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The Law Professor as Legal Commentator

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THE LAW PROFESSOR AS LEGAL COMMENTATOR

*Amy Gajda**

This compilation of short papers and discussion on law professors' media involvement is the result of the panel, "Op-Eds and Talking Heads: Legal Commentary for a Lay Audience," co-sponsored by the American Association of Law Schools' Legal Writing, Reasoning and Research and Mass Communication Law committees and held during the AALS annual meeting in Washington, D.C., in January 2003. The participants — Benjamin Wittes of the *Washington Post*, Linda Greenhouse of *The New York Times*, Peggy Robinson of *The Newshour with Jim Lehrer*, Ian Ayres of Yale, Erwin Chemerinsky of the University of Southern California, Pam Karlan of Stanford, and Arthur Miller of Harvard — all have extensive media experience as reporters, writers, producers for media, or law professors involved as media commentators.

I became interested in the subject for three reasons. One, I am a former journalist who covered legal topics. Two, I am currently the legal commentator for National Public Radio stations in Illinois. And three, I directly faced the issue of law professor expertise a few years ago.

Back then, I wrote an opinion piece for *The New York Times* on political campaign fundraising and how similar its tactics were to those the United States Senate had just voted against in the Sweepstakes Reform Act, legislation meant to curb overzealous magazine-subscription-and-sweepstakes companies. *The New York Times* published my piece and media attention started flowing; other reporters, other commentators, radio programs all called me and interviewed me about the piece in general. But my turning point, perhaps, came about two weeks later when a producer from *60 Minutes* called. He first told me that he wanted to produce an investigative report based on my *Times* opinion piece. He then asked me the crucial question: "Are you an expert in this area?" Pause.

You can imagine the dueling devil and angel on my shoulders. If I told him "yes," Morley Safer would surely come to my office and I'd be launched into national expertdom. My family and

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friends would see me on *60 Minutes*. If I told him “no,” they’d turn elsewhere for their expert even though it was my op-ed that started it all.

I listened to the more angelic of the two advisors and I told the *60 Minutes* producer that my knowledge wasn’t based on any special scholarly work that I’d done in the area and that I didn’t teach any related class. So they interviewed a political scientist from the University of Virginia instead.

That story highlights two aspects of the panel presentations and discussion. Perhaps too many law professors would have answered “yes” without hesitation. I still wonder if I was foolish not to. Second, it’s tough to get your foot in the door. But once your foot is in there, the door swings open rather easily, and you, too, can become a media darling.

But “media darling” is a somewhat controversial faculty position in law schools across the country. While many law schools have hired public relations and media professionals to guide them in their quest for greater news coverage, the same law schools may give very little, if any, tenure credit to professors who write for newspapers or appear on television. The public may have decided that it is interested in law. Big stories like *Bush v. Gore*, O.J., and Rodney King helped fuel that interest. But law schools continue to contemplate whether media involvement is right for law professors. The following short papers and discussion focus on that dilemma and, for those who would throw caution to the wind, the journalists and law professors also offer tips for those interested in media involvement.

*Benjamin Wittes***

I’m here before you today with all the trepidation of the devil arising before a Southern Baptist congregation, having been asked to give the Sunday Sermon. When Amy asked me to speak here, I warned her that I had very little pleasant to say on the subject of law professors as pundits. I actually harangued her for some time on the subject. Quite to my surprise, she suggested that I repeat the harangue for you all, so here it goes — with the clear understanding in advance that the views I’m expressing are my own and do not reflect the position of the *Washington Post*.

**Editorial Writer, *Washington Post*.

The legal professoriate has performed quite disgracefully in the public arena in the last few years — in a fashion that calls its seriousness into question, very frankly. It has been at once politicized and more self-aggrandizing than informative to the public. In my view, law professors as a group need to think long and hard about whether they aspire to educate the public on matters within their professional expertise, or whether their role in the public arena should be — as in too many cases it has been — just to mouth off.

I don't mean to suggest that there's no appropriate role for law professors in the general interest public debate. Far from it. As American politics have become increasingly legalized, the proper role of specialists in explaining and commenting on technical matters — some of great political moment — has grown commensurately. Law being the language of democracy, those who study law seriously have a natural role to play in explicating the way the tectonic plates are moving in democratic government. Such a role would be unobjectionable, even laudable. And I don't mean any of what I am about to say to sound critical of those who have ventured into the public sphere to educate their fellow citizens on matters about which they actually know something.

But in recent years, we've actually seen something else emanating from the legal academy. We've seen professors trading on their name chairs to talk about issues far outside their professional competence, and often quite ignorantly. Even worse, we've seen professors making perfectly indefensible statements, often in high profile forums *within* their supposed areas of professional expertise. These statements fail not only to meet basic academic standards; they fail to meet rudimentary journalistic standards, as well. Let's not kid ourselves about what law professors are doing: they are playing the Bill O'Reilly game — only with the prestige of our nation's finest universities behind them.

Now, this is a matter about which I confess to having a bit of a chip on my shoulder. Academics tend to reflect a certain contempt for journalists. We are, after all, mere popularizers and dilettantes, right? And I hear that we never do original scholarship and that our work is derivative. Many of us, it's whispered, don't even have advanced degrees. So there's a tendency among professors to pull rank in arguments with journalists, and to argue from a point of view of authority. Academics do that not just with journalists but with the public at large. The citizenry is meant to admire professors as an intellectual elite — which, traditionally, professors

have been. But what then are we to make of the — not to put too fine a point on it — gibberish that passes for public utterances from some very esteemed professors? Exactly what am I supposed to think when Cass Sunstein and Ronald Dworkin sign an ad in the newspaper during the election controversy that refers to, and I quote, “a constitutional majority of the popular vote?” What am I to think when Bruce Ackerman proposes in the *London Review of Books* that the Supreme Court should have resolved the election controversy by issuing an injunction for which no party to the litigation had moved, against a nonparty to the litigation? What am I to think when any number of law professors accused Ken Starr of ethical misconduct — a finding that no competent adjudicatory mechanism has ever validated? None of these professors, as far as I know, has ever publicly said that they were wrong in light of the various investigations of the subject — all of which exonerated Mr. Starr. What am I to think of the recent spree of conservative professors who have argued that the filibuster is unconstitutional now that President Bush’s judicial nominees are being held up using it?

I could go on — actually for quite a long time; I’ve compiled quite a mental list of nonsense. My point is that I don’t know a lot of journalists who’ve made errors of this magnitude and suffered no professional embarrassment as a result. Our profession simply doesn’t tolerate that — as the recent bloodletting at *The New York Times* demonstrates. And what’s so disturbing to me about what law professors are doing now, is that the most irresponsible statements seem to be coming from the leading lights of the profession, who seem to be suffering no professional consequences for not just being wrong, but being spectacularly, indefensibly, and, sometimes, let’s face it, illiterately wrong. It’s as though the whole profession has collectively made the judgment that standards that apply when you write for a rarefied audience of a few dozen people who might read a law review, simply get waived when you happen to be addressing 250 million of your fellow citizens. I confess that I fail to see the logic of that judgment. I really don’t see why the more democratic the debate becomes, the lower the standards should be. And I also believe that this judgment — to the extent the academy tolerates it — will have consequences and should have consequences. As the press and the public come to see the professoriate as essentially no different from — except, perhaps, a little bit less honest than — Karl Rove and Jim Carville, it will come to regard law professors not as educators but essentially as a

group of political operatives looking for space on television and in newspapers to advance their own political agendas.

