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REPORTING THE RODNEY KING TRIAL: THE ROLE OF LEGAL EXPERTS

Laurie L. Levenson*

*"Grab Levenson—She's all we've got."*¹

I. INTRODUCTION

In the spring of 1989, I served as a legal commentator² for the federal criminal trial of four Los Angeles Police Department officers charged with violating the civil rights of African-American motorist Rodney King (King Trial).³ It was, as might be expected, an extraordi-

* Associate Professor of Law, Loyola Law School, Los Angeles; A.B., 1977, Stanford University; J.D., 1980, University of California, Los Angeles. I would like to thank a host of journalists who inspired me during the federal "Rodney King trial" and afterward. In particular, I acknowledge the guidance and friendship of Michael Singer, Bill Whitaker, and Roberta Hollander (CBS News), Jim Newton and Henry Weinstein (L.A. Times), Wendy Kaufman (NPR Radio), Susan Seager (Los Angeles Daily Journal), Linda Deutsch (Associated Press News Service), Chuck Conner (CNN News), Jim Tranquada (Los Angeles Daily Journal), Seth Mydan and Phil Gollner (N.Y. Times), Sally Ann Stewart (USA Today), Bob Jimenez (KCBS News), Andrew Okun (Reuters News Service), Pam Kramer (San Jose Mercury News), Jeffrey Kaye and Ilyce Meckler (MacNeil Lehrer News), Rosalind Moore (Final Call), Amy Stevens (Wall Street Journal), Patrick Healy (KNBC News), David Goldstein (KCAL News), Lou Cannon (Washington Post), Donna Foote (Newsweek), Kitty Felde (KCET Radio), Steve Futterman (NBC Radio), Jane Platt (ABC Radio News), and Don Nash (NBC Today Show). These are dedicated individuals and I, as well as the community, owe them a debt of gratitude for their service during the King Trial.

I also thank the Editorial Board of the Loyola of Los Angeles Law Review for inviting me to contribute to this Issue and my colleagues Christopher May, Linda Beres, and Sam Pillsbury for their helpful comments on an earlier draft. This Essay is dedicated to the students of Loyola Law School who showed great patience and support during this very busy period of my life. I know we all learned something!

1. This was a remark made by Michael Singer, a producer for CBS News, during the King Trial in March 1993.

2. The term "legal commentator" encompasses a wide number of roles ranging from answering questions for the news media, to appearing live on television, to explaining ongoing legal proceedings.

3. Defendants Stacey Koon, Laurence Powell, Timothy Wind and Theodore Briseno were charged under 18 U.S.C. § 242 (1988) with violating the civil rights of African-American motorist Rodney King. See *Indictment, United States v. Koon*, No. CR 92-686-JGD (C.D. Cal. filed Aug. 4, 1992). The federal trial followed an acquittal of the four officers by a state court jury on charges of using excessive force. See Richard A. Serrano, *All 4 in King Beating Acquitted*, L.A. TIMES, Apr. 30, 1992, at A2. The state verdict sparked riots in Los Angeles that resulted in millions of dollars in damage, the loss of thousands of buildings, and at least 45 deaths. Laurie Becklund, *Riots Touch Off Largest Arson Probe in U.S.*, L.A. TIMES, June 10, 1992, at A1 (estimating riot losses at \$750 million to \$900 million); see also Greg Braxton &

nary experience.⁴ It was also an experience that raised the issue of what role legal experts, including law professors, should play in reporting high-profile criminal cases.⁵ This Essay explores that issue.

Overall, legal commentators can fill an important vacuum in the reporting of court proceedings. Journalists, although educated and industrious, rarely have the background to analyze an ongoing criminal trial in detail.⁶ They are limited by many factors, including the demand for quick, simple coverage, the constant focus of the public on "who's winning" the case, and the lack of access to the internal workings of the court. Legal experts, on the other hand, may have the background to fill in the blanks, explain the significance of events in and out of court, and generally demystify the court proceedings.

Yet legal experts may also have their limitations. No rules govern their conduct.⁷ Legal experts are expected to be objective, but there are no formal restrictions guaranteeing they will. Like others, legal experts filter information through their individual life experiences and motivations. Some may even exploit their media experience to solicit business or influence public opinion to conform with their own ideals.⁸

Jim Newton, *Looting and Fires Ravage L.A.*, L.A. TIMES, May 1, 1992, at A1; Louis Sahagun & Carla Rivera, *Jittery L.A. Sees Rays of Hope*, L.A. TIMES, May 3, 1992, at A1.

4. Although there are many ways to become recognized as a legal expert and commentator, see Gail D. Cox, *So You Wanna Be a Quotemeister*, NAT'L L.J., Nov. 1, 1993, at 9, my opportunity came by chance. Following the state court verdict in *People v. Powell*, No. BA 035498 (Super. Ct. L.A. County 1991), the state prosecution of the four officers for beating Rodney King, I wrote an editorial for the Los Angeles Times regarding the verdict. See Laurie L. Levenson, *Justice in Court Doesn't Mean Social Justice*, L.A. TIMES, Apr. 30, 1992, at B15. Reporters who noticed that editorial began to call me with questions after the federal authorities indicted the defendants. I became a "legal commentator" by answering my telephone. In particular, I was given the opportunity to comment for National Public Radio and to work with its great group of professionals. I am grateful for that opportunity as well as so many others offered by individuals in the broadcasting field.

5. Many law school professors have achieved celebrity status, and, as with my own experience, often by chance. See, e.g., Charley Roberts, *Celebrity Status Came by Chance*, L.A. DAILY J., July 12, 1993, at A1 (profiling Georgetown University Law Professor Paul Frederick Rothstein, who described his launch into celebrity status as commentator on cases ranging from Oliver North trial to King Trial as "just accidental").

