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Introduction

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SYMPOSIUM
CELEBRITY PROSECUTIONS
INTRODUCTION

*Gary C. Williams**

It may not be empirically demonstrable, but it certainly appears there are more “trials of the century” today than at any other time in American history. Most of these twenty-first century high-profile trials assume prominence not because there are monumental constitutional issues at stake, as in the Scopes Monkey trial,¹ because important societal values are implicated, as in the Scottsboro Boys cases,² or because democratic values are being tested, as in the prosecution of Ethel and Julius Rosenberg.³

Today’s “trials of the century” command media attention and occupy the collective consciousness primarily because of the prominence of people who accuse or stand accused. In this new millennium we bounce from one high profile criminal proceeding to the next without pause. Winona Ryder was convicted of shoplifting in 2002.⁴ Kobe Bryant was accused and prosecuted for sexual

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1. Gabriel Acri, *Persistent Monkey on the Back of the American Public Education System: A Study of the Continued Debate Over the Teaching of Creationism and Evolution*, 41 CATH. LAW. 39 (2001).

2. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 51, 61–67 (2000).

3. Atossa M. Alavi, *The Government Against Two: Ethel and Julius Rosenberg’s Trial*, 53 CASE W. RES. L. REV. 1057 (2003).

4. Kristina Sauwerwein, *Warning, Probation for Ryder*, L.A. TIMES, Dec.

assault in 2003–04.⁵ Martha Stewart was convicted of lying to federal investigators in 2004.⁶ Michael Jackson was accused and tried for child molestation in 2005.⁷ Scott Peterson was convicted of murder in 2005.⁸ Robert Blake was accused and tried for murder in 2005.⁹ Today, Phil Spector is awaiting trial for murder.¹⁰

To the legal professional these cases are largely unremarkable. They involve basic factual disputes, do not presage new developments in legal theory, and do not present monumental constitutional or societal issues. Starkly put, these cases command public attention and extensive press coverage because of the fame or infamy of the accused or the accuser.

Given this characteristic, these “trials of the century” may accurately be designated “celebrity prosecutions.” The attention the press gives to these celebrity prosecutions, and the challenges that attention poses for the criminal justice system are the subjects of this symposium. While the authors’ viewpoints are disparate, the unifying theme of their essays is that celebrity prosecutions impose extraordinary pressure on the judicial system and demand a fresh look for solutions to the problems that pressure creates.

One measure of the problems created by celebrity prosecutions are the changes in the law and the administration of justice that have been wrought in response. The failed prosecution of O.J. Simpson resulted in a modification of the California Evidence Code,¹¹ and an

7, 2002, at B1.

5. Mike Bresnahan, *Laker Report: Teams Mimic Bryant Double-Team*, L.A. TIMES, Feb. 6, 2006, at D11.

6. Leslie Earnest, *Martha Stewart Convicted*, L.A. TIMES, Mar. 6, 2004, at C1.

7. Steve Chawkins, Stuart Pfeifer & Megan Garvey, *Jackson Acquitted on All 10 Counts*, L.A. TIMES, June 14, 2005, at A1.

8. Maria L. LaGanga & Tonya Alanez, *Scott Peterson Gets Death for Murders*, L.A. TIMES, Mar. 17, 2005, at B1.

9. Andrew Blankstein & Jean Guccione, *Actor Robert Blake Acquitted in Shooting Death of His Wife*, L.A. TIMES, Mar. 17, 2005, at A1.

10. *Spector’s Trial in Slaying of Actress Postponed*, L.A. TIMES, Apr. 26, 2006, at B4.

