

# University of Chicago Legal Forum

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Volume 1998 | Issue 1

Article 3

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Peter Arenella

[Peter.Arenella@chicagounbound.edu](mailto:Peter.Arenella@chicagounbound.edu)

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### Recommended Citation

Arenella, Peter () "The Perils of TV Legal Punditry," *University of Chicago Legal Forum*: Vol. 1998: Iss. 1, Article 3.

Available at: <http://chicagounbound.uchicago.edu/uclf/vol1998/iss1/3>

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# The Perils of TV Legal Punditry

Peter Arenella<sup>†</sup>

In Woody Allen's "Deconstructing Harry," we learn that the Devil has reserved a special place in Hell for all the "TV lawyers." Allen's line and the knowing laughs it triggers should serve as a warning to this growing cottage industry that something is amiss.

The first signs of serious trouble came with O.J. Simpson's civil case. Since the trial was not televised, only a few pundits could gain access to the courtroom or the media listening room. What did lawyers and law professors across the country do when their local television station asked them for "expert" analysis of that day's developments? I hope and trust that many just said no. Far too many lawyers, however, said yes and offered analysis of testimony they didn't see and judicial rulings they hadn't read.

Things have only gone downhill since then. Reacting to the Simpson case, most trial judges have refused to televise high-profile trials in jurisdictions where they have the discretion to keep cameras outside the courtroom.<sup>1</sup> Consequently, nationally prominent attorneys cannot observe these trials unless they are willing to quit their day jobs and work full-time to cover them. Lack of access to these trials has not, however, prevented many celebrity pundits from "analyzing" these cases. On a *Nightline* show covering the McVeigh trial, Ted Koppel asked a legal pundit for her evaluation of the federal prosecutors' performance.<sup>2</sup> After

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<sup>†</sup> Professor of Law, University of California at Los Angeles School of Law. B.A. Wesleyan University, 1969; J.D. Harvard University Law School, 1972. Special thanks to Robert Goldstein for his thoughtful comments on an earlier draft.

<sup>1</sup> See generally Peter Arenella, *Televising High Profile Trials: Are We Better Off Pulling The Plug?*, 37 Santa Clara L. Rev. 879, 891-912 (1997), for arguments that recast the nature of the debate about the benefits and costs of televising high profile trials. In that essay, I show how the courtroom camera functions as a media filter that does not convey all aspects of the trial to the viewing public. Id. at 893-900. I also argue that the viewing public is not a monolith but actually two different audiences — the "hard core" daily viewers and the far larger public audience that primarily catches video snippets from the trial on evening programming. Id. at 900-01. Once this two-audience distinction is made, it becomes easier to see why many of the benefits of televising high profile trials are realized primarily by daily trial watchers, while serious costs result from the second audience's complete and unwitting dependence on the television industry's judgments about which video snippets should be shown on evening programming. Id. at 893-912.

<sup>2</sup> *Nightline* (ABC television broadcast, May 20, 1997).

complimenting the prosecutors for presenting a tight case that balanced technical detail with emotional appeals to the jurors, the pundit candidly acknowledged that she had not been in the courtroom. She, at least, felt obligated to inform the television audience, albeit indirectly, that she was essentially repeating the media's conventional wisdom about the case.

Many legal pundits are not so candid. Commentators who evaluate the performance of trial lawyers they are not observing in the courtroom perpetrate a fraud. Networks are willing accomplices because their legal "infotainment" shows would have very few guests and even fewer nationally recognizable personalities if they only used local attorneys who actually observed the trial. Ironically, television imposes a higher standard of competency for its sports "color" analysts than its legal pundits. After all, would the modern television audience take seriously the expert analysis of some former athlete who was not actually watching the game he or she was analyzing?

The recent controversy concerning the nature of the President's relationship with Monica Lewinsky provides further evidence that some pundits have let their egos and their politics trump their professional judgement. Before Starr's report was released, you could turn on any channel and find commentators relying on rumor, hearsay, or unsubstantiated leaks from partisans, to criticize or defend the actions of the special prosecutor, the President and his legal team. Of course, some of these commentators have reminded viewers they were only discussing "allegations," not "facts." But the court of public opinion will render a verdict about the truth and significance of these "allegations" that will affect Starr's criminal investigation as well as the political decision of whether to impeach the President. This uninformed process of direct democracy in action would undoubtedly occur without the legal commentators' participation. But should legal pundits with various political axes to grind play such a significant part in shaping that public opinion?

Have the legal commentariat lost their way or is this one more example of legal demystification that demonstrates the absence of any real separation between law and politics? If George Will gets to play this game, why shouldn't prosecutors, defense counsel, and law professors pontificate on television as well? Or should our role as lawyers and "officers of the court" place some constraints on the functions we serve, what we say, and how we say it?<sup>3</sup>

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<sup>3</sup> See Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator*, 69

As a media-certified member of the pundit community, I have had ample opportunity to think about the TV legal expert's legitimate functions and how best to serve them ethically by learning from my mistakes. Some media requests for commentary raise no troubling issues. I am happy to cooperate if the media is seeking an explanation of some legal institution, procedure, or issue on which I have some expertise. After all, why shouldn't a former criminal defense attorney who teaches and writes about the criminal law use his knowledge to help the media describe and explain the legal system's principles and procedures in ordinary digestible English? Webster's Dictionary defines "pundit" as "a learned man: teacher."<sup>4</sup> I am a teacher and the opportunity to educate such a vast audience is hard to resist.

Such explanations of legal principles and procedures, however, are the media's version of foreplay. What the media really wants to know from its pundits is which lawyers are doing a good job, which ones are screwing up, and which party will ultimately prevail in the courtroom and in the court of public opinion. Responding to such "scorecard" inquiries raises troubling questions about the pundit's competence and ethics.

When pundits evaluate the performance of legal actors, predict legal outcomes, and assess their accuracy and public acceptability, they perform functions (for example, story-telling, and normative analysis that assigns blame, credit, and responsibility) that permit the media to attribute meaning to legal events while simultaneously preserving the media's professional stance of objectivity. The story-telling and normative-critique functions are consistent with a second definition of "pundit": "one who gives opinions in an authoritative manner: a critic."<sup>5</sup> Glib and articulate lawyers who talk in sound bites can give the media what it wants; but should pundits refrain from doing so when they have no adequate basis for their reviews? Even when lawyers observe the legal proceedings they are "scoring," is something lost when pundits help the media trivialize criminal investigations and trials into sporting contests that entertain the masses? Finally, are there some questions (for example, what will the jury do? did the jury act in bad faith?) that pundits usually should not answer?

Neither the media nor many pundits see anything particularly

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S Cal L Rev 1303, 1337-38 (1996); Erwin Chemerinsky and Laurie Levenson, *The Ethics of Being a Commentator II* 37 Santa Clara L Rev 913, 915 (1997).

<sup>4</sup> Webster's Tenth New Collegiate Dictionary 947 (Merriam-Webster 1996). My friends may balk at the "learned" characterization.