6. There is no specialized training required to be a reporter. See STEPHEN HESS, *THE WASHINGTON REPORTERS* 84 (1981). "Proud of their freedom, journalists accept no standard of professional preparation." J. EDWARD GERALD, *NEWS OF CRIME: COURTS AND PRESS IN CONFLICT* 18 (1983). Therefore, while some reporters may also have specialized training, including a law degree, these individuals are the exception. Broadly stereotyped, "[m]ost reporters are liberal, college-educated, male, white, and middle class." HESS, *supra*, at 67.

7. Although legal experts who are members of a Bar are governed by that state's ethical rules, there are currently no specific ethical standards governing conduct as a legal commentator. See *infra* note 33.

8. I watched with horror as this conduct occurred during the King Trial. For example, on the first day of trial, local attorneys and professors appeared at the courtroom. One individ-

Nonetheless, legal commentators can play an important role in reporting cases. That role is to explain—accurately and without conscious bias—the court proceedings, each proceeding’s significance, and other legal issues. This role is not an easy one and, as this Essay discusses, there are both advantages and disadvantages in using legal experts as commentators on high-visibility cases.

As we enter a new era—an era in which journalists are covering the law as an industry⁹—it is important for both the media and members of the legal profession to consider the impact of using legal commentators. I generally agree with those who believe it is important to popularize the law and make it more accessible and understandable for the general public.¹⁰ I have some reservations, however, about the current practice of relying on legal experts—it should be done only with a clear understanding of the benefits and risks involved.

II. THE ROLE OF MEDIA LEGAL EXPERTS

A. *Advantages of Using Experts*

I would guess there comes a time when each legal commentator asks, “Why me?” or “Why does anyone care what I have to say?” or “How can I explain the law and courts to those who have remained blessedly immune from their complexities?” I am not sure that during the King Trial I ever answered these questions, primarily because I did not have time. During the trial, my day often began at 2:15 a.m., when I awoke to appear on a television show. I would then take my children to school and head for the courthouse to watch the trial. In the late afternoon and evening, I taught my law school courses. It is only now, with the trial behind me, that I have had the chance to sort out the benefits and risks of using and serving as a legal commentator.

Clearly, there are some advantages—advantages for the media, public, and legal commentator. Some of these advantages are fairly evident, including the expert’s ability to decipher the law. Other advantages, however, are less apparent. They include the willingness and ability of a legal commentator to give opinions not only on the merits of the case,

ual passed out business cards to media in attendance and offered immediate analysis of any legal issue. Likewise, at the end of the trial, several of these so-called experts, some of whom had never watched any of the actual trial proceedings, returned to the courthouse to deliver commentary on the jury’s verdicts.

9. Cox, *supra* note 4, at 26 (discussing proliferation of news stories about the legal profession and topical cases).

10. Harvard Law School Professor Alan Dershowitz has stated, “When I started in this profession, lawyers were like some secular priesthood . . . I want to combat that. Rights don’t work if people don’t understand them.” *Id.* at 26-27.

but also on how it is being presented. I have identified at least six advantages for the public and media in using legal commentators.

1. Deciphering the law

Perhaps the primary reason legal experts are used and should be used is that they, unlike most reporters, have a background and training in the law, which allows them to explain the rationale behind court rulings, proffers of evidence, and legal arguments to the court. Legal experts are trained to interpret laws. Although journalists may be capable of reporting the black letter of the law, legal experts can put the law and court rulings in perspective.

The distinction between reporting and interpreting the law is often critical. Consider, for example, the King defendants' motion to dismiss the case for violation of the Double Jeopardy Clause.¹¹ It was, at minimum, difficult for both reporters and the public to understand how federal authorities could prosecute the four officers for beating Rodney King after a state court jury had already acquitted the defendants of excessive force charges. A reporter who simply checked "the law" might have reported that the Constitution provides, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. . . ."¹² It is only with input from a lawyer or professor familiar with the special exceptions to the double jeopardy rule that most reporters could explain that the "dual sovereignty" exception allows for successive prosecutions by state and federal authorities.¹³

As another example, consider the media's initial confusion over whether, in the federal trial, racial animus was an element the prosecu-

11. Defendants' Motion to Dismiss Indictment for Being Twice Put in Jeopardy, *United States v. Koon*, No. CR 92-686-JGD (C.D. Cal. filed Oct. 5, 1992). The issue of double jeopardy arose because the defendants had been tried and acquitted in state court for the same conduct at issue in the federal trial.

12. U.S. CONST. amend. V.

13. The Supreme Court has held under the dual sovereignty doctrine that successive prosecutions by state and federal authorities do not violate the Double Jeopardy Clause because each sovereign has a right to prosecute an individual for violating the laws of that sovereignty. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985); *United States v. Wheeler*, 435 U.S. 313, 316-17 (1977); *Abbate v. United States*, 359 U.S. 187, 194-96 (1959).

In addition to understanding the dual sovereignty doctrine, a legal commentator may also know that it is common practice to intervene federally only after the state authorities have attempted a prosecution. *See, e.g., United States v. Gwaltney*, 790 F.2d 1378, 1381 (9th Cir. 1986) (filing of federal civil rights violation by federal prosecutors against California Highway Patrol officer after mistrials in state court).

tion was required to prove.¹⁴ This confusion was created when United States District Court Judge John Davies stated in pretrial orders that even though racial animus is an element of the federal civil rights charge,¹⁵ he would not allow the prosecution to introduce evidence that defendant Powell, during police radio transmissions on the night of the King beating, had referred to "Gorillas in the Mist" when describing an African-American social gathering.¹⁶

Knowledge of substantive federal criminal law, rules of evidence, and trial procedures are all necessary to understand the court's ruling. What is the effect of the pretrial order? What are the elements of a civil rights crime? If race is not an issue, is evidence regarding racial animus nonetheless admissible at trial? Not only are reporters unlikely to know the answers to these questions, but time pressures on reporters to report what is occurring during trial make it both more efficient and accurate to rely on legal experts to sort out court decisions.¹⁷

2. Taking a position

The media's second advantage of reporting with the assistance of a legal commentator may seem, at first, a bit odd. Although a cardinal rule of journalism is to remain objective, it is my experience that legal commentators are often called upon precisely so reporters can take positions on the merits of a ruling or argument. Legal experts, unlike reporters, enjoy the independence to voice their opinions. Those opinions may be on the ultimate issue in a case—such as whether the officers used excessive force—or on smaller issues such as whether a lawyer was effective in examination. A reporter may reflect a particular viewpoint in a story through the use of legal commentators.