11. CAL. EVID. CODE § 1370 (West 1996), was enacted as an “urgency statute” in 1996, the year following the acquittal of O.J. Simpson. This provision permits the introduction of a hearsay statement if it purports to narrate, describe, or explain the infliction or threat of physical injury upon the

addition to the California Rules of Professional Responsibility, noted in the essay by Mark Geragos.¹² The Kobe Bryant prosecution resulted in the issuance of a prior restraint against the press, though it is extremely rare for a court to issue a prior restraint in a matter that does not involve national security.¹³ The succession of celebrity prosecutions has led to increasing judicial reliance upon very broad gag orders that cover counsel, the parties and now, witnesses and their attorneys. In the Michael Jackson prosecution the gag order issued by the court covered counsel, parties, witnesses and potential witnesses. Its language was so broad that it became a staple source of comedy for Jay Leno on the Tonight show before the court modified the order as it applied to Leno.¹⁴

Celebrity prosecutions have even led to the creation of a new profession. Because the crush of media coverage can be overwhelming to court personnel, the judiciary, and the media, there are now “media coordinators” who serve as liaisons between journalists, law enforcement, the judiciary and the attorneys.¹⁵ Media coordinators exist for several reasons. Celebrity prosecutions often jam courtrooms, necessitating allocation of scarce seating. Similarly, celebrity trials tax courthouse facilities, due to the media

declarant, and the declarant is unavailable. Section 1370 was adopted by the California Legislature after similar evidence was ruled inadmissible in the Simpson murder trial.

12. Mark Geragos, *The Thirteenth Juror: Media Coverage of Supersized Trials*, 39 LOY. L.A. L. REV. 1167 (2006), nn. 65–67 (discussing the adoption of Rule 5-120, which details an attorney’s ethical obligations regarding extra judicial statements).

13. Jeffrey Matrullo, *People v. Bryant and Prior Restraint: The Unsettling of a Settled Area of Law*, 4 CONN. PUB. INT. L. J. 347, 356–58 (2005). Professor Erwin Chemerinsky said the Bryant ruling flies in the face of a long line of U.S. Supreme Court rulings going back to the 1932 *Near v. Minnesota* ruling. Steve Henson and Henry Weinstein, *Court Bars Disclosure by Media*, L.A. TIMES, July 20, 2004, at D1.

14. Steve Chawkins, *Gag on Jackson Gags is Loosened*, L.A. TIMES, Mar. 12, 2005, at B1. Because Leno was a potential witness, under the language of the gag order he could not talk about the case on his show, even in jest. Leno proceeded to enlist other comics to relate jokes about the trial until he obtained a release from that portion of the order. The article reports Leno told 25 Jackson jokes on the evening Leno was freed of the restriction.

15. Robin Abcarian, *The Go-to Guy at Jackson Trial*, L.A. TIMES, Apr. 27, 2005, at E1.

need for electricity, internet access, and space to conduct interviews. Celebrity prosecutions can disrupt other proceedings, and at times overwhelm scarce courthouse parking space.¹⁶

In the general milieu of criminal prosecutions, the constitutional principles of freedom of the press and the right to a fair criminal trial are complimentary. The freedom accorded to the press to report on judicial proceedings is one method for guaranteeing fair criminal trials. Public scrutiny of criminal prosecutions through the lens of media coverage reduces the temptation for judicial, prosecutorial and defense misconduct.¹⁷ But in a celebrity prosecution these constitutional rights seemingly come into conflict, rather than exist in harmony. Certainly that is the view of Mark Geragos, and the view of the judges described in the essays by Paul Hoffman and Craig Matsuda. These legal advocates and jurists believe that extensive publicity before and during a high profile criminal trial often degrades or destroys a defendant's right to an impartial jury and a fair trial. These jurists and advocates attribute this detrimental effect to the wide public dissemination of inadmissible evidence and the discussion of "just verdicts" by commentators and analysts before all of the evidence is elicited.

Jury pools are contaminated by pre-trial publicity, and in many cases there is the fear that publicity during a trial will get back to jurors despite the best efforts of the judiciary to immunize them from press coverage.

