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How journalists covered two Bay Area sexual assault cases : a content analysis

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HOW JOURNALISTS COVERED TWO BAY AREA SEXUAL ASSAULT CASES: A CONTENT ANALYSIS

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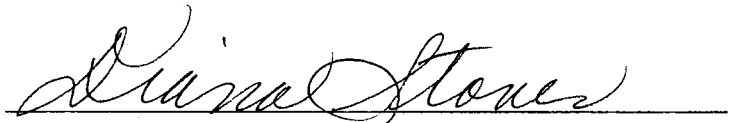

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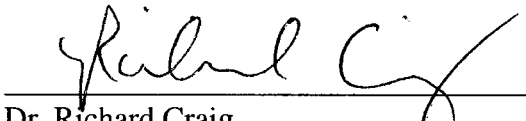

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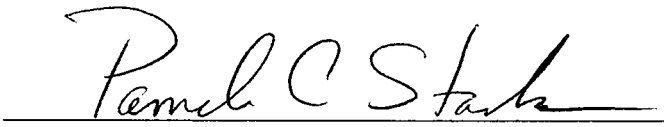

ABSTRACT

HOW JOURNALISTS COVERED TWO BAY AREA SEXUAL ASSAULT CASES: A CONTENT ANALYSIS

By Jennifer C. Shearer

This thesis analyzes whether there was prejudicial information in local newspaper coverage of two sexual assaults of elderly women that occurred in May 2002. Articles were reviewed for prejudicial content by using the guidelines developed by the Joint Declaration Regarding News Coverage of Criminal Proceedings in California and the American Bar Association's Model Rules of Professional Conduct.

In-depth analysis of the cases, the coverage they received, and interviews with journalists and attorneys resulted in the following findings. First, the articles that were written contained prejudicial information that violated the Joint Declaration and the Model Rules of Professional Conduct. Of the 776 paragraphs written about An Vinh Nguyen and Jorge Hernandez, 32% were negative in tone. Second, the reporters and editors interviewed for this research were not familiar with the Joint Declaration. Third, journalists face significant constraints when writing about criminal cases, including lack of access to those accused of crimes.

ACKNOWLEDGMENTS

My thanks go to journalists and attorneys who willingly shared their time and expertise with an inquisitive graduate student. Their insights were invaluable to this research. I would also like to thank my thesis committee advisers: Dr. Diana Stover, Dr. Richard Craig, and Jan Shaw. Special thanks go to Dr. Stover, my primary adviser, for being a wonderful professor, mentor, and editor. I am grateful for the guidance and support she gave me throughout this process.

DEDICATION

This thesis is dedicated to my dear family: my mother, Marge, and brother, James. When I think of the happy times in my life, they always involve you two. Mom, your belief in my abilities gives me the confidence to take on new challenges. Thank you for listening and for always encouraging me to do my best. I am grateful for your wisdom, prayers, and positive energy. James, thank you for making me laugh and helping me to see the bigger picture when I am too focused on the details. I love you guys—lots.

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CHAPTER 1

Introduction

Crime news accounts for a significant portion of the daily output of a community's news. Crime makes good copy—individual acts can be unusual, intriguing, violent, and dramatic. Certainly crime coverage is newsworthy; the more violent or unusual the crime, the more media attention it receives. Although it's important for members of a community to have an accurate record of the criminal activity in their area, crime news presents several challenges.

Problems can arise when a crime occurs and residents hear of it through the media. Most residents of an area could qualify as potential jurors and typically watch local news broadcasts and/or read the newspaper. A crime occurs, an investigation begins, and usually an arrest is made. How these events are chronicled in the press is a slippery slope because of the potential to create prejudicial pretrial publicity. Media coverage can jeopardize a defendant's fair trial rights in subsequent criminal proceedings. What happens when the First and Sixth Amendments, free press and fair trial, respectively, collide?

Liberty is prized in our free, democratic society. There's no hierarchy to the Bill of Rights. Although the press' right to publish information is staunchly defended, what about the rights of the accused? In the American justice system, a person is innocent until proven guilty. The media's reports of crimes and suspects can bias this assumption, however.

Police arrests are not an admission of guilt; arrests are often made because the evidence appears to indicate someone's guilt and authorities believe the suspect poses a flight risk. Mistakes happen: condemning crime scene evidence can be tested using sophisticated DNA technology, witness accounts may be false, and statements suspects make during an interrogation can be misinterpreted. Suspects are often wrongly detained and released, but news of an arrest can follow someone for the rest of his or her life. A crime occurs, an arrest follows, and both receive press coverage. When press coverage crosses a line, when the media's coverage of a crime and its alleged suspects becomes prejudicial and begins to bias readers and viewers who are potential jurors, there's a problem.

The role journalists play in ensuring against prejudicial pretrial coverage is an important one to examine because lives can be irrevocably changed based on what appears in the print and broadcast media. The influences that color how the media treats members of a society, including those accused of committing violent crimes, should be studied to promote professionalism in journalism. As former trial judge Thomas Hodson (1992) noted, journalists typically lack an understanding of the law and criminal procedure and don't have law degrees. The police and court beat are often the first assignments given to inexperienced reporters. Young journalists are learning on the job how to report often disturbing crime news to their readers.

This research is important because crimes often challenge the nation's fundamental principles of fairness and justice. Chapter 2 of this study of prejudicial pretrial publicity begins with an overview of decisions made by the United States

Supreme Court about the dangers posed by such coverage. The role and effects of pretrial publicity in these cases will be emphasized to create a legal foundation for understanding.

Once the legal foundation is established, relevant social science studies and research literature about the effects of pretrial publicity will be discussed. In addition, background information about how Bay Area print media covered two rapes and beatings of elderly women will be reviewed. The cases occurred in San Jose and Palo Alto in May 2002 within nine days of each other. Authorities arrested and incarcerated An Vinh Nguyen and Jorge Hernandez until DNA evidence exonerated both men. There are four research questions the researcher would like to answer. First, did the news stories written about Nguyen and Hernandez contain prejudicial information that violated established guidelines? Second, why do journalists make the decisions they do while covering crime stories? Third, are journalists aware of press-bar guidelines and, if so, why are these guidelines violated? Fourth, what training, if any, do newspaper reporters and editors have to cover the crime and court beats?