At the end of the *Wizard of Oz*, the Wizard assures the Scarecrow, who, you'll recall, is looking for a brain, that he actually doesn't need one. Where he comes from, the Wizard says, there are these things called universities, and they're stocked with people called professors. And the Wizard says "and they have no more brains than you have. But they do have one thing you haven't got: a diploma." In her description of this event, Amy promised that, amongst other things, this would be a primer for people interested in catching the wave. I have only one piece of advice, which is that a diploma isn't a roving license to expound on the world and beat the data until it confesses. Your countrymen aren't idiots, and even if you have something that they haven't got, they will see through you if you behave like one.

*Peggy Robinson*¹

I don't quite have the same strong feelings that Benjamin Wittes does, although obviously I've been in the position to watch, in many ways, the legal profession as well as legal professoriate change dramatically over the last twenty-some years.

They've changed because of what's happened in my business: the onset of twenty-four-hour cable channels and the need for commentators. That, I think, has increased the desire for warm bodies in the seats. I come from what I hope is a totally different approach to this. I need — and my whole program is based on — intelligent discourse. We bring people on, hopefully, who have some expertise to talk about an issue and to put them in some sort of context. I can only address this issue really from my perspective as the producer of our program.

We firmly believe that our mission is partially an educational one. And much that we do on our program is to educate; we strive to educate. We give you the news. Our goal, more than anything, is to present two perspectives with the explicit notice that these are advocates for a particular side or that they represent particular points of view that we want to bring out on a particular issue.

Legal affairs at *The Newshour* has a relationship with Jan Crawford Greenburg, who covers the Supreme Court for the *Chi-*

¹ Senior Producer, *The Newshour with Jim Lehrer*. At the time of the panel discussion, Ms. Robinson was the Senior Political Producer for *The Newshour with Jim Lehrer*.

cago Tribune. We call upon her to be our eyes and ears in the Supreme Court. And what she does and the primary function of her role on our program is to provide our listeners with a glimpse inside that courtroom. Jan provides a description of the case, the arguments, and the interaction between the Justices and the attorneys who are arguing the case. That's a regular feature of our program. If the story is newsworthy enough, we will bring on attorneys or law school professors to advocate the different sides. We try very hard to make it clear that advocating is what they're doing. We don't try to put somebody in a commentating role as such. I resist the role of commentator. What we're trying to do is not necessarily provide a forum for somebody to commentate but rather to assess, to analyze, to educate.

We tend to look at issues when they're before the Supreme Court. And there's a long time in the court process to do that. I have the luxury of an hour five nights a week with segments anywhere between eight to twelve minutes. Part of the job of my anchors is to try to facilitate the conversation so that you get beyond point A, and maybe to B and then to C. That way, you get to bring out a variety of points and issues.

I think that having law professors commentate is a good idea. When they have particular points of view, I think it's important to bring them on programs such as mine in a fashion where they can articulate those views but not be unchallenged. We challenge them by including people who are opposite them and with anchors who ask relevant and specific questions to draw out information. I'm not adverse to people in the academy being part of the journalism craft. But there are particular roles and we need to define very carefully how we use that expertise.

*Linda Greenhouse*²

I thought I would talk a little bit about what I want out of the legal academia and about our relationship with it. I don't share Benjamin's adversarial sense or a sense that there's just a bunch of useless drivel going on out there. If I see 200 law professors signing a petition that runs in the paper, I could shrug at it, but it doesn't offend me. As he said, law is the language of democracy,

² Supreme Court Correspondent, *The New York Times*. Except for a brief period in the 1980s when she covered Congress, Ms. Greenhouse has covered the United States Supreme Court for *The New York Times* since 1978. Ms. Greenhouse earned a Master of Studies in Law from Yale Law School in 1978.

and I don't see anything wrong with people chiming in, whether they have law degrees and teach at a law school or whether they don't, for that matter.

More generally, I don't see a real dichotomy between journalists who write about law, teachers who teach about law, lawyers who practice law, and judges who judge law. I see us all as part of a community — a self-defining community of people who are extremely interested in this subject and in what it means for the country. I feel myself in an ongoing dialogue with all those kinds of people. I've been known to read law journal articles. I've been known to write them. People send them to me constantly. They pile up. I don't always respond, but sometimes, almost two years later, I'm leafing through a stack looking for something on some particular subject, and I'll find something and give that person a call. They probably figured it ended up in the circular file a long time ago, but that's not necessarily the case.

There are a few ways in which journalists tend to use legal academics, and it's a symbiotic and mutual use. Some of them are good ways, and some of them, I think, are not so good. One good way is for journalists to reach out to law professors. Just say, "Here's some development, what does it mean?" As a journalist, you have a Rolodex of people who are proven quantities, are accessible, and are responsive. If you call them and they don't work out, you don't call them the next time. I also talk to people about general background kinds of things. Then there's the situation where you want somebody who speaks as a known authority to make a key point in the story, to wrap things up, or to validate a point. Some people are very good at that and some extremely smart, productive scholars are not very good at that. I think that pundits may be born and not made. Some people have that facility. Those are the kinds of people that I think journalists would tend to go to for that kind of need, as opposed to general background.

The third way is one that I see a lot, and I disapprove of it journalistically. It is a story about a court decision that consists of a string of quotes from five or six or ten professors — some saying it's X, some saying it's not X. That story leaves readers, I'm sure, scratching their heads. There's a lot of expertise in that story, but the person writing that story hasn't performed one of the major functions for which he or she is being paid — to work through the material himself or herself with whatever experience or smarts he or she can muster that day and come to some kind of point. Not a contentious point or an advocacy point, but an answer to whether

this development is important or not. It's up to the journalists to tell the reader that, and not just five professors who say this and five professors who say maybe not. I hope I never use law professors in that way, although it's very comforting for editors. They actually like to see that, especially when the editors aren't all that sure of the credentials of the reporter.

I remember when I was very new on the Supreme Court beat, although I wasn't new at the *Times* or in writing complicated stories because I'd done a lot of political writing before. I was new on the beat and new in the Washington bureau. I've forgotten what the topic of the story was, but the editor asked me to write an analysis and it didn't really have any quotes in it, though I was pretty sure what I was saying. The editor came to me and said, "Well, this is okay, but if you quote some law professors in this piece I can get it on page one." And I was kind of offended. And I wound up on page D-25. I try to resist getting the quotes in there just for the sake of sort of dressing up a story. I don't think that's a very honest or legitimate use of the professoriate.

We do live in a culture of celebrities, and I know that from the exponential increase in the last three or four years in the public relations departments of law schools. A number of law schools have gotten pretty aggressive in sending out a press release saying, "Here are five cases on the Supreme Court docket and here are our five experts on our faculty." Sometimes they send out press releases containing packaged quotes from a law professor about a pending case. I don't know what they expect the people who receive this to do with it. Although once in awhile, I do call people who are brought to my attention through press releases, if they have some connection to the case. I can think of one example — a school that was not high in the rankings sent me a press release reporting that a professor I had never heard of had filed an amicus brief in a particular case. Obviously this guy knew the case, and I called him and he was great. He added to my understanding of the case.