<sup>5</sup> Id.

problematic about offering this type of analysis. In their view, legal pundits should not be held to a higher standard of competence and expertise than the other “talking heads” who populate the airwaves. The public knows what it is getting and has the freedom to switch channels, stations, or articles if it is not interested. More information and “critical analysis” are better than less because it contributes to the “marketplace of ideas,” thereby enhancing public understanding of our legal system while subjecting its decision-makers to greater democratic accountability.

This article paints a less rosy picture. Part I examines the functions a legal pundit can serve and what pundits must know and do to perform these roles competently. Once one realizes the prerequisites for competent legal punditry, it becomes easier to see why celebrity pundits add little value to the intellectual marketplace when they analyze cases they are not observing.

But the perils of TV legal punditry go beyond the problem of talking heads offering uninformed commentary. Any evaluation of punditry’s impact on our legal institutions and the public’s understanding of how our system functions must examine how well pundits can serve their normative functions in a visual, “live,” entertainment medium that relies on powerful video images, sound bites, and polarized adversarial debates to communicate information to its audience.

Part II suggests that the constraints of television as a medium limit the educational benefits derived from TV legal punditry while generating significant costs. Television legal pundits improve the media’s news gathering function and thereby contribute to the public’s understanding of some legal issues and procedures when they competently perform their descriptive and explanatory functions. When, however, they perform their storytelling and normative critique functions by offering sound-bite analysis of complex, nuanced problems, they frequently frame important issues in a misleading fashion that generates unproductive and ill-informed public discussions about pseudo-issues.

There are several dangers in my writing a polemic against TV legal pundits when I continue to be one, albeit on rare occasions. By doing this work, I might be tempted to inflate the significance of TV punditry. Perhaps the viewing audience has already figured out how much hot air passes for intelligent commentary and pays little attention to any of it. Conversely, if TV legal punditry does matter, the reader might view me as either a hypocrite or a self-delusional egomaniac who mistakenly believes he can avoid all the

pitfalls that come with the territory.

What follows, however, is the product of my efforts to define the appropriate nature of the pundit's job by analyzing what I've learned from my mistakes. I have struggled with these issues for the last decade, especially during the Simpson saga when I worked as an on-air legal consultant for ABC News. During the criminal trial, I also did "gavel-to-gavel" television coverage every morning for a local station, wrote a daily column in the Los Angeles Times, and offered trial commentary on local and national radio news stations. I learned first-hand that there were vast differences in how the three mediums communicated information to their audiences. In defining and redefining my job description, I hope I have developed some insight into punditry's temptations and perils. This essay draws upon those personal experiences.

## I. TV LEGAL PUNDITRY'S FUNCTIONS

### A. From Description to Prescription: The Pundit's Changing Role

Legal punditry is not a new phenomenon, but the commentator's job description changed with the advent of Court TV and the networks' discovery that some high profile trials had commercial as well as news value. Legal experts from across the country weighed in on the Goetz verdict and the prolonged McMartin preliminary hearing that involved sensational allegations of child abuse. Three televised high profile trials in Los Angeles — Rodney King, the Menendez brothers, and the Simpson case — increased the legal expert's prominence as he became a constant "on-air" personality who provided ongoing analysis of the case.

Realizing the public's seemingly insatiable appetite for sensational criminal cases, television has called on celebrity pundits to analyze the Oklahoma City bombing trials, the Nanny trial in Massachusetts, the Unabomber case, and Starr's investigation into alleged Presidential wrongdoing. Legal pundits are now a media fixture on commercial, cable, and public television.

#### 1. *The Pundit's Decoding Function.*

Why does the media insist on its daily dose of legal punditry? Why not? Lawyers can decode legal jargon (for example, "what is a subpoena duces tecum?") and explain the meaning of legal principles and procedures ("what is a grand jury?") so that the

media can translate legalese into comprehensible English. Legal pundits perform this explanatory function so that they can help the media interpret the significance of legislative, judicial, and executive actions by placing them in their proper context.

When the pundit performs this decoding role competently, he enhances the media's ability to gather and report legal news more accurately, thereby contributing to the public's understanding of the legal system. Most journalists are not lawyers and they need help understanding what they are observing so they can write or produce a coherent story that educates the public. Pundits who perform this function for the radio and print media provide a valuable service with very little public recognition, because most of what they say to the reporter is not attributed to them. The pundit receives his reward for doing this job well when he sees how his input has improved the clarity and accuracy of the journalism that results from lengthy phone conversations with reporters. The pitfalls of serving this explanatory function are its time-consuming nature and the inevitable occasions when the reporter does not understand what the pundit is saying or quotes the pundit out of context. Except for live radio, the pundit assumes such risks because he does not control the ultimate editing process.

Putting aside the difficulty of explaining anything complex in a ten-second sound bite,<sup>6</sup> there is nothing problematic about national celebrity pundits serving this decoding function on television, provided that they have an adequate basis of factual and legal knowledge to inform their analysis. While these two caveats about legal and factual knowledge appear self-evident, many pundits apply very modest definitions of what qualifies as an adequate knowledge base.

To perform the explanatory role competently, the commentator must be aware not only of general legal principles but their definition in the particular jurisdiction. One troubling aspect of the "national pundit" phenomenon is how frequently well-known pundits misstate the law at issue because they have not practiced in the particular jurisdiction nor have they researched local law to find out whether it is consistent with the law in their own state. During the Simpson case, Los Angeles-based commentators frequently listened to East Coast pundits<sup>7</sup> confidently give

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<sup>6</sup> See Part II.

<sup>7</sup> The networks minimized this problem by hiring Los Angeles attorneys and law professors as legal consultants. However, some Los Angeles-based commentators also made egregious mistakes. Covering the Simpson case was a full-time job that required the pundit not only to listen to all the testimony and read all the motions but to anticipate legal issues that

completely erroneous accounts of the California legal principles implicated in the day's events.

2. *The Pundit's Story-Telling Function: Assigning Credit, Blame, and Responsibility.*

Gavel-to-gavel televised coverage of O.J. Simpson's criminal trial required constant expert commentary, if only to fill those frequent and prolonged periods of dead air when the trial ground to a halt and the inevitable sidebar conference began. The national obsession with the Simpson case also fueled higher ratings for evening infotainment programs like *20/20*, *Dateline*, and *Rivera Live*,<sup>8</sup> which often featured panels of lawyers acting like Siskel and Ebert, giving their thumbs up or down on the legal actors' performances.

Both the "on-air" expert commentary during the broadcast of live trials as well as the evening lawyer shows popularized the pundit's "scorecard" and normative critique functions. Pundits offered daily evaluations of how the lawyers were doing, what strategies they were pursuing and their likely impact on the judge, jurors, or public opinion. Pundits commented on witnesses' credibility, defended or criticized judges for their legal rulings, and predicted the outcomes of contested trial motions, appellate cases, and jury verdicts. When juries returned verdicts, pundits evaluated their accuracy and the public's likely reaction to them.

What explains this tendency of legal pundits to offer "play-by-play" analysis of trials as if they were sporting contests? First, it is easy to do without violating the media's objectivity norms. Assessment of trial lawyers' tactical judgments is seen as descriptive reporting that does not endorse the merits of the advocate's position. Second, the scorecard focus accommodates television's need to tell a dramatic story that will resonate with the audience, even if what is transpiring inside the courtroom is far from exciting. Third, evaluating the attorneys' strategic judgments gives legal pundits the opportunity to impress viewers with their own experiences and insights.

