gives absolute protection to those whose goal is the subversion of the right to a fair trial.

An absolute condition for protection of a confidential source under a shield law should be that the source was *promised* confidentiality. The whole rationale for Shield Laws is that they are necessary to persuade reluctant sources to provide information by guaranteeing their anonymity. If a professional rule or regulation imposes an obligation to maintain confidentiality, and provides that a promise of anonymity for a breach is void and unenforceable, there should be no expectation of confidentiality when members of that profession speak to journalists. This objective could be easily achieved for the legal profession by adoption of the following proposed rule.

Proposed Rule of Professional Conduct

(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 should know either that it will present a clear and present danger to the fairness of an adjudicative proceeding in the matter, or that it will disclose information included in a valid protective order issued in the matter.

(B) A lawyer who is participating or has participated in the investigation or litigation of a matter shall make no extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication without attribution and identification of the source. No such lawyer is entitled to anonymity or confidentiality for any such statement.

(C) A lawyer should exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated in a matter from making an extrajudicial statement that the lawyer is prohibited from making.

(D) No lawyer associated in a firm or government agency with a lawyer subject to this rule shall make any statement prohibited by this rule.

If the invocation of Shield Law protection requires a valid promise of confidentiality, this rule would insure that lawyers who are participating in a case could not be protected as sources, since the promise of confidentiality made to them would be void and unenforceable. The Shield Law would no longer “trump” a valid protective order. Lawyers would be required to take public responsibility for any information they released to the media about a case in which they were participating. Other sources not governed by such a professional rule, however, would still be protected by the Shield Law.

VII. THE LAW ENFORCEMENT SIEVE

The most difficult source of leaks for courts to deal with is investigative personnel of law enforcement agencies. In the criminal trial of O.J. Simpson, reports of D.N.A. testing results were appearing in newspapers before they had even been delivered to the court or the lawyers. The leaks stopped only after Judge Lance Ito ordered the laboratories to stop sending the results to the Los Angeles Police Department and to send them directly to him for distribution to the parties.¹¹⁰ In the Unabomber investigation, detailed descriptions of the evidentiary items allegedly found by the F.B.I. in Theodore Kaczynski's mountain cabin were leaked to the press within days of the search.¹¹¹

In the initial stages of an investigation, before charges have been filed, courts have little or no control over investigative agencies. Protective orders ordinarily cannot be issued before charges have been filed. A.B.A. Model Rule 3.6 recognizes this reality, by allowing lawyers to respond to adverse publicity initiated by other sources. This may simply be an invitation to a pissing contest with a skunk. Defense lawyers

110. UELMEN, *supra* note 76, at 71.

111. Neal R. Sonnett & Timothy B. Dyk, *Prosecutorial Leaks*, A.B.A. J., Sept. 1996, at 78-79. The use of anonymous leaks was particularly egregious with respect to the results of the search. *Id.* U.S. Department of Justice guidelines permit personnel, subject to specific limitations imposed by law or court rule or order, to make public “[t]he circumstances immediately surrounding an arrest, including . . . a description of physical items seized at the time of arrest.” U.S. Department of Justice, Statements of Policy, 28 C.F.R. § 50.2(b)(3)(iv). The search was pursuant to a warrant issued after the arrest. The guidelines require personnel who believe information beyond the guidelines should be released to request permission of the Attorney General or Deputy Attorney General. *Id.* at 28 C.F.R. § 50.2(b)(9).

are often reluctant to seek a protective order from the court, because it will impede their ability to respond to law enforcement leaks. Prosecutors throw up their hands in frustration, claiming they have no control over the law enforcement agencies they work with.

Ultimately, this problem is simply another manifestation of the lack of accountability of police agencies. The answer lies in the movement to professionalize law enforcement. There is no reason why law enforcement officers cannot be subjected to professional rules of conduct the same way lawyers are. A commendable model already exists at the federal level, with detailed regulations specifying what information can and cannot be released by any employee of the Department of Justice.¹¹² There is no reason why such regulations cannot include a general proscription of any anonymous or unattributed statements regarding a pending investigation.