That is what I'm looking for, but it's a tough market, and I am sympathetic to its demands, in part because I'm married to a practicing lawyer who is a bit of a pundit these days because his area of expertise is military law. He's quoted often, so I get to see how this works from both sides.

People are welcome to send me their stuff as long as they're not too sad or offended if I don't get back with them.

Ian Ayres³

My comments will focus mostly on how to break into the citadel. But I have a brief response to the criticism of the punditry. I think it would be better to judge us by our best contributions and not our worst. I particularly take exception to the criticism of Bruce Ackerman, who pointed out the lame duck problem with impeachment⁴ and argued that NAFTA might be unconstitutional.⁵ These observations represent, I think, the highest level of issue spotting and are something that a nonlaw professor is not likely to have been able to do. Those were excellent op-eds. If these things are so incredibly terrible and clearly on their face wrong, then the op-ed editors are doing a very bad job. I think that the system is working better than that.

On the primer side, let me speak briefly. One thing to start: I'm a fan of sound bites. It increases your chances to send in a query with your twenty-five-word description of what the op-ed is going to be about instead of writing the whole eight hundred words. More likely, to get attention, it actually signals that you're more of an insider and you're not taking the trouble to write up the whole thing. It also fits, if you haven't heard it, that you should write the piece as if you're going to lose half of your readers every paragraph.

The other issue of primerism is a slight criticism of the process. I think there are a number of market failures in the op-ed market, and I'll talk briefly about three of them.

The first is a real bias against nonobvious solutions. I've done some empiricism on this, sending out research assistants to read the first two paragraphs of every op-ed in *The New York Times*, *The Wall-Street Journal*, *The Washington Post*, and *The L.A. Times*. And much less than five percent of the op-eds are on nonobvious solutions. There are some that would be fairly characterized as obvious solutions: I see that somebody is beating his children and he should stop. You can fight against this and write about the nonobvious solutions, as I sometimes do. But I tend to

³ William K. Townsend Professor of Law, Yale Law School. In addition to serving as the William K. Townsend Professor of Law at Yale Law School, Professor Ayres has a joint appointment at Yale School of Management. Professor Ayres currently teaches courses in law and economics and corporate finance.

⁴ Bruce Ackerman, *Testimony Submitted to the House Committee on the Judiciary*, <http://classes.ils.edu/archive/manheimk/371d1/Ackerman.html> (Dec. 7, 1998).

⁵ Bruce Ackerman & David Golove, *Is NAFTA Constitutional?* (Harv. U. Press 1995).

think that the nonsolutions pieces that say instead, “Isn’t it odd that we’re prosecuting Linda Tripp,” or “I’m mad as hell pieces,” such as “I’m mad as hell that students are surfing,” are much more likely to get picked up. This is in contrast to a piece suggesting a nonobvious way that we could radically reduce the inefficiencies of the dock workers’ strike. Or there’s a nonobvious way that we could redeem the telemarketing industry with a couple dozen words in the new “don’t call” statute. Those op-eds are not going to place and nonobvious solution op-eds aren’t going to place either.

I was talking with a friend of mine who writes for the *Times* magazine. He said, “But Ian, don’t you understand, this is an opinion page?” My opinion is that we should have this much less socially costly mechanism for strikes and lock-outs. That doesn’t quite fly with editors and it’s a real constraint. Writing about things that you’re angry about that are odd, and that have obvious solutions, have a better chance of getting placed.

A second factor is the difficulty in publishing new facts. You can have new theoretical insights, and those can get published, but not new facts. Newspapers want to maintain a monopoly on reporting new facts. You can fight against that and try to submit op-eds with new facts in them; but, instead, my advice is to work with the system, and let reporters report your new facts. Next month, for example, I’m going to have a new study that says that passengers tend to tip African-American cab drivers a third less than white cab drivers. Right now I’d predict this can get some play. But there’s no chance that I can directly write this up and report on it myself, not on the op-ed page or any other place. I must send it to somebody else who will write it. Maybe it would be different if I wrote it up separately in an academic journal, and then wrote a piece commenting on my findings. But that’s the second kind of market failure that, for some reason, any fact that you come up with yourself, you can’t write about.

A third market failure — and this isn’t relevant to a lot of people — is that there’s a real bias against saying positive things about for-profit companies. You cannot praise a for-profit company on an op-ed page. A few years ago, I did some empiricism suggesting that Lojack had a surprisingly large general deterrence effect. People generally had an interest in this, but Lojack’s a for-profit company. There are some real constraints about the types of ideas that can get on an op-ed page. You’d be tilting at windmills to try to get these things placed. I’d say that if you want to get inside the citadel, work within the system.

And finally, I find that the process of writing op-eds keeps me honest. It makes me state my ideas more clearly and makes me certain that I'm not just using jargon for its own purpose. But would I do it if it were anonymous? That's the real test.

*Erwin Chemerinsky*⁶

I think that one of the most important things that I do as a law professor is serve as a media commentator. It's my opportunity to educate the public about the law. When I'm on television or radio or quoted in the newspaper, I'm educating a much larger classroom than I'll ever see in any law school.

I also think one of the most important things I'm doing is educating journalists about the law. I'm not talking about Linda Greenhouse; she knows more constitutional law than any law professor I know. I'm talking about the conversations I regularly have with reporters for local newspapers who don't regularly cover the legal system — the reporter for the *Pasadena Star* or the *San Bernardino Sun*, who is covering a legal issue for the first time. A large percentage of the time, maybe even most times when I talk to reporters, I'm not quoted in the newspaper. What I'm there for is to explain and provide background material for the reporter. I remember during the O.J. Simpson case, almost every night at ten o'clock, an anchor on the local ABC affiliate would call me at home. I was doing daily work for the CBS affiliate, so I never once appeared on ABC or her show during the trial. But she wanted to be sure she understood the legal issues that she was going to discuss the next day. We usually talked about a half-hour before she would go on the eleven o'clock news. It wasn't about my being on television, it was about my opportunity to educate a journalist about the law. So I don't share Mr. Wittes' perspective of an adversarial relationship with journalists. In my experience in talking with journalists, I've come away with the highest regard for them. I regularly teach a class at U.S.C. with a journalist for the *L.A. Times*, Henry Weinstein, who's one of the best reporters I've ever met. We teach about media and the law so the students can hear both the perspective of the journalist and the law professor.

I also think that as a media commentator, I am at times advocating positions I believe in. When I write op-ed pieces, I'm advo-

⁶ Erwin Chemerinsky is the Alston & Bird Professor of Law at Duke Law School. In January 2003, Professor Chemerinsky was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California.

cating things I care about. I don't believe that there's any tension between being an advocate and a scholar. I'm often an advocate in appellate courts. I've frequently been an advocate in the legislative process, so I think it's completely acceptable to also be an advocate in the media.