Some stories were worth telling. Televising Simpson's preliminary hearing and suppression motion for five days gave

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might arise in the future so that adequate legal research could be done ahead of time. Some of the Los Angeles-based pundits apparently did not have the time or motivation to engage in such research and "winged" it on the air instead of confessing their lack of knowledge on a particular legal issue. See Paul Thaler, *The Spectacle: Media and the Making of the O.J. Simpson Story*, 170-72 (Preager 1997).

<sup>8</sup> For a discussion of the unprecedented television coverage of the Simpson trial, see *id.*



some of us an unprecedented opportunity to use the medium to teach millions of citizens several valuable lessons about our criminal justice system. Instead of viewing the Fourth Amendment as an arbitrary “technicality,” the national audience got a primer on its meaning and importance as a protection of basic privacy principles. When some pundits pointed out the implausibility of police testimony denying O.J. Simpson’s status as a potential criminal suspect, they did more than simply suggest that police may lie under oath. They explained how and why the police are motivated to circumvent rules of procedural justice that may impair their capacity to uncover the truth and bring the guilty to the bar of justice. And Judge Kennedy-Powell’s ruling denying the defense’s suppression motion<sup>9</sup> provided a valuable counterpoint to the media’s tendency to present the criminal justice system as a body of technical rules that provide far too much protection to the guilty while ignoring the rights of victims.

The legal commentary during Simpson’s preliminary hearing also illustrated how seamlessly the pundit’s decoding work turns into normative analysis and critique. I came away from the experience convinced that pundits cannot perform the decoding function competently on live television without offering some normative analysis of specific legal actors, institutions, and legal principles. TV legal pundits are storytellers who need to provide a coherent context for the screen’s video images.

### *3. Are Some Stories Not Worth Telling?*

When pundits tell stories, they inevitably contribute to how television attributes social meaning to the legal events it covers. Sometimes, television is quite explicit about how it constructs social meaning by asking pundits to criticize particular legal actors, institutions, and principles. In answering such questions, pundits offer narratives that attribute blame, credit, and responsibility.

Is there anything problematic about how celebrity legal pundits contribute to television’s construction of social meaning for these high profile cases? What constitutes an adequate factual analysis for such opinions? For example, should pundits without first-hand knowledge concerning the investigation or trial answer “scorecard” questions about the lawyer’s strategy based on what they have gleaned from media accounts? Should pundits without such first-hand knowledge of the facts ever offer a normative critique of the jury’s verdict based on the reporter’s summary of the

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<sup>9</sup> 1994 WL 733990, \*5 (Cal Mun Trans).

“relevant” facts? And, finally, are some media questions such as the calls for prediction and inquiries about improper jury motivation better left unanswered even by pundits who have observed the trial?

## B. Lessons From Playing the Pundit’s Role

When I first started offering legal commentary on high profile cases, I believed such first-hand knowledge was not a prerequisite as long as I trusted the reporter’s account of the relevant facts. I started answering such critical questions from reporters in the Goetz case in a state of blissful ignorance about the perils of such reliance and the agendas of the journalists who were asking the questions.

Outraged by the jury’s acquittal of Goetz on the serious charges of attempted murder, the public wanted an explanation. Who better to offer one than the famous law professor at Harvard who had not observed the trial? But on those infrequent occasions when Alan Dershowitz was not available, I got the call. I had no trouble talking about a case I had not watched (ethical insight came to me late in the game) because the media was asking me “general” questions about the law of self-defense and the frequency of jury nullification.

It did not dawn on me that my answers to questions about jury nullification would help legitimate the media’s take that only nullification could explain why the jury’s verdict disagreed with the public’s consensus concerning Goetz’s guilt.<sup>10</sup> If asked at the time to defend my role, I would have offered the first definition of a pundit: a teacher who is simply defining the legal principles of self-defense and explaining why their application to the Goetz “facts” was problematic. But, in fact, I was offering “critical” analysis of the case, even though I did not fully appreciate an odd wrinkle about how New York’s “unreasonable self-defense” rules applied to attempted murder and had not read the jury instructions that may have confused the jurors about the mental state at issue. Nor did I realize how the media would use my “analysis” to support its (and the public’s) interpretation of the verdict’s social meaning.

Should a lawyer who has not observed the trial answer evaluative questions about the performance of the lawyers, judge, or jury? Many pundits see no problem doing so as long as they get

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<sup>10</sup> For an explanation that suggests that jurors misunderstood the mental state for attempted murder, see George Fletcher, *A Crime of Self-Defense* 186–88 (Free Press 1988).

the facts from the reporter and wire service accounts. But there is a danger relying on the media's version of the "facts." If the reporter is not a lawyer herself, her version of the "facts" might omit relevant information or include information that has not been proven to the legal fact-finder's satisfaction. While the experienced pundit can question the reporter to elicit more data, there is always the danger that the pundit's opinion or analysis will rest on mistaken factual presuppositions.

Should pundits satisfy the media's desire to anticipate the outcome of trials and judicial decisions? Answering such predictive questions in many contexts is a fool's game, yet many lawyers are willing to play it. It is one thing to evaluate the likelihood of success of a legal motion where the pundit is aware of all the testimony and applicable law. The pundit might guess wrong, but his answer is based on his legal analysis of the merits of the motion. It is quite another to predict whether an investigation will end with an indictment or how the jury will vote once the case is given to them.<sup>11</sup>

How should the pundit respond when asked to evaluate the jury's verdict. How can a pundit who did not observe the trial assess the jury's performance, which includes making credibility judgments about witnesses that the pundit never saw? How does such a pundit know what constitutes a "reasonable doubt" in such an empirical vacuum? Relying on the media's account of the testimony, including the media's evaluation of the case's strengths and weaknesses, is no substitute for one's own observation.<sup>12</sup> Rendering an opinion based on the media's evaluation of the prosecution's merit will usually legitimate the media's interpretation of what occurred unless the pundit has some other normative axe to grind.

I learned this lesson during the Lorena Bobbitt trial.<sup>13</sup> After

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<sup>11</sup> I learned how hard it is to avoid even the appearance of answering "predictive" questions when I was asked by NBC's *Dateline* show whether Simpson was getting "preferential" celebrity treatment by being allowed to surrender himself instead of being arrested. I pointed out that such personal surrenders have occurred frequently in Los Angeles when a wanted indigent suspect feared a police beating if arrested outside the media's glare. I then added wryly that Simpson "wasn't exactly a flight risk; after all, where could he go where people would not recognize him?" ABC played only my sound bite answer about the low risk of flight on national television the evening before the Bronco chase. See *Nightline* (ABC television broadcast, June 17, 1994).

<sup>12</sup> As I have argued elsewhere, even watching a trial on television is not the same thing as attending that trial in the courtroom. See Arenella, 37 Santa Clara L Rev at 893-901 (cited in note 1).