14. Jim Newton, *Race Still Focus of King Beating Case*, L.A. TIMES, Jan. 10, 1993, at B1 (reporting that court's pretrial orders suggest racial animus is element of federal civil rights offense).

15. In his Order Denying Defendant Wind's Motion to Dismiss Indictment for Being Twice Put in Jeopardy, *Koon*, No. CR 92-686-JGD (Nov. 30, 1992), at 3, Judge Davies described the elements of the offense as: "(1) the defendant must act under color of law and (2) willfully subject (3) an inhabitant to (4) a deprivation of constitutional rights (5) on account of the inhabitant's color or race." *Id.* at 3 (emphasis added).

16. See Order Granting in Part and Denying in Part Defendant Powell's Motion in Limine to Exclude Evidence Regarding Defendant Powell's MDT Messages Transmitted on March 3, 1991, *Koon*, No. CR 92-686-JGD (Nov. 30, 1993). Judge Davies also repeated in this order that racial animus was an element of the federal offense. *Id.* at 3.

17. After commentators and the prosecution noted for the court that racial animus is not an element of a federal civil rights charge under 18 U.S.C. § 242 (1988), the court filed a supplemental order clarifying its prior ruling and holding that the prosecution was not required to prove a racial motive for the crime. See Order Granting Plaintiff's Motion in Limine, *Koon*, No. CR 92-686-JGD (Jan. 22, 1993).

Although a journalist's credo may require him or her to remain distant from events and present them in a neutral manner,¹⁸ it is impossible for any individual, including a reporter, not to be affected by his or her background. Reporters, like legal commentators, have a variety of experiences. Privately, they are often more than willing to express their opinions regarding a case. In public, reporters can use legal experts to opine on the merits of an action and align a story to a particular position.¹⁹

For example, in the King Trial, many reporters were frustrated by the court's ruling that defendant Koon could not be cross-examined regarding his reference to a "mandingo sexual encounter" in describing King's interaction with a female officer at the scene. Generally, the reporters stated how the court ruled and why. Other reporters, however, wanted to convey their own frustration over the court's ruling. Accordingly, they included in their stories remarks by legal commentators who strongly criticized the court's ruling. The same technique was used in reporting the verdicts from the state King Trial. By selecting experts with particular views, a reporter is able to represent his or her own opinions regarding an incident.

From the reporter's perspective, even if the story is slanted, it is far better for an expert to make a controversial statement than for the reporter to indicate bias in a story. Reporters must maintain a rapport with all participants in the case. If they indicate bias, they may be shut off from key participants in a proceeding. Thus, one role of legal commentators is to reflect opinions shared by reporters but which reporters feel constrained from reporting directly.²⁰

3. Respectable sound bites

Third, legal experts can distill court processes into manageable sound bites that meet reporters' time and space constraints. It is imprac-

18. Most news agencies do not have formal rules of ethics. Those that do, however, often require the journalist to remain objective. *See, e.g.,* STATEMENT OF PRINCIPLES art. IV (American Soc'y of Newspapers Editors 1975), *reprinted in* BRUCE M. SWAIN, REPORTER'S ETHICS 111, 112 (1978) ("Good faith with the reader is the foundation of good journalism. Every effort must be made to assure that the news content is accurate, free from bias and in context, and that all sides are presented fairly.").

19. This is referred to as "advocacy journalism" and is condemned by some commentators. *See* SWAIN, *supra* note 18, at 13 (noting that sometimes reporters take on credentials of their favorite commentator).

20. The legitimacy of this practice is subject to question, but it exists nonetheless. For the public and the media, the key issue may be whether there has been full disclosure of the commentator's bias. *See infra* part II.B.1.a.

tical, and in federal court impossible,²¹ to report a trial to the public with gavel-to-gavel coverage. Thus, the media turns to experts to encapsulate the day's proceedings into a few remarks. Like the courtroom artist who captures the emotion of the proceedings in drawings, the legal expert is called upon to summarize the court's lengthy proceedings for the public. Even in a trial that is broadcast, a commentator becomes necessary because it is impossible for most individuals, even if they were so inclined, to monitor every moment of the proceedings. Legal commentators can sum up the day's proceedings and their impact on the overall case.

Consider what occurred during the end of the King Trial when counsel on both sides spent nearly four days arguing whether defendant Briseno's videotaped testimony from the state trial should be admitted in the federal case. Given the complexity of the arguments, it was unrealistic to expect the media to report these proceedings without the assistance of legal commentators. Legal commentators summed up in minutes the defense and prosecution arguments²² and the impact the videotape would likely have on the trial.²³

4. Educating the media

Sometimes a legal commentator's most important role is neither on camera nor in an interview with a newspaper reporter. Rather, legal commentators educate reporters, alerting them to issues that may arise in court proceedings. For example, legal commentators in the King Trial were able to explain to reporters that the court's reference to an *Allen* charge²⁴ during the discussion of proposed jury instructions was an indi-

21. Pursuant to the Federal Rules of Criminal Procedure, cameras are not allowed in federal courtrooms. FED. R. CRIM. P. 53. This rule is subject to criticism, *see, e.g.*, Roy Ulrich, *Nothing Can Take Place of Live Trial Coverage*, L.A. TIMES, Feb. 15, 1993, at F3, but continues to govern in federal court.