But I do think being a media commentator is often a difficult role. During the O.J. case, which was the first time I was ever doing this on a daily basis, I constantly saw ethical issues in being a commentator. When I had such an ethical issue, I'd call my friend Laurie Levenson who was playing the same role during the O.J. case, and she would often call me. We decided that when the trial was over that we would write a law review article on the ethics of being a commentator. It turned into three separate law review articles on the ethics of being a commentator.⁷ We proposed a voluntary code of ethics for commentators; obviously it would have to be voluntary in terms of the First Amendment.⁸ We're pleased that the American Bar Association, the American Trial Lawyers Association, and the American College of Trial Lawyers have all favorably considered this.

The code would call for a duty of competence for commentators.⁹ For example, I will never comment on any case until I've read that decision. I don't believe that any law professor or lawyer should. I will never comment on trial proceedings unless I've either seen them or read a transcript of the trial proceedings. Mr. Wittes criticizes law professors for making inaccurate statements. I totally agree that it's indefensible for any lawyer, any law professor, or any commentator, to do that. I will never speak in any area outside my expertise. I refer journalists to my colleagues or others in the city and the country who are real experts in that area of the law.

A second thing that the code of ethics needs to address is the duty to avoid conflicts of interest.¹⁰ If I have any involvement in a case, I believe I have the affirmative duty to tell the reporters interviewing me about that. I believe there's an affirmative duty on

⁷ Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator III*, 50 Mercer L. Rev. 737 (1999) [hereinafter *Ethics III*]; Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 Santa Clara L. Rev. 913 (1997) [hereinafter *Ethics II*]; Erwin Chemerinsky & Laurie Levenson, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Ethics of Being a Commentator*, 69 S. Cal. L. Rev. 1303 (1996) [hereinafter *Ethics I*].

⁸ See *Ethics III*, *supra* n. 12, at 742-754.

⁹ *Ethics III*, *supra* n. 12, at 742-743.

¹⁰ *Id.* at 744-746.

the part of any commentator to disclose any possible conflict of interest.

I also think it's very important that there be a self-awareness about the role we're serving as commentators. Sometimes when I am a commentator I try in the most neutral fashion I can, knowing no one can be really neutral, to explain the law. There were many times during the *Bush v. Gore* litigation when I saw my role as one of being as neutral as I could, to explain just what was going on. There are other times when I'm there to be an advocate, when I'm paired with somebody from the opposite perspective, for example. But I need to be very self-conscious of my role, asking, "Am I here to try to neutrally describe the law or am I here to advocate a position?" All the while, I recognize that that line can often be blurred. And to the extent that Mr. Wittes is criticizing law professors for not being aware of that line, again, I would agree with him.

A code of ethics also needs to deal with issues of confidentiality.¹¹ I've had instances where judges have called me, talked about a particular case they were handling, and then reporters called to talk to me about the case. I don't feel I can then have that conversation. During the O.J. case, I regularly would be in the situation of running into lawyers who were involved in the case, who'd want to tell me things that weren't yet public, and they knew that I'd be on television the next day and I was worried that they were just using me or spinning me. I see it as the commentator's duty to clarify what's confidential and what's on the record.

I could go on about all of these, and Laurie and I have written about the topic in detail.¹² And so to respond to Mr. Wittes, if his criticism is that law professors at times are inaccurate, then I think he's absolutely right and we've failed in our duty. If he's criticizing law professors for times when they are advocates of positions, then I disagree because I think it's completely appropriate for law professors to be advocates so long as it's clear in what we're doing.

Finally, I should address the issue of how one becomes a commentator. I think a lot of it is being in the right place at the right time. I've never called any reporter to ask to comment. Being in Los Angeles and teaching constitutional law made it natural to be called in certain situations. The only advice I could give any-

¹¹ *Id.* at 746–747.

¹² *Ethics III*, *supra* n. 12, at 742–754; *see also Ethics II*, *supra* n. 12, at 913–941; *Ethics I*, *supra* n. 12, at 1303–1339.

body is to return journalists' calls if you want to be a commentator. And remember that they're on a deadline. I think that the way that I became a commentator is that I returned everybody's phone call and I tried to return journalists' calls as quickly as possible because I knew that they're on tight deadlines. Returning their calls tomorrow doesn't help them if they're working on the story today.

In terms of op-ed pieces, just send them out, and if the first newspaper doesn't take it, you can send it to another newspaper. It's not like law reviews where you can do multiple submissions, you have to do them one at a time. But I've generally found that if you're willing to keep trying with different newspapers, it is usually possible to get a piece published and one thing does lead to another. At the *L.A. Times*, I was able to build a relationship with an op-ed page editor, and he would call me sometimes to ask if I wanted to write about a particular issue. That kind of a relationship develops over time.

I think I am a better teacher because of the work that I've done as a commentator. I think it's helped me in being more precise in articulating ideas. I think I'm a better commentator because of the work that I do as a scholar. So I see the roles as entirely compatible and not all as in tension.

Benjamin Wittes responds

In response to points made by Linda Greenhouse and Erwin Chemerinsky, I should clarify that I don't actually disagree that there's no tension between speaking in public and scholarly work or that there's necessarily an adversarial relationship between the press and professoriate. In fact, as many of you know, I talk to law professors literally every day and I share Linda's sense that there's a general dialogue between us and that we're all essentially part of the same conversation. And I also would say that if all professors observed the ethical strictures that Professor Chemerinsky has outlined, I think my issue would take care of itself. I don't actually think he and I are disagreeing at all.

*Pam Karlan*¹³

My experience may be somewhat distinctive; although I've had a fair degree of contact with reporters during my career in the academy, I think I was probably invited to be on the panel because of my Warholian fifteen minutes of fame. One of my specialties is regulation of the political process and with the election of 2000, I hit the jackpot. If you pick an obscure-enough topic on which to become an expert, when your number comes in, it really comes in.

Much of what I think has already been addressed by the other panelists. So let me organize my remarks the way they taught me when I worked for the Riverbank Elementary School News: Who, What, When, Where, and Why.

On the "Who," I can't emphasize enough that it's important to know who the reporter is with whom you're speaking, since that will tell you a lot about the level of knowledge the reporter has. If I talk to Linda [Greenhouse], or to Chuck Lane of *The Washington Post*, or to Nina Totenberg of National Public Radio, they know the legal issues really well. And they may know a lot more than I do about details of the particular case they want to discuss. Often what expert reporters are asking you to do is to put the case they're covering in the context of other cases and relatively fine doctrinal issues.

If, on the one hand, you're talking to a sports reporter who's been referred to you by the legal affairs reporter — because he wants you to explain public accommodations laws, and why Augusta National can exclude women from its golf club — you need to tailor your remarks in a very different way. When a four-year-old asks you, "Where do babies come from?," that calls for a very different answer than you would give if you were asked the same question on a college biology exam. So it's important to know something about who is asking the questions.