<sup>13</sup> For a brief account of the Bobbitt affair, see David Margolick, *Lorena Bobbitt Acquitted in Mutilation of Husband*, NY Times 1 (Jan 22, 1994).

allegedly being abused by her husband during their marriage, Bobbitt finally retaliated by cutting off his penis. Despite the absence of any prior history of significant mental illness, the jury found her insane and acquitted her. According to the media's account of the trial testimony, the evidence of severe mental illness was quite weak but the evidence of her victimization at her husband's hands was quite compelling. Alan Dershowitz later coined the term "abuse excuse" to describe his view of the defense's strategy: present the jury with a fabricated claim of insanity which the jury could use to excuse a victim for retaliating against her victimizer.<sup>14</sup>

When CBS radio called me for my reaction to the verdict, I gave it. After suggesting that jury verdicts normally deserved our respect and deference because only the jurors saw the evidence and deliberated, I proceeded to pay those jurors no respect at all by suggesting they had mistakenly embraced the abuse excuse theme. No one should be happy, I said, with a verdict that transformed her willful, unjustifiable act of violent retaliation against her abuser into the irresistible impulse of a crazed woman. We should not excuse private vengeance. Nor does being a victim prevent one from becoming a victimizer. Her husband did not deserve mutilation but punishment by the state for his prior assaults. Bobbitt should have been held accountable for her crime, with her victimization being used to justify a lenient sentencing disposition.

I do not regret articulating and defending the moral principle that past victimization should not justify or excuse violent retaliation. Nonetheless, I was wrong to allege that the Bobbitt jury had nullified the law, even if the mental defect testimony was weak. I had no business accusing the jury of disregarding an important moral and legal principle when I was not in a position to know they had done so. I had a normative axe to grind and my desire to wield it motivated an unsubstantiated allegation of jury nullification.

What if the pundit watched the entire trial? Should legal pundits then feel entitled to offer not only their informed opinion that the jury reached the wrong result, but for the wrong reasons? Many pundits who watched O.J. Simpson's criminal trial voiced this opinion after the jury came back so quickly with its verdict of acquittal. Was there anything problematic about legal pundits making such charges of race-based jury nullification to the media?

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<sup>14</sup> Alan M. Dershowitz, *The Abuse Excuse and Other Cop-Outs, Sob Stories, and Evasions of Responsibility* (Little, Brown 1994).

The danger here is that the pundit will too easily assume bad faith on the jurors' part when the pundit believes, albeit in good faith, that the evidence did not come close to establishing reasonable doubt. What I find problematic about charges of jury nullification in these cases is that the pundit who watched the trial still did not go through the process of deliberating about the case with the jurors. Watching the trial does give the pundit an informed opinion about how he or she would have voted (at least initially) in the jury room, because the pundit is in a position to make an evaluation of the case's strengths and weaknesses. In high-profile trials, however, the pundit has also been contaminated by access to other inadmissible information that might color how the pundit interprets the strengths and weaknesses of the actual trial evidence. Finally, the pundit never acts like the trial juror who must deliberate with eleven other human beings with very different perspectives. For all of these reasons, legal pundits should not make accusations of "bad faith" jury nullification<sup>15</sup> when they lack relevant information about what was discussed inside the jury room and where the factors that usually motivate such juror misconduct are not present.<sup>16</sup>

In offering these stories about why jury verdicts in high profile

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<sup>15</sup> Not all versions of jury nullification presuppose jurors acting in "bad faith." Jury nullification can occur when the jury's criteria for evaluating the moral culpability of the criminal defendant do not coincide with the law's criteria for attributing moral blame. To the extent that we value lay participation in guilt determination because we want community notions of justice to temper the literal application of legal norms to facts, this version of jury nullification respects the criminal law's attempt to link criminal responsibility to a demonstration of the offender's moral culpability. Thus, in a case where a jury acquitted a defendant of a mercy killing despite overwhelming proof of legal guilt, a pundit could explain how such a "nullification" decision reflected community values of mercy towards the defendant. Other illustrations of jury nullification that lack this "bad faith" element include cases where the jury believes that the legislature's criminalization decision is mistaken (for example, criminalizing consensual sexual activity between adults) or that the prosecution's application of the crime to an unusual set of facts was unwarranted — when, for example, a victim of a serious illness is prosecuted for the possession of marijuana that the defendant uses for medicinal purposes to alleviate pain or other undesirable symptoms of the illness. In contrast, accusing the O.J. Simpson criminal jury of nullification conveys allegations of juror racism and bad faith. It implies that in order to send a message to the Los Angeles Police Department, the Simpson jurors acquitted someone they believed was guilty beyond a reasonable doubt of two vicious murders.

<sup>16</sup> Classic examples of bad faith jury nullification occurred throughout the South during the civil rights movement in the sixties where all-white juries acquitted white defendants of crimes committed against black and white civil rights workers. When juries acquit defendants because their racism prevents them from identifying with the humanity of the defendant's victims, pundits should criticize such decisions because such verdicts do not warrant any respect or deference from the community. For an explanation of why such charges were not warranted in the Simpson criminal case, see Peter Arenella, *Simms Memorial Lecture Series — Explaining the Unexplainable: Analyzing the Simpson Verdict*, 26 NM L Rev 349, 364–66 (1996).

trials do not reflect the "truth" that appeared so obvious to the public, pundits impugn the integrity of individual juries and cast doubt about the value of lay adjudication.<sup>17</sup> By alleging jury nullification, these pundits lend legitimacy to the media's interpretation of the verdicts' meaning while simultaneously concealing the media's social interpretive function from view. Journalistic objectivity is maintained because it is the pundit who offers the normative analysis, not the reporter, even though it is the reporter (or editor) who chooses which pundit quotes are included in the story and which ones are omitted.

Charges of jury nullification are too easy to make when jurors return an unpopular verdict, and too damaging to the system to be made without substantial evidence supporting such charges.<sup>18</sup> When pundits tell stories about jury nullification that attack the good faith of jurors who have delivered unpopular verdicts, they help legitimate the pernicious notion that trial juries should be viewed as democratically accountable institutions whose verdicts can be ignored when they differ from those rendered by the pundits and the court of public opinion. Ironically, such commentary suggests there is something fundamentally wrong with one of the few aspects of our criminal justice system, the jury, that most prosecutors and defense lawyers believe works reasonably well most of the time.

This section has suggested that pundits who are not observing a trial should refrain from engaging in ill-informed scorecard analysis of daily proceedings. I have also argued that even those pundits with direct access to the trial should refrain from answering most predictive questions and should not charge jurors with acting in bad faith when they return unpopular verdicts, absent compelling evidence to support such charges. The next section suggests that the nature of television as a live

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<sup>17</sup> See, for example, *Nightline* (ABC television broadcast, August 26, 1997) (discussing concern of Americans about jury nullification).