22. The defendants argued that the tape should not be admitted because it was hearsay, it was improper rebuttal testimony, it included perjured testimony, and Briseno had been tainted by his exposure to immunized statements by his codefendants. For these arguments and the government's responses, *see* Laurie L. Levenson, *Divide and Conquer: The Admissibility of the Briseno Videotape*, L.A. LAW., Sept. 1993, at 32.

23. The videotape was likely to have an important impact on the jury because Briseno broke ranks with his fellow officers and described his codefendants' actions as out-of-control and unnecessary. Given that the standard for a civil rights violation is whether a reasonable police officer under the same circumstances would have believed the force was necessary, Briseno's testimony provided especially valuable insight. Additionally, because it was in videotape form, the testimony was not subject to cross-examination and therefore unimpeachable. *Id.*; *see also* Jim Newton, *King Jury Sees Key Videotape*, L.A. TIMES, Apr. 7, 1993, at A1, A25.

24. In *Allen v. United States*, 164 U.S. 492 (1896), the Supreme Court approved the trial court's practice of admonishing a deadlocked jury to make a further effort to reach a verdict. Such a jury instruction is commonly referred to as an "*Allen* charge."

cation that the court was possibly anticipating potential problems with jury deliberations. Similarly, legal commentators, anticipating the importance of intent as an issue in the civil rights prosecution,²⁵ alerted reporters to the issue.

Legal experts provide a wide range of educational functions for the media and public. These functions range from explaining the overall workings of the criminal justice system to alerting the media to issues that will be crucial to a case but are not apparent to the untrained observer. In this role, the legal expert may bring to the court's attention issues that none of the parties, or even the media, have observed. At least one such situation occurred in the King Trial. Toward the end of the trial, Judge Davies, in a goodwill gesture,²⁶ tentatively agreed to permit the radio and television media to broadcast the verdict live from the courtroom. The media was quite disheartened when legal commentators noted that such a ruling would violate Federal Rule of Criminal Procedure 53,²⁷ thereby prompting the court not to allow the broadcasts.

The more familiar legal commentators are with a proceeding, the courtroom, and the parties, the more likely they can serve competently in this educative role. At times, the legal commentator represents the reporter's instincts as to what issues should be explored. Other times, the legal commentator answers the questions that the reporters have regarding those issues. All of these functions are important to accurate and in-depth reporting of a trial.

5. Diversity of opinion

A fifth role for legal commentators is to provide a diversity of opinion that might not otherwise be available to the reporter. For example, under current Department of Justice guidelines, the prosecution may not comment about ongoing investigations or criminal trials.²⁸ Legal com-

25. 18 U.S.C. § 242 (1988) requires federal prosecutors to prove that a defendant acting under color of state law willfully deprived the victim of his or her civil rights. *See Screws v. United States*, 325 U.S. 91, 101 (1944); *United States v. Stokes*, 506 F.2d 771, 776 (5th Cir. 1975).

26. Shortly before the court agreed to allow live broadcasting of the verdict, the court revoked the media pass of one reporter for relaying live transmissions from the court to the reporter's broadcasting station. The transmission was accidental and the court later returned the reporter's credential. *See Faye Fiore & Greg Braxton, Mild-Mannered Reporters Needn't Apply in King Case*, L.A. TIMES, Apr. 16, 1993, at A1.

27. Federal Rule of Criminal Procedure 53 provides: "The . . . radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

28. UNITED STATES ATTORNEY'S MANUAL 1-7.000 (1993) (limiting disclosable information to matters of public record); *see also* 28 C.F.R. § 50.2 (1993) (restricting release of information by Department of Justice officials).

mentators can fill the vacuum created by restrictions on the prosecution's comments to the media and thus help journalists provide balanced reporting. During the King Trial, I was frequently called upon to provide the prosecution's perspective because I am a former federal prosecutor. Although I was comfortable doing so, it was important that the public understand that as a legal commentator I was not representing the actual prosecutors in the case, but only what I believed to be their perspectives of the case.

Additionally, a legal commentator may be called upon to give voice to those who, for one reason or another, do not have access to the media. During the King Trial, members of the community who had been watching portions of the trial approached me with questions or comments regarding the proceedings. These were very dedicated people who would line up as early as 2:00 a.m. for a seat in the courtroom. As someone who was regularly in contact with the media, I had an opportunity to forward to the media the observations of regular citizens who were interested in the trial.

6. Accessing sources of information

Finally, legal commentators can lead the news media to other sources of information for their stories. The legal commentator is more likely to know what pleadings will be filed in a case and who in the criminal justice system can best answer the media's questions. Although reporters who regularly cover court proceedings may know what pleadings are typically filed in a case, high-visibility cases attract many reporters new to the beat. A legal commentator who has worked within the system can direct reporters to trial memoranda, pretrial motions, jury questionnaires, sentencing memoranda, exhibit lists, witness lists, and even information available through the Marshal's service.

Accordingly, legal commentators perform many useful functions for both the media and the public. The quality of these services, however, depends significantly on the commentator's qualifications and ethics. If the commentator is incompetent or unethical, the dangers of using legal commentators can outweigh the benefits.

B. Dangers of Relying on Legal Experts

In certain situations, there are downsides to employing legal commentators. Sometimes difficulties arise because of a legal commentator's unethical conduct. Other times there are dangers to the media, public, and even the commentator, regardless of ethics. Before one assumes that it is productive to use or serve as a legal commentator, it is important to

consider the risks posed by this type of journalism. Certainly, the best way to prevent abuses is to be on the lookout for the form they may take.

1. Dangers to the media

The use of legal commentators poses dangers to the media, public, and even the commentators themselves. While some of the dangers are experienced by all groups, others are more likely to fall on certain categories. The media face several risks by using legal commentators.

a. commentators' bias

It is undeniable that legal commentators, even those in academe, have biases.²⁹ Only "[i]f you're going to operate in some wonderland, [can you] say that your background doesn't color your story."³⁰ Yet, unlike reporters, legal experts may not understand that they are expected to discard their biases when commenting on a case.