The "What" question. There's a big difference between occasions on which you are the author — op-ed pieces, for example, or on-camera appearances — and times when you're essentially providing background information. On the former occasion, you're often being asked for more factual, objective information. For exam-

¹³ Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. At Stanford, Professor Karlan teaches constitutional litigation, civil and criminal procedure, and legal regulation of the political process. In addition to her teaching responsibilities, Professor Karlan currently serves as Commissioner of California's Fair Political Practices Commission.

ple, if a reporter asks you, "How many times have courts ordered ballots to be reallocated between candidates in an election?," she's not asking you, "How do you feel about this?" She isn't asking you, necessarily, "Do you think it should happen in Florida?" She's simply asking you if this ever happens. And that's a piece of information. Eighty percent of the time when I talk to a reporter about the state of the law, I don't get quoted and I wouldn't expect to get quoted.

The "Where." There's a big difference between talking to print journalists and talking to broadcast journalists. When I talk to a reporter like Henry Weinstein of the *L.A. Times*, we might spend an hour on the telephone discussing all the nuances of the issue he's covering. By contrast, if I'm talking to a television reporter, I might get twelve seconds. My favorite example of this is the time I was called by *Good Morning America*, which sent a stretch limousine to pick me up at 2:00 a.m. to take me to an ABC affiliate station in San Francisco on the morning the Florida trial court was set to rule on the recount in *Bush v. Gore*. The opinion was only seven pages long so it took me three minutes to read it. And then Diane Sawyer asked, "So Pam, do you think they're going to appeal?" And I said, "Yes." And she said, "Thank you very much," and they put me back in the limousine and sent me home. That's the extreme version of this phenomenon. But if you are talking to broadcast journalists, be aware that you cannot give a fifteen-minute statement to them. Even when I appeared on the *Lehrer Newshour*, which is probably the network show that gives guests the *most* time to comment, you have no idea how fast time moves until you've done it once.

Still, you have to prepare a lot. That's one of the things I really want to emphasize if you're going to do any kind of commenting where you are appearing in public. Even if you're going to talk to a print reporter, you need to know what you're talking about. The ratio of preparation time to face time should be roughly what it is in your classroom teaching. I probably spent five or six hours preparing for each of my *Newshour* appearances, reading things in preparation for eight-minute interview segments. And I don't think that was over-preparation. Sometimes a lot of it was wasted in the sense that it wasn't preparation for the question I ended up being asked. But you do not want to make a fool of yourself on television, because I guarantee you that people you have not seen since high school will see you and they will call you up and you will get letters and e-mails from them. If you're on the

West Coast, you will get the e-mails before you even get to see yourself appear because a lot of these stories are being done live on the East Coast and have a three-hour delay. And in the three hours between when you did the show and when you get to watch yourself, you will get thirty e-mails from people saying, "You idiot." You will feel much better if you know those people are wrong because you knew what you were talking about.

"When" should you appear? The point that a number of people have made but I can't emphasize enough is that you should appear only if you know what you're talking about. Do not revert to a junior high school mentality where you think, "If I don't accept every date I'm offered, I'll never go out again on a Saturday night." Journalists appreciate it when you say to them, "I can't come on your show. I don't know enough about this." I've gotten calls from people who've offered me op-ed slots and they say, "We want you to write about national security." And I say, "But I don't know anything about national security that I haven't read in your paper." If I read it in *The New York Times*, I shouldn't be writing it in *The New York Times*. I should be writing it in *The New York Times* only if I have something special to say that rests on real expertise. So don't be afraid to say "no." And don't be afraid to recommend other people who you think are really good; not every journalist will know all of the people you know who would be good commentators on something. If you say one time, "My good friend Erwin can talk about this," reporters will still call you.

And lastly, the "Why." We talked about the high purpose "why" — because we know things that are useful for other people to know and because we have points of view that we'd like to communicate — but there's another reason why you should think about dealing with the media: because it's actually a lot of fun. Many journalists are extremely smart and interesting, and you can learn a lot from them. Your parents will love it when you're quoted in the newspaper or appear on television or radio. And so I recommend doing media, but remember that you have a day job and your day job comes first. So do not cancel classes to go on T.V. Do not kick students out of your office because a reporter has called. Do not forget that your major job is to teach and to write scholarship — not to be the intellectual equivalent of one of the people on the *Jerry Springer Show*: "Law Professors Who Ran off with Reporters When They Could Have Been Teaching Their Classes."

I'll end with one thing that Erwin suggested which has been true for me as well. Talking to people who are not lawyers is a really good way of learning to speak and think clearly about the law. That goes beyond appearing on television or radio or writing op-eds. I recommend that you go out and talk in the community as well, face-to-face with people. Talking to the League of Women Voters if you know about voting rights issues or talking to the local NAACP chapter about racial profiling. Talking to your university's alumni groups. This kind of work improves your teaching and it also will improve your commenting because you'll be used to talking about legal issues in a way that is real to real people.

*Arthur R. Miller*¹⁴

It's strange to sit here with this wonderful group of panelists and realize that twenty-four years have passed since I was teaching a class and thought that I saw two alums in the back of the room. They turned out to be the top executives at the ABC affiliate in Boston who'd come up with the crazy idea of trying to figure out whether there was a role for law on television. They had promised the FCC to do more local programming and they'd been told to go watch this crazy law professor at Harvard.

The class and I had been talking about the august subject of how you take depositions in Switzerland. So I could understand that they didn't understand. But they said that there was an energy in the room and wondered if there was any way to translate that energy into television. That became *Miller's Court*.¹⁵

Now, why did I do it? Was it an ego trip? Sure. But what also motivated me was my role as an educator, just like the other people on this panel. As an educator, you must decide whether it's worthwhile to educate those outside your classroom. And I've always felt that it was worthwhile.

I love journalists. I've had twenty-two years with journalists: good, bad, and indifferent. But I also love the law. I feared that if we left the law to journalists, they would make an irreducible number of mistakes and would never get it as right as possible. For example, they don't understand what a denial of certiorari is.

¹⁴ Bruce Bromley Professor of Law, Harvard Law School. Professor Miller's research interests include civil procedure, copyright, and implications of computer technology for personal privacy. Professor Miller was appointed Professor of Law at Harvard in 1972; he was appointed to the Bruce Bromley chair in 1986.

¹⁵ *Miller's Court* (PBS 1979-early 1990s) (TV series).

They don't understand that innocent is not the same as a finding of not guilty. I felt, back then, that I could add something to public comprehension about one of society's most significant systems. I am also aware of a media bias against law and lawyers because the law is dull and doesn't produce good pictures for television and lawyers because they are ponderous unless they provide comic relief.

You can decide to be involved in media for a variety of reasons. You can be a reporter, but law professors are not reporters or gumshoes. We are and can be advocates. We can be educators. We can be translators. We can be pundits. And it's important to understand that those roles are very different. Alan Dershowitz and I, for example, are the dearest of friends. We've both had lives in the media but we do very different things in the media. I view myself as an explainer, a translator. Alan goes on television to be an advocate. I'm not right, he's not wrong. They're different functions.

The critical thing is that you make a decision what it is you're doing on any particular day. Am I here to translate, to educate, to explain, or am I here as I sometimes have been, because I love privacy and media people are destroying privacy? If you're going to advocate, advocate. If you're going to explain, explain. But don't mix the two without marking your role because then you are a cheat. I didn't do much opining on *Good Morning America*, but when I did, I would explain that I was in opinion mode. I once went on television, in the early days of O.J., with Alan. It was the only time Alan and I ever had any difficulty about a media appearance. Alan went on and on during the interview and never disclosed that he had been retained by the defense. So I mentioned it. I felt it was a matter of integrity. And he understood what I was doing. Know why you're there, know what your function is, and don't mix them up.