A four-part method was used in this study. First, a case study of relevant landmark Supreme Court cases that set precedents concerning pretrial publicity and criminal cases was conducted. Second, court documents in the cases were analyzed. Third, a quantitative and qualitative content analysis of the relevant press coverage Nguyen and Hernandez received from May 2002 to July 2003 was conducted. Finally, personal interviews with local journalists who covered the cases as well as attorneys were conducted to inform the research.

CHAPTER 2

Literature Review

Free Press – Fair Trial

In the 1960s and 1970s, the U.S. Supreme Court issued several precedent-setting opinions involving prejudicial pretrial publicity and free press, fair trial issues. The backgrounds along with the Supreme Court's decision in each case will be presented and analyzed. The first case is *Irvin v. Dowd*, 366 U.S. 717 (1961).

Irvin v. Dowd

Petitioner Leslie Irvin was arrested for the murders of six people near Evansville, IN, which is part of Vanderburgh County. The media of Vanderburgh County and neighboring Gibson County covered the slayings, which received intensive coverage.. Upon arrest, the local prosecutor and police officials issued press releases that stated Irvin had confessed to the murders. Irvin's attorney requested a change of venue to counteract pretrial publicity during the indictment. This request was granted and the trial was moved to neighboring Gibson County. Defense counsel requested the trial be moved farther away from Evansville because of concerns about pretrial publicity; however, the motion was denied because an Indiana statute only allowed one change of venue.

A total of 430 potential jurors were examined; 268 were excused because they had existing opinions about Irvin's guilt and 103 were excused because they didn't believe in the death penalty. Of the 12 jurors, 8 admitted they thought Irvin was guilty, but they

nevertheless believed they could deliver an impartial verdict. Irvin was found guilty and eventually appealed his case to the Supreme Court.

Justice Clark delivered the Court's opinion in which he stated that Irvin's rights to a fair trial were violated. The Supreme Court of Indiana should have allowed a second change of venue for Irvin's trial based on an earlier precedent. Justice Clark noted "in essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process" (p. 722).

The amount of prejudicial publicity Irvin's case generated was substantial. The Court noted: "Here the build-up of prejudice is clear and convincing. . . . It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County" (p. 725). News of Irvin's prior criminal record, including the crimes he committed as a juvenile, an arson conviction, burglary, and court martial on AWOL charges, appeared in the local media. The voir dire record of 371 excused jurors indicated they had opinions about Irvin's guilt. In fact, many commented that if their roles were reversed, ". . . they would not want him on a jury" (p. 727).

The Court stated: "The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man" (p. 727). Are jurors able to set aside thoughts of preexisting guilt aside and focus their deliberations based solely on the evidence presented during trial? In this case, the Court disagreed:

> No doubt each juror was sincere when he said that he would be fair and impartial to the petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. (p. 728)

Another notable case that is cited for the role pretrial publicity played in its outcome is *Rideau v. Louisiana,* 373 U.S. 723 (1963).

Rideau v. Louisiana

In February 1961, Wilbert Rideau was tried for robbing a bank, kidnapping three employees, and killing one of them in Lake Charles, LA. As the Court noted, the morning after his arrest, a film was made that featured an "interview" in the Calcasieu Parish jail between Rideau and the local sheriff in which Rideau admitted ". . . in detail the commission of the robbery, kidnapping, and the murder, in response to leading questions by the sheriff" (p. 723). The 20-minute interview documented Rideau's interrogation and the sheriff's allegations that Rideau had committed the crimes. Later that day, the interview was broadcast to 24,000 people in the Lake Charles area. During the next two days, it was rebroadcast to estimated audiences of 82,000 people—Calcasieu Parish's population was approximately 150,000.

The Court noted that Rideau was arraigned two weeks later, and although his lawyers requested a change of venue, alleging that ". . . it would deprive Rideau of rights guaranteed to him by the United States Constitution to force him to trial in Calcasieu Parish after the three television broadcasts there of his 'interview' with the sheriff" (p.

724). The change of venue motion was denied and Rideau was tried, convicted, and sentenced to death. Of the 12 jurors, 3 acknowledged they had seen the broadcast.

Justice Stewart delivered the opinion of the Court and noted that Rideau's rights to due process were denied:

> For anyone who has ever watched television the conclusion cannot be avoided that this spectacle, to the tens of thousands of people who saw and heard it, in a very real sense *was* Rideau's trial—at which he pleaded guilty to murder. Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality. (p. 726)

Broadcast media also played a significant role in the outcome of the next case, *Estes v. Texas*, 381 U.S. 532 (1965).

Estes v. Texas

Although this case primarily dealt with the issue of allowing cameras in the courtroom, it is important because of the pervasive television coverage given to high-profile cases. As Gillmor, Barron, and Simon (1998) noted: "Bench and bar have tended to equate television's power to attract an audience with power to prejudice" (p. 415). Billie Sol Estes was charged and convicted of swindling. He petitioned the Supreme Court on the grounds that his due process rights were violated by the presence of cameras in the courtroom. His case had been granted a change of venue to Reeves County, 500 miles west of Smith County.

The Court noted "massive pretrial publicity totaling 11 volumes of press clippings . . . had given it national notoriety" (p. 535). Estes' attorneys filed a motion to prevent telecasting, broadcasting by radio, and news photography, which was denied. However, the judge did grant their motion requesting continuance. According to the

Court, during the two-day hearing, wires for the cameras and recorders ". . . snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table" (p. 536).

The Court commented about the harmful effects of pretrial publicity: "Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence" (p. 536). The broadcasting of the pretrial proceedings was highly publicized and demonstrated to those present in the courtroom and those watching the events unfold that Estes' trial was newsworthy.

Similar to the community in *Rideau v. Louisiana*, residents who watched the proceedings in the Estes case were subjected to a ". . . bombardment. . . with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized" (p. 538). The Court ruled that the publicity emphasized the ". . . notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case. . . ." (p. 538).