Lawyers and academics build their reputations on having a certain point of view. Certainly, one would not ordinarily expect Alan Dershowitz³¹ to have the same perspective on a matter as Robert Bork.³² Both, however, would undoubtedly be considered prestigious legal experts.

Reporters often know a legal commentator's position prior to publication. Particularly in a case where the supply of legal commentators is lower than the demand, a reporter is at risk of employing a legal commentator who has a biased view of the proceedings. Although a commentator comes from the world of academe, there is no guarantee his or her remarks will be either scholarly or objective. The only guarantee is that the comments will be the product of a perspective developed during the expert's work.

29. Even if commentators do not have intentional biases, it is axiomatic that each individual will process and relate the same information differently. People may perceive selectively and differently various aspects of the same news event; they are able to retain only small parts of what they perceive; they make different assumptions and inferences about the events; and they allow their values, preexisting beliefs, attitudes, and opinions to color their observation of the event. V.M. MISHRA, *LAW AND DISORDER: LAW ENFORCEMENT IN TELEVISION NETWORK NEWS* 31 (1979).

30. HESS, *supra* note 6, at 73.

31. Professor Alan Dershowitz, author of *Chutzpah*, is a nationally recognized expert and commentator on criminal law. He strongly believes in the popularization of the law and freely admits engaging in a campaign to be part of the media to convey his ideas on the justice system to the public. See Cox, *supra* note 4, at 26-27.

32. In 1987, then-President Ronald Reagan nominated Robert H. Bork, a conservative federal appellate judge, to the Supreme Court. See James Gerstenzang, *Reagan Chooses Bork, Praises His Judicial Restraint*, L.A. TIMES, July 2, 1987, at 1. Although the Senate recognized that Bork was a top legal theorist, his nomination was rejected because of his conservative views.

When a reporter first starts work with a legal commentator, it is particularly difficult for the reporter to recognize the commentator's biases. Thus, high-visibility cases, in which a slew of experts may be contacted for comment for the first time shortly before the verdict, pose a significant risk that the reporter will be unaware of some of the biases of these experts.

The media may resort to several remedies to guard against biased commentators. First, reporters can carefully screen the background of commentators, staying attuned to how experiences shape expert opinion. Second, journalists can fully disclose the commentator's background so the reader or listener understands the basis for the expert's opinions. This full disclosure may involve more than just a current title of the commentator. It is often more important to know the expert's former pursuits, such as work as a prosecutor or defense lawyer, criminal or civil litigator, or representative of certain types of causes. Third, the legal profession could adopt ethical standards for serving as a legal commentator.³³

b. incompetent commentators

It is tempting, especially when under time pressure, for reporters to believe that all lawyers or professors are competent to comment on a legal matter. The truth is that they are not. While a person may have sterling paper credentials, competency to comment on a legal matter often turns on familiarity with the facts of that case and its procedural history. Cases are not abstract legal rules. They are the complicated interplay of law and factual events. Few legal experts have the time or inclination to familiarize themselves with a case sufficiently to be an "expert" on the matter. In my own case, it took eight hours per day, five days a week to understand the trial well enough to serve as a legal com-

33. Although much study would be needed before the adoption of such standards, the primary ethical responsibilities would be that a legal commentator only comment on a case if:

- (1) The expert is competent, with an understanding of both the facts and law of the case, to do so;
- (2) It is not the expert's primary motive in commenting to solicit legal business;
- (3) The expert does not have an interest in the proceeding about which he or she is commenting or represent a client whose case may be affected by the dispute; and
- (4) The expert provides to the news organizations full disclosure of the expert's legal background and potential for bias.

The ethical standards could be predicated both on lawyers' ethical obligations under professional codes of responsibility, *see, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (1981) (setting competency standard); *id.* DR 5-101 (prohibiting conflicts of interests); *id.* DR 7-107 (standards for pretrial publicity); *id.* DR 2-101 (restrictions on solicitation of business), and on principles of ethical journalism as reflected in the ASNE Code of Ethics, *see* SWAIN, *supra* note 18.

mentator. Few legal commentators can or will devote themselves to learning the factual intricacies of a case, yet many succumb to the temptation of being cited by the media or featured on television.

A legal expert may be incompetent to comment on a matter for several reasons. First, he or she may be unfamiliar with the type of law in a case. Many radio and television news stations use regular "legal experts" to discuss a host of issues ranging from family law to the death penalty. One must wonder, however, whether one individual can really be classified as an expert in a potpourri of subjects.

Second, a so-called expert may not be qualified to comment on a case because he or she is unfamiliar with its specific facts. Although it will sometimes be sufficient for an expert to gain the necessary knowledge from media accounts or the interviewing reporter, a commentator will be in a much better position if he or she has actually witnessed the proceedings. This is especially true when a commentator is asked to remark on the importance of a piece of evidence or a witness's testimony. Consider, for example, the question of whether Rodney King's testimony was important to the prosecution's case. Without watching King's testimony, or for that matter the testimony of other prosecution witnesses, it would be difficult to discuss the impact of King's testimony. King's testimony was not substantively critical. It did, however, have a crucial emotional impact on the jury because it humanized the videotape and reminded the jury what was at stake in the trial.