The legitimate needs of law enforcement to communicate information concerning a pending case to the public can be met with public statements in which the source is identified. A police officer or investigator is not entitled to any expectation of anonymity or confidentiality when it comes to a pending investigation. A promise of confidentiality made by a reporter should simply be unenforceable, and Shield Laws should give no more protection to police officers than they give to lawyers. Police officers and investigative personnel, just like lawyers, are professionals who should be required to accept personal responsibility for the information they release to the media.

VIII. REFURBISHING TRADITIONAL TOOLS

One factor that is frequently overlooked in analyzing the problems created by media coverage of current high-profile trials is the procedural "reforms" that have undercut the effectiveness of the tools traditionally utilized to cope with massive publicity: *voir dire* questioning of jurors, challenges for cause, change of venue, and sequestration. In a climate in which media saturation coverage cannot be effectively controlled, the effective use of these traditional tools will carry even more of the burden of ensuring the fairness of trials. Yet the prevailing trend is to limit these devices to save time,

112. 28 C.F.R. § 50.2 (1995).

reduce expenses and protect the privacy and convenience of jurors.

Effective *voir dire* questioning of jurors who have been exposed to pretrial publicity can provide an informed judgment on the critical question of their ability to set aside preconceived opinions and decide the case on the evidence presented in court. This kind of questioning can rarely be conducted by the judge, who may lack the familiarity that counsel is likely to have with the nature and extent of media coverage of a case. Yet in jurisdiction after jurisdiction, the participation of counsel in *voir dire* questioning has been limited in recent years on the grounds that it is too time-consuming. Typical is the California provision, adopted by initiative, which allows judges to conduct all *voir dire* questioning without participation by counsel.¹¹³ Limitations have also been imposed upon public identification of jurors, even permitting the jurors to remain anonymous in some cases.¹¹⁴ And in *Mu'min v. Virginia*,¹¹⁵ a five-four majority of the U.S. Supreme Court declared that a trial judge is not even required to question jurors about the content of news reports they have been exposed to.¹¹⁶ Although eight of twelve jurors in a death penalty case admitted exposure to extensive pretrial publicity, the trial judge accepted an *en masse* assurance they could decide the case on the evidence without individual inquiry into what they had read, seen or heard.¹¹⁷

The frequent use of juror questionnaires has enhanced the level of information available about prospective jurors in advance. Counsel for the parties, however, are in the best position to process and utilize this information effectively in *voir dire* questioning. While the use of jury consultants has been widely criticized in high profile cases, the fact remains that tracking of media coverage of the case and assessing its potential impact upon prospective jurors who are exposed to it requires expertise beyond the capacity of most lawyers and judges. The efficient use of questionnaires and jury consul-

113. CAL. CODE CIV. PROC. § 223 (West 1995) (enacted as part of Proposition 115 (1990)).

114. Ephraim Margolin & Gerald F. Uelmen, *The Anonymous Jury: Jury Tampering By Another Name?*, CRIM. J., Fall 1994, at 14.

115. 500 U.S. 415 (1991).

116. *Id.* at 431.

117. *Id.* at 415.

tants can only enhance the efficiency of effective *voir dire* questioning.

Ultimately, the acceptability of a juror depends upon the credibility and persuasiveness of his claim that his fixed opinions can be disregarded and guilt or innocence judged impartially on the evidence.¹¹⁸ Such a judgment cannot be based upon perfunctory judicial questioning eliciting "yes or no" answers.

A challenge for cause to excuse a juror must be granted upon a showing of either implied or actual bias. In California, implied bias exists if a juror has an "unqualified opinion or belief" on the merits of the action, based on knowledge of the facts.¹¹⁹ Actual bias is defined as "the existence of a state of mind on the part of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with entire impartiality, and without prejudice to the substantial rights of any party."¹²⁰ Little uniformity exists in how various trial judges interpret these broad provisions. Many judges allow the potential jurors themselves to be the final judges of their own bias, uncritically accepting a juror's assurance that he can "set aside" a previous opinion and follow the court's instructions to decide the case on the evidence presented in court. The availability of peremptory challenges often functions as a "safety valve" even though a challenge for cause has been denied, but serious efforts are now under way to severely limit or eliminate the availability of peremptory challenges. Thus, at a time when the risks of juror exposure to pretrial publicity are accelerating, the risks that jurors with preconceived opinions will be actually seated on juries is also increasing.