In its opinion, the Court started with a review of the Sixth Amendment. "We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused'" (p. 538). A public trial serves to protect defendants from secret tribunals, which were historically used to condemn people unjustly. The Court then contrasted the Sixth Amendment with the First Amendment:

> It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press. (p. 539)

Although the press has important functions in a democratic society, the Court noted "its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process" (p. 539). The state of Texas argued that televising legal proceedings did not result in a violation of due process or harmful effects for the defendant, but the Court disagreed. "At the outset, the notion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited" (p. 541).

The Court, however, identified four potential hazards of televised legal proceedings, the first of which concerns this discussion: its effect on jurors. Jurors are the ". . . nerve center of the fact-finding process. . . . From the moment the trial judge announces that a case will be televised, it becomes a *cause célèbre.* The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it" (p. 545). Furthermore, broadcasting an initial trial could jeopardize future trials because ". . . potential jurors will have see and heard the original trial when it was telecast" (p. 546).

The Court's concerns expressed in the *Estes v. Texas* opinion also relate to the fourth case to be studied, *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

Sheppard v. Maxwell

Long before O.J. Simpson's trial of the century, there was the trial of Sam Sheppard, an Ohio osteopath accused of murdering his wife in 1954. This case inspired the television series and film "The Fugitive." On July 4, 1954, Marilyn Sheppard was

bludgeoned to death at the lakeshore home she shared with her husband, Sam. and their young son. Authorities immediately suspected her husband. Although Sheppard denied having anything to do with this wife's slaying, he remembered hearing her cries in the middle of the night, running to their bedroom and struggling with a "form."

How the local press covered the case was problematic from the start. Stories and editorials accused Sheppard and his family of being uncooperative with authorities, implying Sheppard had something to hide. Some of the most prejudicial coverage during the time between the crime and Sheppard's arrest came from editorials:

> On the 20th, the 'editorial artillery' opened fire with a front-page charge that somebody is 'getting away with murder.'. . . . The following day, July 21, another page-one editorial was headed: 'Why No Inquest? Do It Now, Dr. Gerber.' The Coroner called an inquest the same day and subpoenaed Sheppard. (p. 339)

When Sheppard was arrested, the Court noted that "the publicity then grew in intensity until his indictment on August 17" (p. 341). Press coverage from the beginning of the case until Sheppard's conviction in December of 1954 filled five volumes (p. 342).

Not only was Sheppard the subject of intense media scrutiny, so were the prospective jurors and jurors in his case. The names and addresses of 75 prospective jurors were published. Sheppard went to trial two weeks before an election in which the chief prosecutor and trial judge in the case were candidates. Reporters were allowed to sit at a table inside the bar. Sheppard himself was brought in early before each day's proceedings began for photo shoots. Of the 12 jurors, seven subscribed to newspapers that covered Sheppard's trial. Verbatim accounts of the trial, including objections by the attorneys, were published in newspapers. In its opinion, the Court noted:

> A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism. (p. 350)

The media attention given in *Sheppard* exceeded the coverage seen in *Estes v. Texas*. Unlike Estes, Sheppard was not granted a change of venue and the jury was not sequestered. The manner in which the case was handled by the authorities caused the Court to note: "For months the virulent publicity about Sheppard and the murder had made the case notorious. . . . There can be no question about the nature of the publicity which surrounded Sheppard's trial" (p. 354).

The Court faulted the trial judge for not taking appropriate measures to counteract the harmful effects of pretrial publicity. "We conclude that these procedures would have been sufficient to guarantee Sheppard a fair trial. . . ." (p. 358). The actions the trial judge should have taken included:

- Adopting stricter rules governing the use of the courtroom by journalists
- Insulating witnesses from the press
- Controlling the release of leads, information, and gossip to the press by official trial participants, including police and attorneys for both sides
- Warning the press to check the accuracy of their reports—inaccurate information about Sheppard's trial was reported as truthful by the press
- Proscribing legal counsel from making extra-judicial statements
- Delaying the case until threats to a fair trial are reduced
- Transferring the case to a different venue

- Sequestering the jury
- Ordering a new trial. (p. 358-363)

As Supreme Court Justice Clark wrote in the opinion that reversed Sheppard's conviction:

> From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. . . . Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. But we must remember that reversals are palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. (p. 362-363)

The measures for countering the affects of pretrial publicity that were recommended in *Sheppard v. Maxwell* surfaced in the final case to be studied, *Nebraska Press Association v. Stuart* (427 U.S. 539 (1976)), which involved issues of prior restraint.

Nebraska Press Association v. Stuart

On the night of October 18, 1975, six members of the Henry Kellie family were found slain at their home in Sutherland, NE, population 850. Local police released a description of the suspect, Edwin Charles Simants. Simants was arrested and arraigned in Lincoln County the next morning. The case attracted significant publicity. Attorneys on both sides asked the County Court to issue a restrictive order:

> 'matters that may or may not be publicly reported or disclosed to the public,' because of the 'mass coverage by news media' and the 'reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.' (p. 542)

The County Court granted the restrictive order on October 22. The order prohibited anyone attending legal proceedings from "releas[ing] or authoriz[ing] the release of public dissemination in any form or manner whatsoever any testimony given or evidence adduced" (p. 542). Moreover, the order required members of the press to follow the Nebraska Bar-Press Guidelines, ruling in effect that the voluntary guidelines be made permanent until the restrictive order expired. Simants' preliminary hearing, which was open to the public but subjected to the restrictive order, was held the same day. The County Court bound over the defendant for trial to the State District Court and the charges against Simants were changed to include sexual assault. As Gillmor et al. noted, Simants had ". . . raped and shot 10-year-old Florence Kellie, then murdered all possible witnesses—her grandparents, her father, a brother, and a sister" (p. 387).

Journalists asked that Judge Stuart of the District Court lift the restrictive order. However, Stuart then entered his own restrictive order because, as the Court noted, ". . . the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant's right to a fair trial" (p. 543). The order was set to expire once the jury was impaneled and:

> . . . prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the victims of the sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. (p. 543)

The journalists asked the District Court to stay Judge Stuart's order, which incorporated the state's press bar guidelines. The journalists also asked the District Court

to and simultaneously apply to the Nebraska Supreme Court for ". . . a writ of mandamus, a stay, and an expedited appeal from the order" (p. 544). The Supreme Court noted that the Nebraska Supreme Court ruled that in this case, "Both society and the individual defendant. . . had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy" (p. 545). Nebraska statues only permitted trials to be moved to adjoining counties, in which residents had also received the same publicity as Lincoln County residents. The Nebraska Supreme Court modified what journalists could not cover to three categories:

> (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts 'strongly implicative' of the accused." (p. 545)

The Supreme Court noted that the problems in the Simants case ". . . were almost as old as the Republic. . . . it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press," (p. 547). Advances in communications technology and ". . . the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate" (p. 548). Despite the existence of the Nebraska Bar-Press Guidelines, they don't hold much weight ". . . when a case such as Simants' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards" (p. 550).