I'm a popularizer. I'm a trivializer, I'm a synthesizer, I'm a dilettante, a generalizer. I know that because Peggy Robinson has never called me in over twenty years to be on *The Newshour*. Never! That is absolute confirmation I have no expertness about anything. And that's the right word: expertness, not expertise. Linda never calls me because I rarely deal with the Supreme Court. I deal with the other ninety-eight-and-a-half percent of the law.

I agree with my colleagues: Never go on to discuss a case unless you've read an opinion. But I disagree with my colleagues: Don't be afraid to go on if the subject of the interview is not in your

area of expertise but is one in which you feel competent to synthesize issues, translate them, and project out the key elements. As an example, I don't know beans about matrimonial law (which is why I've been divorced three times I suppose), but if *Good Morning America* asked me to do something on child custody, I would become an instant expert by talking with Linda Silverman on the NYU faculty. When the Pope got shot, I needed to learn the legal status of the Vatican, so I called up the Archdiocese in New York and became a three-minute expert. I wasn't afraid to do it, as long as I was willing to commit to get the case information, digest and distill it, and translate and explain it. That's what we do when we teach, you just have to do it on much shorter notice.

The only time I talked about an opinion without having read it was *Bush v. Gore*.¹⁶ Dan Abrams ran down the steps of the Supreme Court the night it came down, reading extracts and asked, "What does this mean, Arthur?" Dumb luck, I was right. But I don't advise doing that except in extreme circumstances.

Now, some advice: Understand that you have no tenure in the media. Understand that in a real sense you are a commodity. You are the proverbial sponge. Once wrung, you will be discarded. Understand that the media people are not really your friends. They may be your partners, your collaborators, but not your friends. You must protect yourself. Don't cancel classes. Develop internal standards for yourself. If they want you to discuss whether it's a crime for a woman to go into a men's room at intermission at a theater because there are inadequate toilet facilities for women, think about whether you want to discuss that.

Finally, face it, it's fun. We live in one world and the media lives in another world. The ability to shift and float between the worlds creates a certain sense of exhilaration and excitement and sometimes you almost feel like you're a Renaissance person. Look at me. My whole life is Federal Rule of Civil Procedure 12(b)(6) motions. To talk about the legal status of the Vatican to millions of people is a high. But watch out. When I was in my first year of doing *Miller's Court* the station manager warned me that media activity can be as addictive as a narcotic and can lead to thinking that there is no life outside the camera. And that's something you've got to protect yourself against.

You have a day job. It is your job. It is what you were trained to do. Never, never, never give it up or compromise it.

¹⁶ 531 U.S. 98 (2000).

Question:

Should you write opinion pieces or appear on television if you are not yet tenured? Should you identify yourself as a law professor with a certain law school?

Arthur Miller:

I was so uptight about my decision to create *Miller's Court*, I didn't tell a single person in the Harvard community until the program went on the air and they discovered it. About the second week, one of my very senior colleagues came to me and said that he had watched the program the prior night. He told me that he really appreciated what I was trying to do but he then suggested that the program not identify me as a professor at Harvard Law School. That remark was crushing at the time. Time has proven him wrong, but I would say to you if you are not yet tenured, don't do it. Don't do it until you're tenured and you are established.

Benjamin Wittes:

I don't have a problem with people using their law school titles and the names of their chairs to talk about things that are germane to the research that they do. I do have a problem with people who use the name of their chair as a point of authority that conveys to the public that this is a person who is learned in the subject about which they are speaking if the subject about which they are speaking is, in fact, something in which they have no relevant experience. That seems to me to be trumping up a credential that isn't exactly relevant. It doesn't make you an authority to say the things that you're saying. However, if you're doing a generic show about law and you're a professor at the Harvard Law School, that strikes me as altogether relevant, and that doesn't trouble me at all.

Erwin Chemerinsky: I would disagree a bit. First, whether you write op-eds as an untenured professor

should depend on your particular school. At some schools, it would be recognized as something that's very important. At other schools, they'd rather you not do it. Obviously I agree that it can't interfere with your teaching and your scholarship because that's what you will be evaluated on in the tenure process. But whether you should or shouldn't do it untenured depends so much on the culture of the school.

In terms of using your title, I agree with Mr. Wittes that you should only speak in areas where you're competent. But any time I speak, people can use my title because it is an accurate description of my employment and position. My exact title is the result of a donor who gave a lot of money to the law school to have that be the title of the chair. That doesn't mean those are the only things that I know about. So, I think that my title goes with me and then people can evaluate whether I am competent to say what I'm saying. But I don't see any problem with using my title, because it is my title.

Benjamin Wittes:

What about if you're talking about a subject that's only very distantly law-related?

Erwin Chemerinsky:

If it's about baseball, then I could do it, because I know a lot about baseball, but they shouldn't use my title. Other than that, I shouldn't be talking about it unless I know a lot about it. But no matter what I'm talking about, if somebody wants to say, "And he's a professor of law at the University of Southern California," that's fine. Because that's descriptively accurate.

Benjamin Wittes:

But let's go back to the baseball example for a minute. Because some of the punditry — and I accept Professor Miller's distinction between punditry and ex-

planatory educational speaking — some of the punditry is exceptionally far removed from the areas of people's actual expertise, or expertness — hardly less so than when you're talking about baseball. Now if you say you're explaining baseball in your capacity as a professor of law, that is ridiculous on its face. However, there are lots of situations in which the ridiculousness isn't quite as obvious initially. And I'm saying that there's a duty of candor on the part of a professor to identify the situations in which he has no professional expertise to bring to a particular discussion or, at the very least, not to pull rank in that discussion by trotting out a fancy academic title granted for work wholly unrelated.

Erwin Chemerinsky: I criticize any commentator who speaks outside of his expertise unless he or she has done enough research to become an expert. I think that the media shouldn't be calling law professors to be talking about baseball unless it's a legal issue regarding baseball and the person called is an expert in that. All I'm saying is, if I am competent to speak on an issue and if a reporter chooses to quote me about it, it is fine to say that I am a professor of law and political science at U.S.C., because that is accurate information.

Question: Can we blame journalists for this sometimes for calling not the true experts but the people who will, instead, give them the delightful, snappy ten-word answer that people want to hear or read?

Linda Greenhouse: That's exactly my response. I don't blame the law professors for putting their opinions out there. I do blame the appetite of editors for bestowing a credential that's not germane. And that's where we have to

be the gatekeepers in the culture of celebrity and not let everybody in.

Benjamin Wittes:

I agree with that as well.