The authors in this symposium approach these issues from four unique perspectives. Mark Geragos is a prominent defense attorney who has been involved in several high profile trials. He explores the problem of trial publicity and its effect on a celebrity defendant's right to a fair trial. Mr. Geragos argues that pre-trial publicity in celebrity prosecutions almost inevitably works to the detriment of the criminal defendant. He documents cases where prosecutors have used an arrest to publicize their theory(ies) for guilt of the accused, then requested gag orders to prevent defense counsel from commenting on the cases to counteract the impact of the prosecutorial press conference. Mr. Geragos also documents how pre-trial publicity can operate to prejudice a jury venire against a defendant in

16. *Id.*

17. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 n.9 (1980).

a high profile prosecution. He argues that in some cases pre-trial publicity makes it virtually impossible to assemble a jury that has not prejudged the case against the defendant.

Mr. Geragos writes that the media's insatiable hunger for stories about sensational trials has exacerbated this problem. He surmises that the rise of cable television, the advent of Court TV and the emergence of the internet as a news source have expanded the role of the press in degrading a defendant's right to a fair trial. Geragos says it is virtually impossible to avoid pre-trial contamination of the jury pool in a celebrity prosecution because of national cable news and the saturation coverage of such prosecutions ensures that potential jurors everywhere will likely know about the case.¹⁸ The related problem, in his view, is the negative impact this coverage has on the presumption of innocence. He argues that where most, if not all, potential jurors know something about the facts of a case due to media coverage, the presumption of innocence is meaningless.

Mr. Geragos documents the remarkable problem of stealth jurors. He defines stealth jurors as people who, due to the publicity generated by celebrity prosecutions, dissemble in an effort to be seated on a celebrity prosecution jury. He identifies two motives for stealth jurors: a desire to see the defendant convicted, or the desire to seek fame and perhaps fortune in the aftermath of celebrity prosecution jury service. Mr. Geragos argues that the phenomenon of stealth jurors illustrates why *voir dire* has become an inefficient tool for counteracting the effects of saturation pre-trial publicity.

Drawing on the British example, Mr. Geragos proposes that Congress and state legislatures address these problems by enacting laws explicitly giving courts the power to sanction reporters, newspapers and other press outlets if their coverage creates "a substantial risk that the course of justice will be seriously impeded."¹⁹ Mr. Geragos acknowledges that his proposal raises substantial First Amendment concerns, but he argues that the freedom of the press must be balanced against the detrimental impact on a criminal defendant's right to an impartial jury and a fair trial decided strictly on the evidence admitted during that trial.

Paul Hoffman addresses an issue created by the increasing

18. Geragos, *supra* note 12, at 1170–74.

19. Geragos, *supra* note 12, at 1192.

reliance upon gag orders in celebrity prosecutions and the proliferation of legal commentators. These converging trends have forced one court to decide whether a commentator may be barred from publicly discussing a case because she represents one of the witnesses in that prosecution.

Mr. Hoffman begins by arguing that gag orders in general do little to promote fair criminal trials. In support he cites opinions holding that pre-trial publicity, even if it includes discussion of inadmissible evidence, does not necessarily deprive a defendant of a fair trial.²⁰ Hoffman argues that *voir dire* and effective jury instructions are, even in celebrity prosecutions, adequate remedies for the effects of pretrial publicity.²¹

Hoffman goes on to discuss the gag order issued against Gloria Allred, a prominent attorney and well known legal commentator. Ms. Allred was representing a potential witness in a high profile criminal prosecution.²² The District Attorney and defense counsel in that case jointly asked that Ms. Allred be included in a gag order restricting public comments about the prosecution.²³ The trial judge granted that request, issuing an order so broad that it effectively prevented Ms. Allred from making any public comments about the case—even if her comments had nothing to do with her client or that client's potential testimony.²⁴

20. Michael Seplow & Paul L. Hoffman, *Punishing Pundits: People v. Dyleski and the Gag Order as Prior Restraint in High-Profile Cases*, 39 LOY. L.A. L. REV. 1195, 1205–12 (arguing that the Supreme Court's reversal of Sheppard's murder conviction in *Sheppard v. Maxwell* was based on more than the existence of pre-trial publicity).