A high-profile case like Simants' illustrates the tensions between ". . . the right of the accused to trial by impartial jury and the rights guaranteed others by the First Amendment" (p. 551). The Court emphasized that because of the liberties granted through the First Amendment, the press has a:

> . . . fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors. (p. 560)

Although the press has significant responsibilities in covering criminal proceedings, so do jurors. Specifically, the Court noted that the ability of a jury to ". . . decide the case fairly is influenced by the tone and extent of the publicity, which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage" (p. 554-555).

In addition to the comments of the Supreme Court about the effects of pretrial publicity on potential jurors, it is also necessary to examine the contributions of research media sociologists and social scientists. Another area that merits attention is how journalists cover crime news—the sources they use, the decisions they make, and the effects of those choices.

The media has a responsibility to report the crimes that happen in a community, but a fine line must be walked in the ways in which these crimes and their alleged suspects are portrayed. As noted in the Statement of Principles in the Joint Declaration Regarding News Coverage of Criminal Proceedings in California (1974):

> The news media have the right and responsibility to gather and disseminate the news, so that the public will be informed. . . . Editors in deciding what news to publish should remember that:
>
> (a) An accused person is presumed innocent until proven guilty.
>
> (b) Readers, listeners, and viewers are potential jurors or witnesses.
>
> (c) No person's reputation should be injured needlessly (Fair Trial/Free Press Voluntary Agreements, (p. 19).

As Friendly and Goldfarb (1967) stated, however: "The press's criteria for publication are what is interesting, satisfies curiosity, tells a story, and, judged from *its* standards—which are not necessarily those of the court—what it *believes* to be true," (p. 87). Certainly these two cases fit much of the above criteria.

Studies on the Impact of Pretrial Publicity

Social scientists have utilized quantitative and qualitative approaches in investigating the impact of pretrial publicity. Content analyses have been conducted to measure the extent of prejudicial pretrial publicity in newspapers (Imrich, Mullin, & Linz, 1995). Here, the researchers applied the American Bar Association's (ABA) Model Rules of Professional Conduct to a sampling of 14 American newspapers during an 8-week period.

The rules (p. 23) stated:

> A trial lawyer shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding. .
>
> Examples of statements to be avoided include comments about the:
> (1) character, credibility or reputation or criminal record of a party, suspect in a criminal investigation or witness, or the expected testimony of a witness;

(2) the possibility of a plea of guilty to the offense or the existence of a confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;

(4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5) information the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and would if disclosed create a substantial risk of prejudicing an impartial trial; or

(6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Imrich et al asked the following three questions. First, how often are the prejudicial types of statements outlined in the Model Rules reported about criminally accused persons in major newspapers in the United States? Second, under what conditions is prejudicial pretrial publicity most likely to occur? They held that the more unusual the crime, the more likely it is to receive pretrial coverage, and this coverage can be used to reflect the interests of the prosecution. Finally, do statements about crime victims contribute to prejudicial coverage (p. 3-5).

The 14 newspapers had a combined circulation of nearly 5.5 million. The types of articles studied included:

> . . . reports about a criminal occurrence or event in the United States, reports of new evidence or information about a previously reported crime, reports about a criminal case coming to trial or about a pretrial hearing, and reports about the aftermath of a crime or about personalities and lives of victims and suspects (p. 6).

Imrich et al. found that 27% of the suspects mentioned in the sampled stories were associated with at least one of the ABA categories of potentially prejudicial publicity and that statements depicting the suspect in a negative light were the most common. It's also important to note that the official sources quoted in the study's articles are also the sources of potentially prejudicial information. The researchers also found that statements made by prosecuting attorneys included comments about suspect guilt—24.7%—or the possibility of a plea bargain—23.3% (p. 9). "Law enforcement officials. . . although not often the target of court-ordered restraints, were most frequently cited as sources for prior arrests, negative statements about the character or reputation of the suspect, and opinions of suspect guilt" (pp. 13-14). Imrich et al. discovered that defense attorneys are strong advocates of a suspect's innocence and good character; they contributed nearly 63% of statements to this effect in the sampled articles (p. 14).

Public defender Robert P. Isaacson (1977) said the protective devices cited in *Sheppard v. Maxwell* and *Nebraska Press v. Stuart* are ". . . totally inadequate to protect the accused's constitutional right to a fair trial," (p. 561). Isaacson took issue with the effectiveness of the following devices to stave off pretrial publicity: postponement of a trial, change of venue, and sequestration. He also included voir dire and a judge's instructions to a jury to only consider evidence heard in court as ineffective measures.

Attorneys Whitebread and Contreras (1996) noted that district attorneys often use high-profile cases to ". . . gain public recognition and generate public support to maintain the power base necessary to win reelection" (p. 1,620). William Kunstler, a prominent defense attorney, alleged that in high-profile cases, the prosecution skillfully uses the

media to make its case, so much so that ". . . any juries eventually seated in their cases have been thoroughly exposed to at least an initial barrage of devastating pretrial publicity that neither time nor effort can effectively dispel" (1992, p. 79).

Kunstler also stated that defense attorneys must fight fire with fire to support their clients' case as it is covered in the media. Imrich et al.'s findings support Kunstler's claim because ". . . prosecution-side sources such as law enforcement were found to be responsible for much of the ABA prejudicial information reported in the press" (p. 15). Whitebread and Contreras wrote that both parties have an incentive to release information favorable to their side. It is the good guys versus the bad guys myth—the media is caught in the middle and used to promote each side's agenda. Pretrial publicity affects defendants' chances of a fair trial, which can deprive them of liberty and possibly life.