Likewise, the question of what was the most crucial testimony in the trial could only be answered by watching the trial. One had to be present in the King Trial courtroom to appreciate the impact of California Highway Patrol Officer Melanie Singer's tearful testimony when she described the agony of watching her fellow officers beat King without just cause. Although an expert who was not present could comment on the substance of Singer's testimony, that expert would be unaware of the dramatic impact of her remarks.³⁴

The same may be true regarding legal issues in a case. For example, the question of whether Briseno's videotaped testimony should be admitted was perhaps the key evidentiary issue in the King Trial. One of the

34. Singer's testimony was particularly important because she had been called as a defense, not a prosecution, witness. Thus, when Singer's testimony began to support the prosecution's argument that the defendants acted in a vicious and unjustified manner, the defense halted its own momentum and the prosecutors gained credibility and sympathy for their case. See Jim Newton, *CHP Officer Weeps as She Recounts Beating*, L.A. TIMES, Mar. 27, 1993, at B1. In summing up the damage caused by the defense's tactical error, defense lawyer Harland Braun said it best: "I don't understand [why co-counsel called her] at all Even I cannot put . . . spin control on this." *Id.*

objections raised by the defense was that the videotape would be improper rebuttal evidence because it could and should have been used as part of the government's case in chief.³⁵ Without being keenly familiar with the other evidence in the case, it would be difficult for a commentator to opine on the admissibility of the videotape.

A third reason a legal expert may be incompetent to remark on a case is that his or her familiarity with the case or the law is outdated. Unfortunately, this type of incompetence also appeared during the reporting of the King Trial. The day the verdict was reached in the federal case, scores of "legal experts" flooded the courthouse. Most of these individuals had not attended a single day of the seven-week trial. Even worse, some had not tried a federal criminal case in years. It was troubling to hear those whose experiences were unrelated to the trial explain, oftentimes incorrectly, the intricacies of this federal prosecution.

c. experts as advocates

Even when a commentator is familiar with the law and facts of a case, there is still a risk that a legal expert will use the media as a platform to advocate personal, political, or sociological views. Especially in the era of "live" television, this individual may seize the opportunity to advocate a personal agenda he or she has for the criminal justice system. Zealous advocates occupy all points of the political spectrum. While people certainly have a First Amendment right to voice their opinions, few reporters would want a legal commentator to directly or indirectly indoctrinate the public through "expert" commentary.

Consider, hypothetically, a legal commentator who regularly serves as legal counsel for police officers. There is certainly an increased possibility that such a commentator will use the media coverage to indoctrinate the public, including potential jurors for other police misconduct cases, to the difficulties of police work and reasons for rendering verdicts in favor of police officers. Likewise, on the opposite end of the spectrum, a strong civil rights advocate may use the media coverage to generate sympathy for civil rights causes.

d. weakening reporting

Although reporters may anticipate most of the aforementioned dangers, another risk of using legal commentators generally goes unnoticed. Reporters are also at risk of using legal commentators as a crutch in their reporting of trials. It is much easier for a reporter to rely on another

35. See Levenson, *supra* note 22, at 35.

individual to summarize a day of trial testimony than to watch, take detailed notes, and report on the proceedings directly.

Reporters must understand that even when the legal expert sits through the trial, that expert does not have the training or incentive of the reporter to record every quote or action that later might be deemed newsworthy. Rather, the legal expert may be busy digesting the information and anticipating future legal issues and rulings. Certainly, legal experts are not to be blamed for reporters' lacking work habits; nonetheless the media is at risk of relying too heavily on legal experts to do the journalists' job.

e. exploiting publicity

Yet another risk is that legal commentators will use the media to advertise not just personal views, but professional services. Few lawyers have the opportunity to reach an audience of millions. For lawyers who are seeking future clientele, becoming a legal commentator provides an ideal advertising source.³⁶ There is a greatly increased opportunity for a lawyer acting as a legal commentator to attract clients through media exposure.³⁷ Many lawyers take high-visibility cases, not because of the fee they will receive, but because of the exposure it will bring them for future cases.³⁸ A legal expert may have the same motivation in commenting on a case. Unless members of the media intend to provide a free advertising vehicle to legal experts, they must carefully consider the economic motivations of their designated commentators.

2. Risks to the public

Because the public is the audience for media reports, the public is ultimately at risk of harm from improper use of legal commentators. As described above,³⁹ the public may receive biased information, incompetent opinions, and manipulative sales pitches. However, the use of legal commentators poses additional and unique threats to the public. The public, unlike the media, is not trained to be sensitive to biases in a story

36. Following the Supreme Court's ruling in *Bates v. State Bar*, 433 U.S. 350 (1977), lawyers are allowed to advertise, as long as their advertisements are truthful and comply with reasonable time, place, and manner restrictions. *Id.* Although advertising for clients is legal, state disciplinary agencies continue to be concerned about and regulate attorney advertisement and solicitation. *See, e.g., CAL. RULES OF PROFESSIONAL CONDUCT*, Rule 1-400 (1992).

37. Some commentators are shameless in this regard. *See Cox, supra* note 4, at 1, 26 (describing PR campaigns by commentators to receive notoriety and presumably more clients by serving as legal expert).

38. *See Susan Seager, King Trial Postscript: 3 Defense Lawyers Get Referrals—1 Gets Fan Mail and Death Threats*, L.A. DAILY J., June 29, 1993, at 11.

39. *See supra* part II.B.1.

or lack of factual support. Members of the community must rely on short stories or soundbites to understand important events in their lives. Given this unfamiliarity with the news process, the public is particularly vulnerable to some of the dangers of using legal experts.

a. undue credibility

When the term "expert" is attached to a legal commentator, the public tends to give added credibility to that individual's comments.⁴⁰ As we have seen, while many commentators are legitimately due that deference, others are not. The person watching television does not have the resources to investigate an expert's background. From the reader's or listener's perspective, all that is apparent is that this legal commentator has been chosen from the multitude to comment on a case. Intuition suggests that this commentator must therefore be better or more insightful than others. In reality, the commentator may simply be the only person who answers the telephone when a reporter, on a tight deadline, calls.

b. undermine or inflate confidence in the judicial system

The title of "expert" gives legal commentators the ability to manipulate the public's perceptions of both individuals and institutions. By attacking court rulings as unprincipled, legal commentators can undermine confidence in the judicial system. On the other hand, if a legal commentator avoids candid discussion of case progression, or shies away from criticizing a court's ruling, the public may be denied an accurate report of the case.