Question:

I hope the reporter who called Amy and asked, "Are you an expert?" wouldn't have relied only on her "yes" or "no." If she had said "yes," there should have been some checking to make sure she was indeed an expert. I am speaking on this sort of as a consumer. I'm not worried about the law schools. I think the law schools should have to take care of themselves. But I'm a little concerned about the public. There are a number of websites boasting of the law schools' experts in certain areas and some journalists who want someone else to do their homework. Too many journalists, especially too many television journalists, fall into what I call "you-be-the-judge journalism," without the rules of evidence. They put on advocate number one and advocate number two — both of whom may be lying. And the journalist at the end says, "Thank you very much. You be the judge."

I wonder if it is possible and reasonable to say to the journalists that they need to distinguish between the explainer and the advocate in their stories. That would make them do their homework a little more and force them not to rely only on experts who call themselves experts. Some journalists let attorneys and law professors alike say whatever they want to say as an advocate and they don't probe, they don't question, they don't find out facts. I think there are facts and experts out there to be found.

Peggy Robinson:

I agree with you one hundred percent. I see part of the problem in my own job. As the producer for politics, education, and

legal affairs, I have a staff of reporters on whom I must rely. Those reporters are young and normally in their second or third job. They may lack the knowledge and courage to look outside the standard experts. Plus, there's time pressure. We go on the air at six o'clock eastern standard time every night. I've got to have a body. We want the perfect guest, but a lot of times you're dealing with young, inexperienced staff people who don't necessarily know who that perfect guest would be. In theory, we're looking for the perfect cast, but that doesn't always happen. Instead, and it's television that's the chief culprit, they're looking for a body. That's the reality. And if you're talking about CNN or about Court TV, then they need new bodies for shows every hour.

Linda Greenhouse:

It is tough out here. I've been on both sides because I get called frequently by radio reporters from local radio stations who want a sound bite from me, I don't do it. There's nothing in it for me and I may not have much analysis to offer them at the time they call. The funniest example was just the other day. We have rotating weekend duty in the office and you show up and you write whatever happens that day. So I was tasked with writing an incremental development in the cloning story and my cloning story appeared in Monday's *Times*. Sure enough, I was called by radio stations, asking if I could come on and talk about cloning. I didn't even return the calls. It's a window into the appetite out there because a minute of air time is an eternity but there are sixty of those every hour. It's a big problem.

Question:

I've been involved with these things in my state and in my community. I'd like the

professors to talk about their own experiences with colleagues in terms of internal consequences: colleagues who are jealous, colleagues who are hostile, administrators' concerns that you need more focus on your scholarship, hate mail from readers, or threats from outside people. Those are consequences I've been afraid of in expanding my media involvement, because of the personal harm that could occur.

Ian Ayres:

Just one clarification on the question of what writing you should do pre-tenure. We should divide it into different categories of publication. If you get a piece in *The New Republic*, or the *L.A. Times* or *American Prospect*, there's just no way in the world that will hurt your tenure file, controlling for everything else. It's definitely a plus factor to me. Secondly, if you write a scholarly piece that then gets media play, that's only going to help your tenure, even if you help promote the piece and then give some interviews based on your scholarship. The thing that is more institutionally contingent and will definitely give rise to more resentment and questioning is if you comment not on your scholarship, but analyze, comment on the news that you haven't created. That's not as much as a plus factor. Don't give reporters quotes all the time on any issue.

You mentioned hate mail. Certainly, if you are quoted in *The New York Times*, you'll attract both the loons who will e-mail you about your statement and you'll also get the producers for every local news show that need to fill time. But I never feel that my family is at personal risk, despite my media involvement.

Arthur Miller:

I said before — very strongly — that if you're pre-tenure, I'd advise against media involvement. I stick with that because

you will never know what your colleagues are saying in the lunchroom when you're not there. You will never know what kind of mail your dean gets. Maybe I'm just a scaredy-cat in my old age. And again, if you become a media commentator, stay within your field. That clearly will not hurt you. But if you stray into fraying toward the edges of your knowledge base, there are unseen risks.

Pam Karlan:

You may well get some negative mail and really scary mail, particularly if you talk about anything that's at all controversial.

On the topic of negative mail, the three or four of the most negative letters I got during the entire election law thing were from second-year law students at various law schools who claimed I knew nothing about the law. I answered them — I actually answered almost all of the e-mails that I got. I viewed the answers as an opportunity to teach the students that good lawyers don't just shoot from the hip. It was important to me to show them that they needed to pay closer attention to doctrinal details.

As for truly scary letters, those tend to be on issues that people take personally. So, for example, conservatives did not write me incredibly nasty letters about my views on *Bush v. Gore*, because they won and they could afford not to. It's when I've talked about civil liberties issues that I've gotten really scary letters. The letters say that "People like you would be the first to go if al-Qaeda took over the United States." And I have no doubt that, yes, I would be among the first to go. If you get letters that really scare you, contact your university's police department.

This leads to a slightly different point: you should learn what resources are available at your universities. Not just the police department, but also your university's public affairs or media office. Often these offices have incredible expert media people. They know if there's an up-link station on campus so you don't have to go someplace else to tape broadcasts or they tell you where to place your op-ed or things like that.

But it is scary when you get e-mails because people obviously know your e-mail address. And if they got your e-mail address from the campus, they can also get your home address, unless you have that unpublished. Do I worry; do I look both ways when I come out of the door of my house in the morning? No, I don't. But that one e-mail was scary enough that I wanted the university to take over.

Erwin Chemerinsky: I've gotten thousands of hate letters and hate messages. E-mail has made it much worse, but I remember the first op-ed I ever did, in *The New York Times* about sixteen years ago. It was the time that *Bowers v. Hardwick*¹⁷ was pending. It had the very simple point that sexual identity should be private. I got dozens of letters, some which were very vicious, saying that I deserved to die of AIDS. In recent times, I've received a lot of letters saying I should die in a Bin Laden bombing, that my family should die. Last year when I was co-counsel in one of the cases on behalf of Guantanamo detainees,¹⁸ I turned on my e-mail one morning and there were 200 hate messages. Unless the message

¹⁷ 478 U.S. 186 (1986).

¹⁸ *Coalition of Clergy, Lawyers, & Professors v. Bush*, 310 F.3d 1153 (9th Cir. 2002) (naming Professor Chermersinsky as co-counsel).

says to me, "I'm coming after you and your family," I just toss it in the trash. I never, ever respond to a nasty or hate message. I delete it because I don't want to give them the satisfaction of responding.

My administration has been totally supportive. I know that both the dean and the president of the university regularly get letters from alums saying, "As long as you have that liberal Chemerinsky on the faculty, I'm not giving any more money." I know my dean has a form letter response saying, "I don't always agree with him, but we have academic freedom." I've never had anything but support from the administration. To that extent, if colleagues have been other than supportive, they've only done it behind my back. Nobody's ever said the slightest negative thing to me.

Question:

I do a lot of op-eds; I write in the area of civil liberties and I certainly agree with those panelists who suggest that it's not only fun, but it has a great deal of impact. It certainly has for me. It's a lot more time- and cost-efficient than writing law review articles, which I do, too, because I get paid to do them in summer. But my question is very specific. I've recently had difficulty getting articles published. One in particular is about the silence of the Islamic community in the United States in response to the killing of reporter Danny Pearl and in response to the terrorist incidents. To what extent is my difficulty in getting this particular piece published a reflection of an attitude of political correctness on the part of op-ed editors, and to what extent could it be that the newspaper op-ed editors are downsizing the number of outside contributors they are

accepting because they don't want to pay them? They have a lot of syndicated columnists they could use instead.