These publicity-garnering attempts qualify as pseudo-events (Lang & Lang, 1971), carefully staged to demonstrate that a community is safe and its law enforcement officers are vigilant. Participants in the legal process may try to become part of the media circus (Walton, 2001). There's a difference in the timelines that the legal system and the media use, too. As Walton stated, the law operates at a slower pace. "It is a process that focuses on court deadlines, not news deadlines. It is the process of protecting justice," whereas the media wants information about a case immediately (p. 7). Walton encouraged attorneys to stay away from the courthouse steps unless there's news to update.

As Boorstin noted, "pseudo-events thrive on our honest desire to be informed" (141). Pseudo-events are large or small gatherings of people typically designed to create

the perception that the gathering is important and newsworthy. The publicity generated by the event often benefits the organizing group. A pseudo-event is usually planned primarily for the convenience of the news media. Another technique of pseudo-event creation is the use of press or news releases. Boorstin described the news release as "precooked," a creation that was ". . . supposed to keep till needed" (127). Interviews are also another type of pseudo-event, a "contrived" way of conveying information (124). People follow the news because they have a need for information; they turn to the media to meet these needs (Katz, Blumler, and Gurevitch, 1974). Residents of a community have a vested interest in knowing what crimes happen in it or near it. People do not want to think that their community is unsafe. Discovering this information results in what Chaffee and McDevitt describe as disequilibration (1997). Crime news is shocking—depending on the severity of the crime, people may not want to believe that a violent incident happened in their neighborhood. Pretrial publicity has the power to jog thoughts and challenge beliefs. News of these happenings can shake people to their very core. Certainly the residents of Calcasieu Parish, LA and Sutherland, NE felt differently about how safe they were as a result of the crimes Rideau and Simants were accused of committing. As Chaffee and McDevitt noted:

> As for news values, an important test is whether a news story will jog our thinking, disrupt our habits, and our feelings about the world outside. And as a story is followed through, it should help people restore the equilibrium of their lives. (p. 19)

Like Chaffee's disequilibration, Graber's schema theory describes how people process information (1988). Schemata are mental pictures, frameworks of information that are constantly adapting as new input is received. Direct experience with a concept

isn't needed to shape an individual's schema. For example, Graber asked respondents ". . . for their conception of the typical criminal and the typical victim" (p. 30). The connection to pretrial publicity is clear—the schemata of people who pay attention to crime news will adapt as new information is provided. The defendants in the cases cited earlier were all viewed differently after pretrial publicity made them infamous. Those who knew them personally or via the media experienced disequilibration.

There are also significant questions about the effectiveness of the pretrial publicity remedies that evolved from *Sheppard v. Maxwell.* Researchers have studied remedies such as judicial admonitions or voir dire by using actual and experimental verdicts. Kerr stated the best way to discover if the remedies are effective would be to ". . . associate the occurrence of pretrial publicity with actual jury verdicts" (1994, p. 123). This approach is problematic because ". . . they fail to examine a matched sample of cases without prejudicial publicity. Without such data it is not possible to establish whether there is an association between the amount or type of pretrial publicity and the jury verdict" (p. 123).

Researchers have utilized laboratory experiments to test the effects of pretrial publicity. Typically, in mock trial experiments, researchers give two juries information about a case and trial with or without the presence of pretrial publicity information. Kerr noted that researchers then make connections between the two groups and their verdicts based on the amount of publicity materials to which they were exposed. Kramer, Kerr, and Carroll (1990) used this approach to examine the effectiveness of three remedies—judicial instructions, jury deliberation, and continuance—the least expensive

pretrial publicity remedies judges may use. Their mock trial involved the pretrial publicity coverage of an armed robbery suspect. After allegedly committing the robbery, the suspect's getaway car struck a seven-year-old girl, who died from her injuries. A 51-minute videotape of the proceedings and examples of print and broadcast coverage were shown to 791 participants.

How effective were the three studied remedies? "An admonition from the judge to ignore all publicity had no effect on juror or jury verdicts" (p. 430). As for jury deliberations, although participants mentioned the proscribed information infrequently and usually with a reminder that it was not to be considered, Kramer et. al noted that pretrial information may ". . . create a bias in the selection or presentation of arguments during deliberation" (p. 431). In other words, some mock jurors who had negative impressions of the defendant based on the pretrial publicity they saw may "...have been less willing to be his defenders in the jury" (p. 431). The 12-day delay used to examine the effectiveness of a continuance also had mixed results. "Though continuance eliminated bias produced by factually biasing publicity, it did not eliminate bias produced by emotionally biasing publicity" (p. 432). The authors concluded that "the simplest, least expensive remedies of instruction and deliberation are most suspect" (p. 434).

Moran and Cutler (1991) utilized a phone survey to research the effects of pretrial publicity on potential jurors. They ". . . assessed the strength of the correlation between knowledge of the media accounts of a crime and willingness to assume that the individual charged is guilty" (p. 347). The first case concerned a federal case against drug smugglers in southern Illinois, one that Moran and Cutler described as receiving

moderate pretrial publicity. They asked 604 potential jurors 40 questions about their opinions regarding crime and drug-related crime, if they had heard about the case in question, and if they believed they could be impartial jurors, among others. The authors noted that 84% of the sample agreed or strongly agreed that ". . . most of what is printed in the newspapers or shown on television news about crime in southern Illinois turns out to be pretty much the truth" (p. 352). In this study, respondents who had ". . . seen as many as five articles are substantially more inclined to say they feel there is a 'lot of evidence' against the defendant" (p. 354).

The second case studied, the shooting of an undercover Florida police officer that occurred after a drug deal went awry, was also described by the researchers as highly publicized (p. 355). This sample featured 100 potential jurors, and 72% agreed or strongly agreed that most of the crime news in southern Florida was also truthful. However, similar to the first survey's findings, the Florida respondents who had seen three or more articles were more inclined to feel ". . . there is a 'lot of evidence' against the defendant" (p. 359). Moran and Cutler described their findings as demonstrating that ". . . pretrial publicity has shorn the defendants of the presumption of innocence, their most effect [*sic*] shield against conviction" (p. 360).

Dixon and Linz examined television news, prejudicial pretrial publicity, and the depiction of race (2002). Half-hour news broadcasts in Los Angeles were coded using the ABA's categories that Imrich et al. used in their content analysis of 14 newspapers. The sampling period consisted of two different sets of broadcasts aired during a 20-week period. Crimes committed in Los Angeles and Orange Counties were studied.