Protecting the public from problems in the criminal justice system is particularly acute in cases with great public interest and the possibility of reaction to a verdict. For example, in the King case, the media, aware of the devastating civil disturbances following the state court's acquittal of the four officers, adopted at times a paternalistic view toward reporting the progression of the federal trial.⁴¹ At one point, some reporters tried

40. One commentator explained this phenomenon, which is also applicable to reporters, as follows:

"Journalists do have a preponderant role in shaping the public universe of discourse. Their vision becomes public fact, in the papers and on television However realistic and correct a private person may judge his or her own attitudes to be, when those attitudes are not confirmed in the public media they cannot help seeming rather sectarian, narrow, and even 'uninformed.'"

SWAIN, *supra* note 18, at 106 (quoting Michael Novak, *Why the Working Man Hates the Media*, MORE, Oct. 1974, at 5).

41. In some ways, this attitude was understandable. As a reporter stated in different circumstances, "No amount of professionalism can recover the lives lost in a contagion of vio-

to deter me from explaining why the court's proposed *Allen* charge might signal its belief in a possible deadlocked jury. There was also a conscious effort not to raise the public's expectations regarding the defendants' sentences if convicted. The public, however, had a right to the truth. A legal commentator may be faced with the difficult question of reporting troubling truth or shielding the public from the realities of ongoing proceedings. Because of the media's concerns over raising expectations or exciting the populace, the public may be at risk of intentionally slanted reporting of a legal expert's opinions.⁴²

3. Risks to the legal commentator

Finally, legal experts pose risks to themselves by serving as legal commentators. There is a temptation, especially for academics who usually live outside the limelight, to get caught up in the excitement of a high-visibility case. Yet, there are certain work constraints when entering the realm of legal commentary. The personal and professional impact of serving as a legal commentator must also be considered when deciding whether to use or serve as an expert.

a. immediate opinions

Law professors, in particular, may be accustomed to a work pace that allows them to pose an idea, challenge it, submit it to others for comment, and then revise the concept. This luxury does not exist when one serves as a legal commentator. The expert must be ready to give an immediate reaction to a proceeding, even if subsequent facts indicate the reaction was incomplete or flawed. "In a world of daily—nay, almost hourly—journalism every clever man, every man who thinks himself clever, or whom anybody else thinks clever, is called upon to deliver his judgment point-blank and at the word of command on every conceivable subject of human thought."⁴³ This can create a great deal of frustration for professionals who pride themselves on accuracy to present the

lence." *Id.* at 56 (quoting J.K. Hvistendahl, *An Ethical Dilemma over Self-generating News*, GRASSROOTS EDITOR, Sept.-Oct. 1973, at 4).

42. Overly protective reporting may also conflict with traditional journalism ethics. See SWAIN, *supra* note 18, at 56. While reporters are expected to exercise some "self-censorship for the public good," the more traditional journalism ethic is reflected in the following reporter's quote: "We don't make the news, we just print it . . . What God in his wisdom has permitted to happen, I'm not too proud to print . . . Give the people the facts, and all will be well." *Id.*

43. LEONARD & THELMA SPINRAD, *SPEAKER'S LIFETIME LIBRARY 138* (1987) (quoting JAMES R. LOWELL, *DEMOCRACY* (1884)).

“right” answer when they lose control to those who might edit or misconstrue their comments.

b. commentators as advocates

One reason reporters turn to legal commentators is to voice an opinion the reporter cannot profess on his or her own. As a result, the legal commentator risks being used by the media to argue a proposition that, although it may be true, is a matter for advocacy, not expert opinion. For example, in the King Trial, the issue was raised whether prior misconduct by Sergeant Koon could be used to cross-examine him at trial. The court’s ruling ultimately came down to an exercise of discretion.⁴⁴ Judge Davies had to decide whether the probative value of the evidence outweighed its prejudicial impact.⁴⁵ While a legal commentator could discuss why the judge had the discretion to admit the evidence, and how the evidence could help the prosecution’s case, it was up to the prosecutors to argue why the court’s ruling disallowing the evidence was unfair. Legal commentators must be constantly aware that reporters may use them not only to explain an issue, but also to advocate a position, perhaps even with a hope that the commentator’s remarks will sway the court’s decision.

c. opinions made to order

Legal commentators also risk being seduced into the high-visibility and possibly lucrative world of media reporting. Commentators may concern themselves more with what they think the media wants to hear than with presenting objective observations. A painful example of this conduct occurred on the first day of the King Trial. Reporters congregated in the hallway for quotes on the court’s remarks. Some commentators seemed willing to say anything—the more inflammatory the better—in order to win the favor of reporters.

d. becoming a public figure

Legal commentators also face the risk of becoming public figures. Some might ask, “So, what’s wrong with a little fame? Isn’t it great to be so much in the public eye?” Even those commentators who thrive on public attention must recognize that public recognition comes with a cost.

44. See FED. R. EVID. 404(b).

45. *Id.*

In the 1964 landmark decision of *New York Times v. Sullivan*,⁴⁶ the Supreme Court held that a public official may only recover for defamation if he or she proves actual malice.⁴⁷ In 1967 the Court expanded the malice standard to public figures, as well as public officials.⁴⁸ Thus, if a legal commentator is determined to be a public figure, that person is open to a wide range of criticism with little recourse through the defamation laws.⁴⁹

Experts who value their privacy or who are emotionally sensitive should think carefully before becoming legal commentators. The scariest moment for me during the reporting of the King Trial was *not* when we were surrounded by sharpshooters the day of the verdicts, nor when I faced a hostile crowd in the halls, but when reporters told me that the Los Angeles Times was publishing my profile to familiarize its readers with the "Laurie Levenson" who was reporting on the case.⁵⁰ I was fortunate. The report by Jim Newton and Henry Weinstein—two extraordinarily professional journalists—was fair. Other legal commentators, however, could face a much greater risk by becoming public figures.

e. the public wrath and concerns for personal safety

I am sometimes asked if I ever feared for my safety during the King Trial. I did not, but maybe I should have. Legal commentators face some physical risk of retaliation by irate viewers or readers. I received some amazing hate mail during the King case.⁵¹ One of these prize-winning letters came in an envelope with no return address and was addressed to: "Professor Laurie Levenson, Loyola College, Los Angeles, California." It read:

To Laurie Levenson,

46. 376 U.S. 254 (1964).