<sup>18</sup> The civil rights cases discussed in note 16 provide an easy illustration of cases where the historical and social context in which the prosecutions were embedded provided strong support for allegations of juror bad faith. In an era where norms of political correctness have deterred most people from making statements that acknowledge their racist tendencies, what constitutes substantial evidence of juror bad faith and racism is a difficult question to answer. When the predominately white Simi Valley jury acquitted the police officers in the Rodney King beating case, several pundits criticized jurors for their "unconscious" racism. Such charges are easy to make because they require no evidence of overt racist attitudes and can be used whenever a criminal case raises racial issues that generate unpopular verdicts. Perhaps such rhetoric should be avoided in favor of more substantive comments highlighting the importance of having racially diverse juries handle cases that require the jury to appreciate minority suspects' experiences with the LAPD.

visual entertainment medium places further restraints on how well competent legal pundits can use the medium to educate the public about our legal system.

## II. WHY THE MEDIUM MATTERS

Television has achieved the status of “meta-medium” — an instrument that directs not only our knowledge of the world but our knowledge of *ways of knowing* as well. . . . We do not doubt the reality of what we see on television, are largely unaware of the special angle of vision it affords. . . . Twenty years ago, the question Does television shape culture or merely reflect it? held considerable interest for many scholars and social critics. The question has largely disappeared as television has gradually *become* our culture. . . . This in turn, means that its epistemology goes largely unnoticed . . . television’s way of knowing is uncompromisingly hostile to [the print medium’s model of reasoned analytical discourse] . . . television’s conversations promote incoherence and triviality . . . [it] speaks in only one persistent voice — the voice of entertainment . . . to enter the great television conversation, one American cultural institution after another is learning to speak its terms. Television, in other words, is transforming our culture into one vast arena for show business.<sup>19</sup>

Legal pundits perform these functions — decoding, analysis, scorekeeping, prediction, normative critique, and storytelling — for all of the media. But TV legal pundits have far greater impact on public perceptions of our legal system than pundits working for radio and print media, because the majority of Americans rely primarily on television for all their news and information.<sup>20</sup>

Unfortunately, the constraints of television as an instantaneous, visual, entertainment medium place severe limits on the legal pundit’s ability to educate the public about how our legal system usually functions. Consider just a few of these constraints.

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<sup>19</sup> Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business* 78–80 (Penguin 1986).

<sup>20</sup> “Television is now indisputably the primary source of news for most Americans.” David Shaw, *LA Times* (April 19, 1996).

A. The Aberrational High Profile Trial Becomes the Norm By Which the Public Evaluates the System's Legitimacy

For the most part, what is news to the media about our criminal justice system is what is out of the ordinary. It is not news that thousands of defendants plead guilty to serious felonies every day or that the acquittal rate for contested felonies is probably less than one percent nationally. Nor is the ordinary criminal trial newsworthy. By definition, the factors that make a case "high-profile" are those unique and aberrational ingredients that distinguish it from the run-of-the-mill prosecution.

Consider some of the elements that explain why a case elicits a strong visceral public reaction that transforms it into a high-profile trial at the local or national level: the notoriety of the defendant (John DeLorean, O.J. Simpson), the special vulnerability or status of the victims (the McMartins, Susan Smith, JonBenet Ramsey, Louise Woodward), the unusual or shocking nature of the crimes (Susan Smith, Lyle and Erik Menendez, Lorena Bobbitt, Jeffrey Dahmer, Ted Kaczynski, Timothy McVeigh and Terry Nichols), and the presence of "hot button" social issues like child abuse, domestic violence, police brutality, and race relations.

Television focuses on these high-profile cases because they provide compelling entertainment value while simultaneously rationalizing the viewing audience's curiosity because of the presence of some important social issue. While pundits may point out how exceptional each of these cases is, the point gets lost when television serves up high profile trials as its daily fare for coverage. Thus, the aberrational becomes the baseline by which the viewing public measures the system's legitimacy. This is a no-win situation for our criminal justice system because the same factors that make the case aberrational increase the probability that the case's outcome will not satisfy the majority's preferences. Very low acquittal rates are unlikely to mollify a public hungry for crime control that has O.J. Simpson and the Menendez brothers as its poster boys.

B. The High-Profile Legal Event Must Be Presented in a Manner that Maximizes its Visual Entertainment Value for the Viewing Audience: "If It Bleeds, It Leads"

By its nature, a visual medium focuses our attention more on



image, personality, and emotion than print and audio media, which more directly engage our analytical thought processes. Consider the difference between those who listened to the famous Kennedy-Nixon presidential debate on radio and television: a majority of the radio audience believed Nixon was the victor whereas a majority of the viewing public concluded that JFK had won.<sup>21</sup>

The constraints of a visual entertainment medium have an impact on how television covers high profile trials. First, television will frequently lend undue importance to legally insignificant events that have dramatic visual appeal. Thus, some of the heated exchanges between members of the prosecution and defense team that took place in the Simpson criminal trial when the jury was not present triggered extensive media commentary on days when important but subtle points in testimony before the jury escaped television's scrutiny. Why? Dramatic video footage dictated the content of the story that would be told on the evening news.

The absence of dramatic video when talking heads discuss legal issues implicated in a given day's developments helps explain why television frequently mimics the adversarial form of trials when it structures such discussions. To create dramatic tension, television frequently uses experts with diametrically opposed positions to debate the merits of some legal controversy. These lively debates between a prosecutor and defense counsel, in which each speaker frequently interrupts the other as they compete for the precious few seconds allotted to them, keep viewers awake even if little of substance is ever said.

The media purports to maintain journalistic objectivity by airing competing "defense" and "prosecution" viewpoints that achieve ideological balance. The possibility that more thoughtful substantive discussions might be generated by using individuals who are looking for some common ground that might accommodate these conflicting perspectives is rarely considered, because the tendency of such discussions is to generate less compelling, C-Span-like television with far lower audience ratings. After all, if the viewing audience wants an informed and nuanced discussion of the issues generated by the trial, they can get such accounts by listening to NPR radio or by reading one of the country's leading newspapers.

If one reads the transcripts of these stylized debates, one finds that televised commentary on legal developments closely resembles televised news: quick snappy sound bites and repartee but no

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<sup>21</sup> Theodore H. White, *The Making of the President, 1960* 293-294 (Atheneum 1961).

prolonged moments of silence or pauses to consider the anchor's questions. Verbal nuance and complexity usually do not play well on television.<sup>22</sup> Since anchors worry that the audience will get impatient with protracted, complicated answers that offer no sharp resolution, they often ask "prediction" questions that impose their own sense of clarity and closure — who is winning and who is losing? Will the race card strategy work or backfire?

Why do so many experienced trial lawyers happily answer scorecard questions when most of them are not watching the trial but are simply reading wire service reports? Why would experienced trial attorneys who appreciate how difficult it is to gauge a jury's sentiment be willing to offer their views about the impact of a witness's testimony on the jury or the likelihood of a conviction or acquittal? The simple answer is show business: television's job is to entertain its viewers, and the pundits are the show's performers. While the more knowledgeable pundits refuse to make predictions, most are perfectly happy to critique the performance of lawyers they have not observed and rulings they have not read, because their critiques establish their legitimacy as "experts" in the eyes of the audience. Television's epistemology differs from the print medium: expertise is not based on what you actually know but on what you appear to know and on how well you present it. If you sound articulate and knowledgeable, and are quick on your feet with winning sound bites, you qualify as a pundit. If the media were to require a more demanding definition of the pundit's knowledge basis, most celebrity pundits would be put out of business, except for the occasional explanation of a legal principle or procedure used in the case. Shows like *Rivera Live* would be forced to rely solely on local legal experts with no viewer name recognition.