Although there were fewer incidences of prejudicial publicity found in this study—19% compared to 27% in Imrich et al's research—it was noted that stories ". . . featuring black and Latino defendants and white victims were more likely than stories featuring white defendants and non-white victims to contain prejudicial information. . . . Latinos who victimized whites were almost three times as likely to be associated with prejudicial information" (p. 21).

Clearly, social scientists have ample opportunities to study the effects of pretrial publicity. Crime news is a staple of the American media. As Dennis and LaMay (1992) noted, "there is no journalistic work more deserving of the designation 'story' than news of crime. . . . Crime stories are both news *and* drama, and to ignore either is to diminish the other" (p. xi-xiii).

Shoemaker and Reese (1996) discussed the roles of influences on content and cited the potential conflict of interest that could arise when crime reporters work to gain the trust of police sources (p. 98). Journalists use court documents, law enforcement, and court officials as sources. These sources are easily accessible and convenient for reporters. "It is the journalist's job to sift through all the information they are given—which is often conflicting—and to come up with news reports that are accurate and complete" (p. 178). With regard to crime news, this sifting process is often done by young and inexperienced reporters because, as Dennis and LaMay noted, this is where ". . . news organizations often break in new hires. . . " (p. xiii).

Shoemaker and Reese wrote that "the media are not just channels. Information that passes through them is changed in a variety of ways before ultimately offering a

specific view of social reality to the audience" (p. 258). This notion is best explored by using two cases that were covered by Bay Area media. The press coverage An Vinh Nguyen and Jorge Hernandez received provides good case studies of some of the larger pretrial publicity issues already discussed.

Background of Study: Nguyen and Hernandez

In May 2002, within nine days of each other, two Bay Area women were sexually assaulted and beaten. These attacks received substantial press coverage in local newspapers, including the *San Jose Mercury News*, the *San Francisco Chronicle*, and the *Palo Alto Daily News*. The cases were especially newsworthy because the victims were elderly: a 69-year-old woman in San Jose was attacked on May 1 and a 94-year-old woman in Palo Alto was attacked on May 10. In the San Jose case, police arrested the victim's son, 31-year-old An Vinh Nguyen, two days after the attack, on May 3. In the Palo Alto case, police arrested 18-year-old Jorge Eduardo Hernandez, on July 18, approximately five weeks after the attack.

Both Nguyen and Hernandez were arrested and placed in custody while their cases were investigated. DNA samples were collected from both men, which were sent to the Santa Clara County lab for comparison with the crime scenes' physical evidence. Hernandez was released from custody on August 9, after DNA tests showed he was not the rapist. On August 22, charges against Nguyen were also dropped after DNA tests showed he was not responsible. Hernandez had been in custody for 23 days; Nguyen had been in custody for 113 days.

Summary

In his concurring opinion in *Irvin v. Dowd*, Justice Frankfurter noted the tension between the First and Sixth Amendments:

> This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade. (p. 730)

Indeed, the press coverage in the Nguyen and Hernandez cases demonstrates how the freedoms of the press—the First Amendment—and an individual's right to a fair trial—the Sixth Amendment—often cross in the criminal justice system. As the Supreme Court noted in numerous cases, pretrial publicity presents a threat to defendants' right to due process. The pervasiveness of the media and modern communication technology has resulted in an increase of crime and trial coverage. Participants in legal proceedings are often the sources of prejudicial information, be it through pseudo-events like press conferences that feature police spokespeople announcing an arrest or comments made about the guilt of a suspect. Journalists and the media become the conduits for competing sides of the law.

Had DNA testing not been performed, both An Vinh Nguyen and Jorge Hernandez would have likely been facing life imprisonment terms. Although the media coverage was not nearly as extensive as the press coverage discussed in *Sheppard v. Maxwell* (1966), it is important to study how these cases were covered in local Bay Area

media because, had there been trials, issues of prejudicial pretrial publicity would most likely have surfaced. . . . . .

Pretrial publicity is a relevant issue for a variety of disciplines: law, journalism, psychology, and criminology. A sampling of some relevant studies has been provided. Moran and Cutler's research about pretrial publicity demonstrated that people are likely to change their views toward defendants after being exposed to information about a case. Kramer et al.'s mock trial showed the biasing effects of pretrial publicity. Prejudicial messages appear in print and broadcast media alike as Imrich et al. and Dixon and Linz noted. Pretrial publicity has the potential to shock, to disrupt lives, and lead to miscarriages of justice.

Although crime coverage fulfills an important role in journalism and society, it needs to be approached with special care. Most journalists who cover the crime and courts beat are typically not legal experts, yet they have to sift through complex legal information to write their stories. The official sources they use to inform their stories are often biased, but highly quotable. As Walton noted, the media operates at a much faster speed than the legal system. Delivering news to the public often puts the press and the law in conflict. The Nguyen and Hernandez cases illustrate why the decisions journalists and editors make, such as which sources are quoted and how headlines are phrased, should be studied.

Research Questions

What is lacking in the existing research on pretrial publicity is the journalism perspective. Surveys and mock trial experiments of jurors are limited because of low response rates and the fact that even controlled simulations lack authenticity. What needs to be studied is how journalists present crime news to their readers; it is through news articles that readers, many of whom are potential jurors, may be exposed to prejudicial information about a suspect in a criminal case. Journalists have significant responsibilities to their readers to report newsworthy information.

The following research questions were answered by this study:

1. Did the news articles written about the Nguyen and Hernandez cases contain information that is prejudicial under the ABA's Model Rules of Professional Conduct and the Joint Declaration Regarding News Coverage of Criminal Proceedings in California?
2. Why do journalists make the decisions they do while covering crime stories?
3. How aware are journalists who cover the crime beat for their newspaper of the Press-Bar guidelines? If they are aware of them, do they adhere to these guidelines in their reporting?
4. What training, if any, do newspaper reporters and editors have to cover the crime and court beats?