21. *Id.* at 1216.

22. Verdict of the Jury, *People v. Dyleski*, Case No. 3-219113-8, (Contra Costa County Super. Ct. Aug. 28, 2006), <http://www.contracostacourts.org/specialaccess/assets/dyleski/0125-082806.pdf>.

23. Notice of Motion for Gag Order, *People v. Dyleski*, Case No. 3-219113-8, (Contra Costa County Super. Ct. Aug. 28, 2006), <http://www.contracostacourts.org/specialaccess/assets/dyleski/0010-102605.pdf>; People's Request for a Protective Order, *People v. Dyleski*, Case No. 3-219113-8, (Contra Costa County Super. Ct. Aug. 28, 2006), <http://www.contracostacourts.org/specialaccess/assets/dyleski/0009-102605.pdf>.

24. See Amended Protective Order, *People v. Dyleski*, Case No. 3-219113-8, (Contra Costa County Super. Ct. Aug. 28, 2006), <http://www.contracostacourts.org/specialaccess/assets/dyleski/0018-102805.pdf>; see also,

Hoffman argues that the breadth of this order violates the First Amendment by impinging on Ms. Allred's right to discuss publicly any aspect of the criminal proceedings. While he acknowledges that courts possess broad authority to control pre-trial publicity, he argues that power must be exercised consistent with First Amendment concerns. Specifically, he contends that gag orders cannot, consistently with the First Amendment, be aimed at curtailing all pre-trial publicity. Rather, courts should be limited to taking reasonable measures to ensure that a criminal trial is heard by a fair and impartial jury, and that the case is decided only on the facts admitted at trial. Hoffman further argues that courts must, in fashioning gag orders, be cognizant of counsel's need to be able to speak publicly on behalf of her client, and of the public's right to engage in debate about the criminal justice system.

Craig Matsuda is a distinguished member of the press who is quite familiar with the demands of covering celebrity prosecutions. Mr. Matsuda makes three important points in the debate about the impact of such cases on the criminal justice system.²⁵ First, he argues that press coverage of criminal prosecutions and trials is an essential element of the public's right to know. Second, he notes that the public demands coverage of celebrity prosecutions. Third, he asserts that the media must meet those demands.

At the same time Mr. Matsuda acknowledges the need to maintain decorum in the criminal justice system. He recognizes celebrity prosecutions have tarnished judges, lawyers and the media because of the circus atmosphere they create.

Recognizing the tension between the competing imperatives of the public's need to know and criminal defendants' right to an impartial jury and a fair trial, Mr. Matsuda proposes an intriguing

Letter to G. Allred from Judge Flinn—Modified Protective Order for Clarity, *People v. Dyleski*, Case No. 3-219113-8, (Contra Costa County Super. Ct. Aug. 28, 2006), <http://www.contracostacourts.org/specialaccess/assets/dyleski/0017-102805.pdf>.

25. Craig Matsuda, *Courting the Stars: Why the Legal System Needs New(s) Thinking for Overpowering Celebrity Trials*, 39 LOY. L.A. L. REV. 1221, 1222–23 (“Celebrity cases will inevitably arise, they will sorely test the system’s mettle, and there will be huge and indisputable interest in them. This is exactly the time for the courts to show themselves and their processes at their best—and not to be arcane, secretive, stumbling or fumbling.”).

solution—the creation of a Celebrity Court. Under Matsuda's proposal the Celebrity Court would be located in Los Angeles, a venue where jurors will not necessarily be star struck by the notion of hearing a case involving supermodel *A* or sports superstar *X*. The Celebrity Court administrator would have experience dealing with high-profile litigation, which would minimize problems such as the inadvertent release of sealed documents. Celebrity Court judges, by virtue of their experience both in Los Angeles in general and as members of the celebrity court bench, would not be overwhelmed by the prospect of another icon appearing in their courtroom. Matsuda theorizes that because the Celebrity Court bench would have extensive experience handling high profile prosecutions, its judges would be less tempted to issue overbroad gag orders or impose overly restrictive limitations on press coverage.