47. *Id.*

48. See *Curtis Pub. Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130 (1967) (expanding *N.Y. Times v. Sullivan* malice standard to "public figures").

49. Under current standards, it may be difficult prior to an actual case to determine whether a legal commentator will be viewed as a public figure. As a federal judge commented, "Defining public figures is much like trying to nail a jelly fish to a wall." *Rosanova v. Playboy Enterprises*, 411 F. Supp. 440, 443 (S.D. Ga. 1976). However, "[p]ersons who, either because they occupy a position which has continuing news value or because they exercise general persuasive power and influence in matters of public concern, are considered public figures for all purposes." ALBERT G. PICKERELL, *THE COURTS AND THE NEWS MEDIA* 170 (1993).

50. See Henry Weinstein & Jim Newton, *Law Professor Turns King Trial Interpreter*, L.A. TIMES, Mar. 27, 1993, at B1.

51. Fortunately, for my emotional well-being, I also received letters of encouragement and appreciation.

Every time I saw your face on t.v., I felt like shooting you. How do you feel about two decent policemen being in prison, while a criminal—Rodney King, is free.

Anyone who drives 110 miles an hour, on drugs, drunk, lunges at police, resists arrests deserves to be beaten to a pulp. I pray every day that one of these drunks hits you, and kills or injures you. Or one rapes you. . . .

Wait till you need the police. I think all the police should quit and see how . . . jerks like you get along. I hope God punishes you.⁵²

The letter was unsigned. That letter came the same day as another letter, in which the author excoriated me for my opinions, referred to my “big yid nose spread all over our screens,” told me to “[c]rawl back in your hole,” and then added, “P.S. I think you are cut from the same cloth as the Kike women in WW2 who ‘slept’ with the Nazis so that they could survive & make a profit.”⁵³

My guess is that anyone who bothers to write such letters would not harm me, but that is only a guess. It is also only a guess that the author who wrote, “If [the rioters] aren’t punished or deported, God help you. Do yourself and society a favor. Go process wills in Montana. . . . Wanna be Pen Pals?”⁵⁴ would also not follow through on his threat. Some commentators might not want to take the risk.

Additionally, commentators might not want to be subject to the barrage of threatening phone calls they might receive while commenting on a highly controversial case. On at least one occasion, I received a call where the threat was specific enough and plausible enough that I reported it to the authorities. As my experience showed, threats and the risk of physical harm are also dangers facing a legal commentator.

C. Summary

There are many advantages to using a legal commentator and serving as one, but there are dangers as well. Given First Amendment concerns,⁵⁵ it is unlikely that these dangers justify abolishing the use of legal

52. Anonymous and undated letter to Laurie Levenson, Professor, Loyola Law School, L.A. (on file with *Loyola of Los Angeles Law Review*).

53. Undated letter from S. Weiss of Grand Rapids, Michigan, to Laurie Levenson, Professor, Loyola Law School, L.A. (on file with *Loyola of Los Angeles Law Review*).

54. Letter from Hal Zack to Laurie Levenson, Professor, Loyola Law School, L.A. (Feb. 24, 1993) (on file with *Loyola of Los Angeles Law Review*).

55. The right of legal commentators to speak to the media and the right of the media to use legal commentators is undoubtedly protected by the First Amendment. See *Nebraska Media Ass’n v. Stuart*, 427 U.S. 539 (1976).

commentators.⁵⁶ Rather, the goal may be to ascertain a role for legal commentators that minimizes the dangers and maximizes the benefits.

III. THE FUTURE

I enjoyed serving as a legal commentator. The rewards—although not monetary—far exceeded the costs and disadvantages. I met competent and dedicated journalists and I hopefully helped others understand a key event in our city's history. In retrospect, however, I realize that it is imperative that the legal community study the role of legal commentators.

Much is expected of legal commentators. Like courtroom artists, legal experts must describe and interpret the soul of courtroom proceedings. The public is entitled to an unbiased, competent, and unobstructed view of the court system and its trial. Yet, this is not an easy task. Accordingly, it should be embarked upon only with an understanding of some of the risks involved. It is my hope that this Essay will add to that understanding and prompt further discussion on the role and responsibilities of legal commentators.

It is beyond question that attorneys, as citizens, possess the right, under the free speech clause of the first amendment to the United States Constitution and under similar provisions in many state constitutions, to speak out on issues of public and community concern, including issues related to the law and legal system.

William P. Hoye, *Silencing the Advocates or Policing the Profession? Ethical Limitations on the First Amendment Rights of Attorneys*, 38 DRAKE L. REV. 31, 31-32 (1988-1989) (footnotes omitted). Although commentators have the First Amendment right to speak, this right may not be unlimited and could, in the future, be subject to ethical restrictions. *Cf.* *Gentile v. State Bar*, 111 S. Ct. 2720 (1991) (setting forth standard of review of ethical restrictions for lawyers).

56. Pursuant to the Court's holding in *Gentile*, the lawyer could only be restrained from statements that have a substantial likelihood of materially prejudicing the court's proceedings. 111 S. Ct. at 2725. *See generally*, Shon K. Hastings, Note, *Constitutional Law—Attorney & Client: First Amendment Rights for Lawyers: Where Should North Dakota Draw the Line?* *Gentile v. State Bar of Nevada*, 68 N.D. L. REV. 937 (1992) (discussing impact of *Gentile* on lawyers' freedom of speech).