CHAPTER 3

Method

A four-part method was used for this study. First, the effects of prejudicial pretrial publicity were examined using a legal analysis of relevant Supreme Court cases. Second, a primary source analysis of court documents, such as police reports and motions from the An Vinh Nguyen and Jorge Hernandez cases, was conducted. Third, a quantitative and qualitative content analysis will be performed using the articles about the cases that appeared in Bay Area newspapers. The articles were compared with the American Bar Association's Model Rules of Professional Conduct and the voluntary Joint Declaration Regarding News Coverage of Criminal Proceedings in California to determine whether and how the coverage violated these principles.

Fourth, 12 in-depth personal interviews were conducted with newspaper journalists, attorneys, and law professors. Several of the journalists interviewed for this research were familiar with the two cases because they wrote about the Nguyen or Hernandez cases. They contributed specialized knowledge based on their recollections of the issues they faced while reporting and writing stories. In addition to the four reporters who covered the cases, the current and former law and justice editor contributed information about the constraints of writing about the crime beat for a newspaper. The remaining interview subjects were attorneys who were involved with prosecuting the two cases or who had backgrounds in criminal law and/or First Amendment law.

Using different research methods creates an opportunity for triangulation, so that results obtained from one method may be verified by another method. For example,

conclusions reached from the quantitative content analysis of newspaper articles were confirmed through the interviews conducted with the reporters who wrote those articles. Verifying conclusions through triangulation ensured validity to the study's findings.

The legal nature of this research merits an examination of precedent-setting cases that raised issues of prejudicial pretrial publicity before the Supreme Court. This constituted the first element of the research method for this study. The cases selected were high-profile cases and were presented in the chronological order in which the Court made its decisions. Five cases were chosen for review because they address prejudicial pretrial publicity and the interplay of media coverage and fair trial issues:

- *Irvin v. Dowd,* 366 U.S. 717 (1961)
- *Rideau v. Louisiana,* 373 U.S. 723 (1963)
- *Estes v. Texas,* 381 U.S. 532 (1965)
- *Sheppard v. Maxwell,* 384 U.S. 333 (1966)
- *Nebraska Press Association v. Stuart,* 427 U.S. 539 (1976)

The second element of the research method was a primary source analysis of the police reports and court documents filed in the Nguyen and Hernandez cases. These documents contain information that was used in subsequent press coverage. An analysis of how the excerpts from these documents were cited in the newspaper articles showed how information from official sources such as police officers is made public.

A content analysis of the 776 paragraphs in the 44 news articles written about Nguyen and Hernandez was the third element of the research method. The five editorials, a letter to the editor, and a column that were written about these men were excluded from

the content analysis because they featured subjective information. They were analyzed as a separate category. Articles appeared in the following Bay Area newspapers: *San Jose Mercury News*, *San Francisco Chronicle*, *Palo Alto Daily News,* and *Palo Alto Weekly.* The articles begin with the news of sexual assaults on the elderly women and chronicle the arrests of Nguyen and Hernandez through their eventual release from custody. The unit of analysis was the paragraph. Descriptive statistics were used in the quantitative content analysis.

Between May 3, 2002 and July 30, 2003, the *Mercury News* published a total of 19 news articles about Nguyen and Hernandez in its pages or on www.bayarea.com, its Web site. The *Mercury News* has a daily circulation of 276,166 and a Sunday circulation of 309,520, according to its Web site. Its circulation area covers Silicon Valley, which includes Santa Clara County, Southern Alameda County, Southern San Mateo County, and Scotts Valley.

Six articles appeared in the San Francisco *Chronicle* and its Web site, www.sfgate.com, from May 3, 2002 to August 24, 2002. The *Chronicle's* daily circulation is 512,129, according to its Web site. Its circulation area includes San Francisco, and cities north and south of San Francisco Bay as well as Contra Costa County.

Journalists with the *Palo Alto Daily News* wrote 13 hard news articles about the Hernandez case from July 19, 2002 to August 10, 2003. The *Daily News'* circulation is 28,000 and it is distributed in Palo Alto, East Palo Alto, Los Altos, Los Altos Hills, Menlo Park, and Atherton, according to an advertising representative at the newspaper.

Four articles were written that featured information about the Hernandez case in the *Palo Alto Weekly* from August 7, 2002 to November 20, 2002. The *Palo Alto Weekly* is a bi-weekly publication, with a Wednesday circulation of 43,000 and a Friday circulation of 57,000. Its circulation area includes Palo Alto, East Palo Alto, Atherton, Menlo Park, Portola Valley, Woodside, Los Altos, and Los Altos Hills.

The Associated Press also carried two wire stories about the Hernandez case that were released as BC (between cycles) stories.

In addition to coding the 44 news articles by date of publication, and type of story, every paragraph was coded for factual information that was negative, neutral, or positive to Nguyen or Hernandez. Paragraphs were coded for this information using criteria created by Diana Stover, a media law professor at San Jose State University. Paragraphs were coded as negative if half or more of the information would tend to make a reasonable person think less of Nguyen or Hernandez. If a paragraph contained information about the victim that would tend to arouse feelings of sympathy for the victim, it was coded as negative. Paragraphs were coded as neutral if half or more of the information was impartial and would tend not to affect the attitude of a reasonable person toward Nguyen or Hernandez or create feelings of sympathy for the victim. Paragraphs were coded as positive if half or more of the information would tend to make a reasonable person think better of Nguyen and Hernandez. This included information that would tend to generate feelings of sympathy for Nguyen and Hernandez and/or negative feelings about the victim.

Additionally, the stories were coded using the following criteria established by the American Bar Association and voluntary California Press-Bar Guidelines that stipulate categories of factual information that are and are not prejudicial. Information that does not violate these guidelines includes:

1. Personal information about the defendant
2. The substance of the charge
3. The identity of the arresting agency
4. The circumstances of arrest
5. The defendant's plea to the charges
6. Any in-court testimony at pre-trial hearings.

Factual information that violates the guidelines includes the following categories:

1. Any admissions made by the defendant
2. Information about a prior criminal record
3. Opinions about the defendant's character
4. References to the performance or results on tests such as DNA, fingerprinting or polygraphs
5. Opinions about the defendant's guilt or innocence
6. Information about the identity, testimony, or statements about witness credibility
7. Opinions about the evidence or merits of the case
8. Information that an attorney knows or has reason to know would be inadmissible at trial.