Commercial television's coverage of trials mimics its coverage of political campaigns; questions focus more on strategy than substance. And questions of substance must be answered in a manner that does not offend current conceptions of political correctness. If the anchor asks the pundit, "will the race card strategy work?," an answer that suggests the question itself is misleading and unhelpful<sup>23</sup> is not a viable option for the pundit who

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<sup>22</sup> Anyone who has watched Charlie Rose may take exception to this comment. But it is no accident that the visual component of that show is muted so that the audience can focus on the substance of what the speakers are saying, not on the images presented.

<sup>23</sup> For a critique of how the media mishandled issues of race and racism by lumping them together under the rubric "race card," see Peter Arenella, *Foreword: O.J. Lessons*, 69 S Cal L Rev 1233, 1258–63 (1996).

wants to be asked back. Such a response will undermine the anchor's credibility with her viewers.

C, **Personality and Character Resonate Better with the Viewing Audience in a Visual Medium than in a Print or Audio Medium**

Many others have pointed out how television news has indulged in the cult of celebrity and personality by offering a "People Magazine" view of the world where public figures are built up and torn down for our viewing pleasure. One can certainly see evidence of this tendency in how television covers high profile legal events. Barbara Walters and Diane Sawyer compete for who will air the first in-depth interview with the high profile counsel du jour or key government witness. Reputations of trial lawyers are built up beyond realistic expectations (witness the "Dream Team" references to O.J. Simpson's criminal defense team) only to be followed by exposés where we learn about intimate and embarrassing details of the lawyer's personal life (Johnnie Cochrane's relations with a former lover) that have absolutely no bearing on his capacity to represent his client. Trial judges are put on the cover of national magazines and become the butt of comedians' jokes. A witness like Kato Kaelin becomes a national obsession because his looks, physical mannerisms, and style of speaking elicits a visceral reaction from the television audience. Fred Goldman's angry press conferences where he denounced the defense for suggesting a police conspiracy triggered intemperate faxes from viewers who were annoyed at the intensity of his grief and anger. Apparently, his fury interfered with their viewing pleasure.

D. **Television Coverage of High-Profile Trials Erodes the Boundary Demarcating the Court of Law from Mass Public Opinion by Converting the Former into a Forum of Entertainment for the Latter**

What exactly is the problem with such reactions? There is nothing wrong with a trial having entertainment value. In an earlier era, many Americans would attend criminal trials in part for their dramatic appeal. A trial can provide a form of public theatre that all of us can afford. Nor is there anything wrong with legal commentary being done in an entertaining manner. As any teacher knows, humor is a wonderful pedagogical tool and no

learning occurs if you are boring your audience. The problem arises when the entertainment value of a legal event becomes the dominant mode of coverage, the primary way of thinking and talking about it. As Neil Postman observed:

The problem is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining. Entertainment is the supra-ideology of all discourse on television. No matter what is depicted or from what point of view, the overarching presumption is that it is there for our amusement and pleasure.<sup>24</sup>

Viewing the trial in this manner interferes with the trial's capacity to provide the community with an opportunity for appropriate community catharsis. The television audience tends to forget the human tragedy it is witnessing as the trial merges with the other soap operas presented for the audience's viewing pleasure. Reducing all legal institutional issues into questions of character and personality can also have a corrosive impact on the conduct of the legal actors involved in the proceedings. Judges begin to respond to the media pressures by changing their courtroom demeanor and conduct, as Judge Ito did during the Simpson criminal trial after taking heat for giving the defense too much slack. Defense lawyers feel compelled to defend their ethics to a hostile press that has little understanding of or tolerance for the defense role in our criminal justice system.

One response to these concerns is to reply that these are the natural costs of a free media doing its job to ensure that legal actors and institutions remain accountable to the will of the people. But this response actually restates the problem, because legal actors in the courtroom are not supposed to be directly accountable to the will of the people. Paul Gerwitz eloquently states the law's dilemma:

Law is all about human life, yet struggles to keep life at bay. This is especially true of the criminal trial. With the public typically ranking crime our country's most important problem, the criminal trial reflects and ignites large passions. Yet it usually seeks to exclude much of that passion from its stage as the trial proceeds with its struc-

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<sup>24</sup> Postman, *Amusing Ourselves to Death* at 87 (cited in note 19).

tured process of legal proof and judgement.

Maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about. Distinctive legal rules of procedure, jurisdiction, and evidence insist upon and define law's autonomous character — indeed, constitute the very basis of a court's authority. The mob may have their faces pressed hard against the courtroom windows, but the achievement of the trial is to keep those forces at bay. . . . But there is always a struggle between this idealized vision of the law — which proclaims that law is and must be separate from politics, passion, and public resistance — and the relentless incursion of the tumult of ordinary life.<sup>25</sup>

Legal pundits further erode this distinction between the courtroom and mass public opinion by using the trial as a civics lesson about how public policy should be formulated to respond to hot-button social issues implicated in the trial, and by legitimating public criticism of unpopular jury verdicts. There is an irony here. To the extent that the public takes the pundits' commentary seriously and looks to the trial as something more than entertainment, it begins to see the criminal trial as the appropriate forum to illustrate valuable lessons about how society should respond to social issues like racism and domestic violence. In short, the public loses sight of the trial's main function of deciding guilt or innocence, as pundits criticize the trial's participants for not being more sensitive to the social costs of their behavior, even when their conduct is dictated by their legal roles.

Again, the criminal justice system is in a lose-lose situation: the high profile trial's entertainment value interferes with some of the functions the trial is supposed to serve. Aware of this tendency to trivialize what is legally and socially significant, pundits will remind the public of the important social issues embedded in the trial, such as society's response to domestic violence or police racism. But then the public will quickly see that the media's and pundits' treatment of these issues does not mimic how the trial handles them. While the media fully explored all of the allegations of domestic violence in the Simpson case, rules of evidence and

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<sup>25</sup> Paul Gerwitz, *Victims and Voyeurs: Two Narrative Problems at the Criminal Trial*, in Peter Brooks and Paul Gewirtz, eds, *Law's Stories: Narrative and Rhetoric in the Law* 135 (Yale 1996).

discovery sanctions prevented the prosecution from presenting the same picture of domestic violence in the courtroom. The public's reaction was to condemn the trial because it did not provide an appropriate airing of the evidence or an appropriate resolution of the allegation's significance to the charge of murder. But the public's frustration with the trial on these grounds rests on a faulty premise: that our criminal trials are the appropriate forum for a full airing of all social grievances that might have some bearing on the case and that such trials can also provide an appropriate social remedy.

These costs might be more palatable if TV legal pundits did a better job of educating the public about the complexities and nuances of the legal issues implicated in the proceedings. But television's *lingua franca*, the sound bite, severely limits the intelligibility of most pundits' analyses.