Mr. Matsuda speculates that if a Celebrity Court were created, special facilities could be built or located to house its proceedings. That facility could be designed to handle the crush of press coverage. Special cameras and equipment could be installed in the courtroom to allow fuller coverage of its proceedings while minimizing intrusion. A special venue could be designed to handle the need for increased parking, interview spaces, security, courtroom seating capacity, and other problems associated with celebrity prosecutions. Costs assessed to the media due to needs generated by celebrity prosecutions would be reduced. Disruption of other judicial proceedings would be eliminated. And the Celebrity Court might permanently retain the services of a courtroom coordinator to further facilitate its smooth operation.

While Mr. Matsuda may be writing with his tongue planted in cheek, the idea of creating a Celebrity Court warrants consideration. As he points out, there is ample precedent for the creation of courts to handle specialized issues. And because Matsuda's proposal makes resort to the Celebrity Court a matter of choice for the defendant, it will not infringe on the defendants' constitutional rights. Mr. Matsuda argues that many celebrity defendants might welcome transferring their cases to this court. The specialized knowledge, personnel and procedures of the Celebrity Court might go a long way toward ameliorating some of the harms to the right to an unbiased jury and fair trial identified by Mr. Geragos.

Ms. Laurie Levenson is a Professor of Law at Loyola Law

School in Los Angeles. Professor Levenson has provided legal commentary on high-profile cases, including the Rodney King, Reginald Denny, Menendez Brothers, and O.J. Simpson trials. She has worked as an expert legal consultant for CBS News, CNN, and NPR, and has worked as a columnist for the Los Angeles Times, Los Angeles Daily Journal, and National Law Journal.

Professor Levenson addresses the possible conflicts of interest that face high-profile prosecutors when handling cases that garner great media attention.²⁶ The added pressures of high-profile cases, she argues, may lead prosecutors to commit the most basic ethical violations. To explore the issue, Professor Levenson examines three recent high-profile cases: the Michael Jackson child molestation trial, the Jesse James Hollywood murder prosecution, and the clemency proceedings of Michael Morales.

Professor Levenson identifies a series of lessons learned from careful examination of these cases.²⁷ First, she warns that high-profile cases are more likely to create conflict issues for prosecutors. In order to protect against this, she suggests that prosecutors include a full review of their ethical duties at the top of their case preparation checklist. Second, she urges prosecutors to safeguard their objectivity when interacting with the media, in that prosecutors should only reveal to the media that information which is absolutely necessary. Third, she urges prosecutors to avoid becoming financially or personally invested in a case as this may endanger their objectivity. Finally, she states that prosecutors should not give the appearance of a conflict in a high-profile case, in order to preserve the legitimacy of the criminal process.

Human nature being what it is, celebrities will continue to run afoul of the law. That truism, coupled with the continuing explosion of news sources and the public's apparent fascination with celebrity prosecutions, will continue to generate extensive media coverage. The pressures created by that coverage will continue to threaten the constitutional rights of criminal defendants, vex counsel, tax the judiciary and bedevil the criminal justice system. This symposium

26. Laurie L. Levenson, *High-Profile Prosecutors & High-Profile Conflicts*, 39 LOY. L.A. L. REV. 1235, 1235 ("The pressure to succeed too often causes prosecutors in the spotlight to make strategic and ethical decisions that can backfire against their case.").

27. *See id.* at 1250–54.

will, ideally, provide a starting point for a dialogue among the bench, the bar, the press and legal academia seeking solutions for current problems and anticipating future challenges.