While a change of venue may be an effective protective device in the face of massive local publicity, today's mass media have wider geographic coverage than ever before. The "media market" of a television station will frequently include an entire state. Thus, a change of venue within a small state may be relatively meaningless. But within the federal system, and even in some large states, a change of venue can dramatically enhance the availability of jurors who have not formed opinions about the case. Recently, the change of

118. *Id.*

119. CAL. CODE CIV. PROC. § 229(e) (West 1995).

120. *Id.* § 225(b)(1)(c).

venue of the Oklahoma City Bombing case to Denver, Colorado and the change of venue of the Richard Allen Davis case from Sonoma County to Santa Clara County in California were both supported by sophisticated surveys measuring public opinion in both the community where the crime took place and the community to which the trial was moved. This is yet another example of the importance of jury consultants and experts, who can enhance the effectiveness of the traditional change of venue to counter the effects of pretrial publicity.

The sequestration of jurors has been greatly disparaged because of its great expense and the burdens it imposes upon jurors.¹²¹ Little attention has been given to the possibility of reducing those expenses and relieving those burdens by modifying the terms and conditions of sequestration. Too often, sequestration is perceived as imposing a requirement of absolute isolation. There may be effective ways for jurors to be "sequestered" while still living at home, by imposing limitations on their access to news media and imposing a judicially supervised regimen upon family members. If modern technology can devise a "V Chip" to prevent a child's exposure to violent television programs, would it not be capable of devising an "OJ Chip" to prevent a juror's exposure to news about a pending trial?

One of the most important resources available to assess the effectiveness of traditional tools of selecting and maintaining impartial jurors is, of course, the jurors themselves. Here, however, we discover the most serious problem of all, in terms of the willingness of courts to enhance the effectiveness of traditional tools. In state after state, provisions have been enacted to seal information regarding the identity of jurors, precluding legitimate research into the impact of media coverage upon juror's attitudes and perceptions.¹²² Apparently, courts have become concerned with the increased use of post-verdict interviewing of jurors to support claims of juror misconduct during deliberations. The response has been to impose strict judicial controls over post-verdict access to jurors. Often, such controls recognize no distinction between access by advocates and access by legitimate researchers.

121. James P. Levine, *The Impact of Sequestration on Juries*, 79 JUDICATURE, Mar.-Apr. 1996, at 266.

122. CAL. CODE CIV. PROC. § 237(a)(2) (West 1995).

What one jury researcher concluded about sequestration is equally true about *voir dire*, challenges for cause and changes of venue.

State legislatures have over the years grappled with the issue of sequestration as they fashion and refashion their rules of criminal procedure. Trial judges must determine which cases warrant the drastic step of sequestration, and appellate courts often have to decide whether verdicts rendered in the absence of sequestration violated constitutional rights. Yet, these policy makers and legal authorities must act in an empirical vacuum, resting decisions on vague cogitations about the impact of trial publicity and the nature of the deliberative process. This situation needs correcting: we need to learn more about how the jury actually functions when it is quarantined from the community.¹²³

Probably no issues of criminal justice policy are as little informed by empirical study as the issues related to jury selection and management. We are flying blind, and yet many voices call for us to turn off the radar.

IX. CONCLUSION

When we view the problems of media coverage of high profile trials from an ethical perspective, we are challenged to step beyond the interests of participants in the process to the perspective of a broader public interest. We cannot effectively prevent the presentation of information about high profile cases to the public, or the formation of public opinion in response to that information. We must recognize that potential jurors will be affected, and come to court with information and opinions.

Rather than making futile efforts to control the uncontrollable, we should focus our energy on goals that are readily achievable: ascertainment of the information that presents a clear and present danger to the fairness of trials; prompt and clear protective orders limiting the release of such information; and strict enforcement of those orders when they are violated.

Shield laws should not be permitted to frustrate the achievement of these goals. Rules of professional conduct should not focus on gagging trial participants, but upon re-

123. Levine, *supra* note 121, at 272.

quiring them to assume personal responsibility for their statements. A proposed model rule can achieve this goal for the legal profession. While broadly expanding the situations in which lawyers can communicate with the public about pending cases, it would require them to identify themselves when they do so. A journalist who promised confidentiality to a lawyer who leaked information about a pending case would be promising something to which the lawyer was legally unentitled, and the promise would no longer be enforceable. Similar rules should be propounded for the personnel of law enforcement agencies.