#### E. The Problem of Sound-Bite Analysis: the Abuse Excuse in Menendez

I assume most Americans were outraged and confused by the inability of two Californian juries to convict the Menendez brothers of murder at their first trial.<sup>26</sup> After all, the brothers intentionally and brutally slaughtered their parents and then lied about it.<sup>27</sup> Few credited their subsequent claims of abuse and most assumed these teenagers did not need to kill their parents to solve whatever problem they were having with them. One could almost hear the sighs of relief across America when both brothers were convicted of first degree murder at their retrial.

How did television and its legal pundits explain this case to the public? Relying on Alan Dershowitz's slogan, "the abuse excuse,"<sup>28</sup> the networks and local television highlighted those pundits who waxed eloquent about how our criminal justice system was eroding norms of moral accountability by privileging such excuses. The media commentary suggested our courtrooms were being flooded by cases where defendants sought to negate their responsibility by shifting blame from themselves to their victimizers.

If such an abuse excuse existed in theory or in practice, its factual and normative premises would indeed be indefensible. Being an adult victim of abuse does not, by itself, unduly impair

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<sup>26</sup> For a discussion of the Menendez case and the abuse excuse, see Peter Arenella, *Demystifying the Abuse Excuse: Is There One?*, 19 Harv J L & Pub Pol 703, 706-09 (1996).

<sup>27</sup> *Id.*

<sup>28</sup> See Dershowitz, *Abuse Excuse* (cited in note 14).

one's moral capacities.<sup>29</sup> Nor does victimhood destroy one's moral duty not to use unnecessary violence against one's victimizer. But there are several problems with pundits' use of this catchy label to describe what was at issue in the Menendez case.

First, there is no "pure"-abuse excuse in the criminal law. The only excuse defense that negates the defendant's responsibility for his criminal act is the insanity defense, and most abuse-related claims of insanity fail. Instead of informing the public about the rarity of such defenses, the media focused on the one exceptional example of a successful insanity defense that relied heavily on an abuse excuse rationale — the Lorena Bobbitt case. The media did not tell the public that the insanity defense is only raised in 2% of cases and most of these defenses are rejected.<sup>30</sup> For every Lorena Bobbitt there are a hundred Jeffrey Dahmers — severely disordered killers who are found responsible for their acts despite their credible claims of insanity. In short, the abuse excuse as portrayed by the media is not a significant problem.

To make matters worse, the media never should have used the Menendez brothers as the abuse excuse poster boys because their defense was actually designed to reduce their criminal liability from murder to manslaughter. The issue in serious dispute was their motive for the killings because their motivation affected the degree of guilt the law attached to their crimes. If they killed their parents to get their money, they were guilty of first degree murder. If they shot their parents because they believed, however unreasonably, that their parents were about to kill them that evening, they were guilty of voluntary manslaughter. One does not have to believe their story to understand that their legal claim of *unreasonable* self-defense concedes criminal responsibility for manslaughter.<sup>31</sup> I wonder how many Americans understood from the media accounts that only the degree of their guilt was

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<sup>29</sup> For an account of the qualities of a morally responsible agent, see Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L Rev 1511, 1609 (1990).

<sup>30</sup> The media finally conveyed the low likelihood of success in insanity defenses when it covered the Unabomber case. See, for example, Gordon Witkin, *What Does it Take to be Crazy?*, US News & World Rep 7 (Jan 12, 1998); Daniel Klaidman and Patricia King, *Suicide Mission*, Newsweek 22 (Jan 19, 1998). Ironically, what the media did not report to the public was that Ted Kaczynski's defense team did not want to raise an insanity defense challenging his criminal responsibility; they wanted instead to raise a diminished capacity defense at the guilt phase as a precursor to using evidence of his mental illness at the penalty phase in order to save his life.

<sup>31</sup> See Model Penal Code § 3.09 (1985), (providing that one who acts in unreasonable self-defense by making a reckless mistake as to the necessity of using force may be liable for a crime of recklessness (manslaughter)).

realistically at stake in the first trial, or that the reason the juries deadlocked in that trial was that some of the jurors wanted first degree murder and others held out for voluntary manslaughter? Of course, there are legitimate issues to discuss about the nature and scope of the law's unreasonable self-defense doctrine in cases where no objective facts suggest an attack was imminent, but these issues were not raised by the media's discourse about abuse excuses eroding norms of accountability.

The irony here is that while the public believes the criminal law is weakening norms of moral accountability by unduly welcoming claims of victimization, the reality is just the opposite. Our criminal law holds most criminal defendants fully accountable for their criminal acts despite evidence of significant impairment of their moral capacities resulting from childhood victimization. If the media paid attention to ordinary murder prosecutions and focused on the background of those killers who populate death row, they would discover serious and undisputed evidence of early abuse and victimization that did not diminish the killers' culpability in the eyes of the criminal law.<sup>32</sup>

Why did television — including *Nightline*, which ran a special show on the abuse excuse after the first juries were unable to reach a verdict<sup>33</sup> — do such a bad job explaining what was really at issue in this case? Consider who gets to participate in televised debates about the abuse excuse. How does one get anointed as an “expert” pundit? Television rewards those opinion-makers who can offer simplistic sound bite accounts of problems and their solutions. Talking about the abuse excuse communicates something quickly to the television viewer, even if it is misleading. But how is a legal pundit going to give a comprehensible sound bite that describes the doctrine of unreasonable self-defense as a partial excuse that does not destroy accountability but reduces culpability? Who is going to understand that bite?

I remember doing interviews for ABC News during the Menendez trial where I deliberately refused to use the abuse excuse label because of its misleading potential. Those interviews were never aired because my attempts to explain unreasonable self-defense confused the reporters who had already accepted the guilt-defeating paradigm version of the defense. Moreover, the editors were concerned that all of my sound bites lasted longer than fifteen seconds. In a television news spot that has allotted 70 seconds to

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<sup>32</sup> See Arenella, 19 Harv J L & Pub Pol at 707–08 (cited in note 26).

<sup>33</sup> *Nightline* (ABC television broadcast, Feb 4, 1994).



cover the entire story of that day's developments, no talking head is going to get the luxury of a twenty-five-second sound bite to explain what is at issue.

Television is unmatched in its immediacy, intimacy, and drama, but it rewards only digestible sound bites and instant reaction. It rarely permits time for reflection or tolerates multifaceted, nuanced responses.<sup>34</sup>

#### F. Conventional Public Wisdom as the Primary Source for Television's Construction of Social Meaning: the Simpson Case and the Race Card

The problem with television's coverage of high profile cases is not simply one of time. Even if I had been given twenty-five seconds to explain unreasonable self-defense, I would likely have confused the viewing audience because my sound bite would have been so inconsistent with the public's conventional wisdom about what was at stake in that case. To an extent not fully appreciated by critics of television news who mistakenly claim it is infected with liberal political bias, television frames legal issues in a manner that is consistent with the public's conventional wisdom about what is transpiring in the courtroom. In short, television tends to embrace conventional public wisdom about legal events and then reflect that wisdom back onto the public, thereby legitimating public constructions of social meaning as "objective reality."