Benjamin Wittes:

I can't address that in general because I work for only one editorial page rather than all of them. I can say that political correctness hasn't encumbered our op-ed page. At least I hope it hasn't. On the specific subject that you mentioned, I have personally seen a very large number of submissions related to that specific issue. I think all op-ed pages are inundated with such material. We get, for example, an average of about eighty op-eds a day — and that fluctuates depending on how dense the news is. It can go well over 100. We read them all. But on any given day, we tend to have no more than two outside pieces on our op-ed page. So you can do the math in your head and it's not very favorable. This is not to discourage you from submitting op-eds; the diversity of submissions is what makes for an interesting page. But it is to say that you shouldn't read a whole heck of a lot into the fact that a given op-ed has a hard time finding a home, particularly when it happens to be on the hottest issue of the day.

Question:

I wonder if anyone on the panel might have advice for those of us from less prestigious schools. It has always seemed to me that the op-ed pages and the media are more accessible to those from the more elite schools, that the school status also gives their pedigree as experts more status. Our law review articles aren't publicly disseminated in ways that allow the media to gauge for themselves whether we are experts, so how do we break in to that op-ed world?

Linda Greenhouse: I think that you raise a good issue. I'm always aware of that. When I have the chance to interact with and quote a professor from a law school that I haven't quoted from often, I'm happy to do it. Actually, I remember finding an expert from a lesser-known school on the Internet while searching for current developments in a story about September 11th. His clinic had represented some of the detainees in New Jersey. I quickly got a warm, follow-up letter from the law school, saying thank you for quoting us and here's a list of our other experts. The visibility issue is a tough one. But be out there and people scanning the horizon will find you eventually.

Peggy Robinson: We're always looking for new voices, different voices. Diversity is important to us, not just necessarily the caliber of the school. Expertise comes into it. I feel like we tend to go back to the same sources time and time again. And while, on one hand, I think that's appropriate to develop that kind of relationship, I also think of people who are here at this meeting. There are a lot of you here and, yet, there are not a lot of you who are reflected on the evening television programs and I would like to see that change. I would like to have more information about you, what your interests are, what you're writing about.

Ian Ayres: I think the institutional bias is there big time. There are two things you can do. One is write off-topic. Don't do a September 11th op-ed. Try to find something quirky that editors haven't been thinking about. And secondly, it's good that *The Washington Post* reads all 100 submissions, but, as a writer, you should be skeptical of that. Make sure that you have

a killer lead, one that grabs them, because they will pay more attention to a Yale submission and, while I might get two of my paragraphs read, you might get just one. Make sure that the first paragraph makes you shine.

Question:

I have sort of the opposite question. Pretend that someone calls you and tells you that they'd like to interview you on the radio for some analysis. What advice do you have for the naive interviewee on how to best protect herself from something that ends up being not what you would have wanted to see in print or on the air? Are there ground rules that people need to know about? Can you summarize, for the novice, what to think about?

Ian Ayres:

Do everything off the record first and then come back and check quotes to go on record.

Erwin Chemerinsky:

I have a slightly different answer than that. First, and this took me much longer to learn than it should have, if I'm being interviewed by a television reporter on tape, I know they're going to edit and use only a soundbite. And if I have one or two points I want to make, I make those one or two points in response to almost any question they ask, because you don't know what they are going to cut. Normally, we don't want to repeat ourselves. But it's ok if it'll be edited because they're not going to use you saying the same thing.

When you're on live television and you don't want to answer exactly the question asked, and you have something you really want to say, go ahead and say it. Again, it's not like having to answer a question for a student. Obviously you need to know who the anchor is and

what's appropriate. Often if you don't answer the question, then they'll just ask it again, but it's okay to do it once to get your point across. I've also found with live television it's often okay to suggest questions to reporters before going on the air.

With regard to being quoted and misquoted in the print media, my philosophy is to try to be as careful, as accurate, and as nuanced as I can. Rarely do I find myself misquoted; I'd say ninety-eight percent of the time the quote is exactly right. But sometimes it's wrong, maybe it's my fault, maybe it's the reporter's fault. Then I just forget about it. The newspaper will be on the bottom of the bird cage the next day. People won't remember. I decided a long time ago that either I have to forget about it or stop doing it. You can't obsess about it. Mistakes happen, maybe they're mine, maybe they're the reporters'. Usually it all comes up fine.

Pam Karlan:

Just two other little points. First, as I said before, know the media person at your university. We have this fabulous guy at Stanford, Jack Hubbard, and he called me about a national cable program and then suggested that I not do it. He told me that the host's style would not mesh with my style and that I would feel like I was on *Jerry Springer*. He told me that I wouldn't like that. I later saw someone else on the show, and Jack was right.

If you're going to do television, the absolute best show to do is the *Lehrer Newshour* because they take enough time with each story. Eight minutes is an eternity if you're on television and it's done live and you're being interviewed. The *Newshour* staff doesn't give you the questions ahead of time, but I would talk to a

reporter maybe for an hour in the morning the day of the interview. I knew then what the anchor would be interested in talking about: maybe how appeals work in state courts. Or maybe equal protection. So I would go and read the cases. And then I would sit down before I went on and think about the topic and the three or four things that are most important within it. Obviously, you answer the question the reporter is giving you. I don't think that you should go into an interview thinking that you will talk about your list of points no matter what the interviewer asks. But I knew my bottom line on the issues. So preparation is important. Prepare, prepare, prepare. It's like class. Fifty minutes in the classroom, the first time, requires up to ten hours outside the classroom. Eight minutes on television — at least two hours of preparation.

The second thing is about not being quoted correctly. Don't freak out unless you said to the reporter, "I think this is a very interesting case," and the reporter instead quotes you as saying, "The defendant is not guilty, I did it." Then you need to worry. But if it's not something like that, one thing you can often do, especially if it's a reporter you've dealt with before, is call him up, or send him an e-mail and say, "I think what I was trying to get at is 'X' and I saw in the paper it came across as 'Y.' Maybe I should be clearer next time about that." Don't worry terribly about it. But be very explicit if you don't want to be quoted in a story. Tell the reporter at the very beginning, "I'll be glad to talk to you about this, but you can't quote me by name." And I've never had a reporter who then quoted me by name.

Peggy Robinson:

I don't put guests on my program to make them look bad. It is live television, but it's orchestrated to a certain extent. When Pam spoke with our reporter for an hour, that's the pre-interview. We insist on pre-interviews so that we know what the guests are going to say. So part of my job is to put together a panel that meshes, whether it contains opposing views or various shades of one view. Being honest as a guest, being straightforward is very important. I can't explain to my mother what I do as a senior producer. It's putting on a show somehow and part of it is trying to find the right people for our studio discussions. We're not trying to make you look bad, because then we look bad. We do the pre-interview to make sure that guests do not speak only legalese. We want to make sure that we're getting the best guests, the ones that will help us put on a good segment.

Amy Gajda:

Thank you all for coming and sharing your experience — and expertise.