To illustrate this thesis, consider how television handled the issue of race in the Simpson case. From the trial's outset, the subtext to the media's treatment of the case was whether a predominately black jury would rise above feelings of racial solidarity and racial payback from the Rodney King episode and do the right thing by convicting an obviously guilty but very famous black defendant. This subtext was made explicit by the media's use of the race card metaphor to describe all of the complicated ways that race played a role in the case.

I have written elsewhere explaining why the race card metaphor is inapt because it conceals from view the positive ways that race can affect jury deliberations.<sup>35</sup> In our culture, race helps define one's social experience and having different social experiences represented on the jury enhances the jurors' collective

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<sup>34</sup> While the print media usually do a better job handling complexity, shading, and nuance, they did not distinguish themselves in their coverage of the Menendez trials.

<sup>35</sup> See Arenella, 69 S Cal L Rev at 1262-63 (cited in note 23).

ability to determine who is telling the truth and who is not.<sup>36</sup> The law promotes racially diverse juries in part because it understands the positive role race can play, but this view of race's impact on the Simpson jury was not communicated to the public by the media's use of the race card label. Nor was there much discussion about how the black jurors' social experiences might have aided their credibility determination that Mark Fuhrman and other officers lied to them under oath. The Fuhrman tapes were a revelation for the white media and the one white woman juror; they simply confirmed what the black jurors had already sensed when they listened to Fuhrman testify during his cross-examination by F. Lee Bailey.

Admittedly, race also played a negative role in the case. For the minority jurors possessing racially-tinged experiences with police, police conspiracies and police misconduct may have appeared all too plausible. Perhaps it became too easy for some of the jurors to believe in every defense allegation of police misconduct regardless of the caliber of the evidence supporting the allegation. Race and gender might also have played a negative role in how some of the jurors responded to the domestic violence evidence.

In short, race played a complicated role in the case that cut in many different directions. But the media's treatment of race via the pejorative race card label simply reified the white public's initial fear and then belief that the verdict was all about racial solidarity and racial payback.

I believe the media, and especially television, played a very important role in legitimizing the public's conventional wisdom about the case, including the nullification account of the jury's verdict. Johnnie Cochrane appeared to legitimate those fears when he asked the jury to send a message to the Los Angeles Police Department and compared Mark Fuhrman to Adolf Hitler. When the jury quickly reached its verdict of acquittal, television showed graphic pictures of white women crying and blacks rejoicing over the verdict. The conclusion that race and not "reasonable doubt" produced the verdict seemed obvious: pictures don't lie and one of the defense team even admitted after the verdict that the defense "had played the race card from the bottom of the deck."<sup>37</sup>

All of the networks used the same "send a message" and

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<sup>36</sup> See Deborah A. Ramirez, *How Affirmative Jury Selection Enhances Both the Deliberative Ideal and the Diversity of the Jury*, 1998 U Chi Legal F 161.

<sup>37</sup> Eric Malnic, *The Simpson Verdicts: Shapiro Trades Criticism with Cochran and Bailey*, Los Angeles Times A3 (Oct 4, 1995) (reporting Robert Shapiro's remark).

“Hitler-Fuhrman” sound bites from the closing argument on their nightly news programs. None of them used a later sound bite where Cochrane linked his “send a message” theme to reliability problems with the prosecution’s evidence. Nor did the networks use any sound bites from Barry Sheck’s masterful closing argument, which pulled together all of the themes of the defense’s attack on the reliability of the prosecution’s evidence. All of the networks showed the same pictures of groups of whites and blacks reacting so differently to the announcement of the verdicts. None of the networks took the time to put those pictures into a context that might explain them as anything other than confirmation of what the white public had feared from the beginning.

The racially-divided reactions to the verdict were news, but those pictures required significant explanation and analysis, not fifteen-second sound bites about the court of public opinion displaying its vote as the thirteenth juror. I am referring to my own comment on ABC News right after the verdict. I was making a descriptive point about the court of public opinion, not a normative one concerning the desirability of the public acting like the thirteenth juror. If given more time, I would have made this distinction clear and tried to put those pictures in a context that did not aggravate racial tensions.

Several points should have been made about those pictures. To list a few: some whites understood that there were major problems with the evidence; not all African Americans believed in Simpson’s innocence, but many had “reasonable doubts” because of the police misconduct that occurred in this case; and others who believed Simpson was guilty were still gratified to see that a *racially diverse* jury shared their mistrust of the police.

Would any pundit’s words have changed the meaning that so many white Americans initially attributed to the verdict? I doubt it. The power of television to shape popular perceptions about the verdict’s meaning is illustrated in part by the absence of those factors that would make a jury nullification story plausible. Jury nullification usually occurs when the jury has problems with the crime itself, the discriminatory application of a crime to a disadvantaged group, or believes the victim of the crime provoked its commission.<sup>38</sup> None of these factors applied to the Simpson case.

Nor was this a case where the jury could not identify with the humanity of the victims. All of the jurors were clearly horrified by

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<sup>38</sup> See note 15.

the brutality of the two murders and expressed sympathy for the victims' families. The media accurately reported that some jurors were moved to tears when they first saw the grisly photos of the two victims. Jurors who appreciate the victims' humanity and the killer's brutality would not acquit someone they believed beyond a reasonable doubt was guilty just to send a message about police misconduct.

### CONCLUSION

Television's interpretive power is only enhanced by the fact that it does not create social meaning out of whole cloth. It takes a partial truth from the trial's dynamics and a complete truth about popular conventional wisdom and then reflects those truths back upon the public; thereby legitimating it as "objective."

So what should the "competent" and "ethical" legal expert do if he believes commercial television can occasionally educate the public, but its constraints as a visual entertainment medium make it a bad bet more often than not? One option is to ignore that medium and offer commentary only to the press and radio. The problem, of course, is that most Americans no longer read their newspapers and rely on television for all of their news and information. That simple fact explains the temptation to follow Professor Pillsbury's good advice, which is to use television when it suits the expert's purposes but not to play television's game:

The expert has a powerful defense against all forms of trivialization: refusing to play the game. The expert can resist the temptation to assume total intellectual authority and admit to limitations of knowledge and insight. When the media insists on a simplistic question, the expert may respond by emphasizing the complexities involved. When conflict is sought, the expert may emphasize points of agreement as well as disagreement. When the law is presented as a game, the expert may remind viewers of the real stakes involved. Sometimes, the expert must be willing to take more drastic action. The expert must be willing to walk — ready to walk off the network set, away from the talk show appearance, or to decline to answer the reporter's inquiry.<sup>39</sup>

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<sup>39</sup> Samuel H. Pillsbury, *Why Are We Ignored? The Peculiar Place of Experts in the Current Debate About Crime and Justice*, 31 *Crim L Bull* 305, 335 (1995).

I have been following that advice since the Simpson case. Consequently, I have turned down most requests to appear on television except for some commentary on the Unabomber case that related to my own scholarship on mental disability law. The question remains, however, whether mainstream commercial television ever realistically permits the competent and ethical pundit to pursue his own educational or normative agenda in a manner that is not ultimately self-defeating.