Articles were also coded using information specified in the Joint Declaration Regarding News Coverage of Criminal Proceedings in California; the researcher assigned "yes" and "no" responses to the following categories:

1. Does the story as a whole support the California Declaration that "editors in deciding what news to publish should remember that an accused person is presumed innocent until proven guilty?"
2. Did the paper let an attorney use publicity to promote his or her version of a pending case?
3. Did the paper avoid deliberate editorialization, even when the crime seemed solved beyond a reasonable doubt?
4. Did the story or headline include a reference in which a person brought in for questioning was called a suspect?
5. Did the story refer to a crime solution or use similar phrasing when it is just a police accusation or theory?
6. Did the paper let prosecutors, police, or defense attorneys use it as a sounding board for public opinion or personal publicity?

A statistical analysis program, SPSS, was used to determine the frequency of specific categories of information that the press used in its coverage.

The fourth element of the research method was in-depth personal interviews with reporters who covered the cases, law and justice editors, and attorneys who were involved with prosecuting the cases, had been retained as counsel by Hernandez or had expertise in criminal law. Law enforcement personnel, such as the public information

officer who was quoted in the press coverage or detective who investigated one of the cases, were contacted and declined to be interviewed because of civil lawsuits filed against the police departments for which they work. Reporters often interview attorneys for crime stories because they are official sources of information, so their perspectives will enhance this research.

Interview Questions

The following list of questions was developed by the author and was intended to elicit opinions on pretrial publicity in general and concerning the Nguyen and Hernandez cases specifically. The questions were in part formed using the cases in the literature review as background as well as by the information presented in the press coverage of the Nguyen and Hernandez cases received. Different clusters of questions were posed to the journalists and the legal and law enforcement professionals. The questions were intended to be open-ended enough so that the interviewed subjects would feel free to expand on the topic and perhaps delve into areas that were not necessarily covered by the questions initially.

Questions for journalists include the following:

1. How long have you covered the crime or courts beat?
2. How much media law education have you received, either as a student or a professional journalist through on-the-job training?
3. Does your news organization adhere to the California Press-Bar Guidelines with respect to crime coverage?

4. How do you view the official sources you use for information? In other words, if you're interviewing a police officer who believes he or she just arrested the prime suspect, do you consider that bias in your reporting?
5. How do you view the First Amendment in relationship to the Sixth Amendment as it affects your profession?
6. When initially covering a criminal case, do the statements given to you by law enforcement, prosecutors, and other sources raise mental caution flags because they are of a prejudicial nature?
7. Do you conceive of readers as potential jurors?
8. If you covered the Nguyen or Hernandez cases, did you view the information you were using in some of your stories as prejudicial? Why or why not?
9. How did you feel after you learned that Nguyen and Hernandez had been exonerated in the sexual assault cases?
10. Do you consider how the information you report will affect the people named in your stories, particularly if the information seems to portray someone in a negative light? Do you ever regret what you write?

Questions for attorneys include:

1. How would you characterize the relationship between the First Amendment and the Sixth Amendment as it affects your profession?
2. How familiar are you with the American Bar Association's Model Rules of Professional Conduct that address what attorneys should and should not comment about regarding their clients?

3. Do you think one of the dangers of pretrial publicity is that it may cause some people to think a person is guilty before he or she goes to court?
4. How do you work with journalists who cover the crime beat for their papers?
5. Do you use the media to argue your cases or do you try to avoid commenting in depth? Why or why not?
6. Have you ever felt compelled to defend your client in the press because of negative publicity? (for defense attorneys only)
7. How much information or familiarity with a case do you like potential jurors to have?
8. Are jurors who follow current events in their communities more desirable in your opinion?
9. How many cases have you tried in which pretrial publicity played a factor?
10. How effective are the remedies judges may use to minimize the effects of pretrial publicity?
11. In your career, how often have you filed motions requesting that some of these remedies be used?

Here is a list of interview subjects and their affiliations:

- Dennis Akizuki, editor, *San Jose Mercury News*
- Richard Cole, reporter, *Palo Alto Daily News*
- Randolph Daar, attorney for Jorge Hernandez
- Ray Delgado, former reporter, *San Francisco Chronicle*
- Terry Francke, attorney, California First Amendment Coalition

- Mike Frankel, bureau chief, *San Jose Mercury News*
- Linda Goldston, reporter, *San Jose Mercury News*
- Scott Herhold, reporter, *San Jose Mercury News*
- Kathleen Ridolfi, J.D., director of the Northern California chapter of the Innocence Project, Santa Clara University
- Karyn Sinunu, attorney, Santa Clara County District Attorney's Office
- Sean Webby, reporter, *San Jose Mercury News*
- Brian Welch, attorney, Santa Clara County District Attorney's Office

CHAPTER 4

Results

There were violations of the American Bar Association's Model Rules of Professional Conduct and the Joint Declaration Regarding News Coverage of Criminal Proceedings in California in the press coverage An Vinh Nguyen and Jorge Hernandez received. Violations included opinions about Nguyen and Hernandez's guilt or innocence and the nature of the evidence in both cases to admissions made by Hernandez during his police interrogation, which were interpreted as a confession. The California Press-Bar Guidelines cautioned editors to exercise care in regard to publication or broadcast of an alleged confession because an accused person may repudiate and thereby invalidate a confession (1974). This is exactly what happened in the Hernandez case. References were also made to Nguyen having a prior criminal record. Law enforcement personnel and attorneys were found to be the sources for opinions about guilt or innocence and evidence. Of the 776 paragraphs written about Nguyen and Hernandez, 32% were negative in tone.

This chapter includes background information about the Nguyen and Hernandez cases, the results of the content analysis, and interview data from journalists who covered these two cases or are familiar with issues of crime beat reporting. Attorneys who were involved with prosecuting the cases or have expertise in criminal and First Amendment law were also interviewed.

Background: The An Vinh Nguyen Case

On the morning of May 1, 2002, a Vietnamese woman, known to friends as "Little Vo," was found lying partially clothed in a dumpster, badly beaten and near death. As reported in the first article that appeared in the San Jose *Mercury News*, "Little Vo frequently would make her way through the various apartment complexes in her neighborhood looking for cans to recycle" ("Woman Fights for Life," 2002). The *Mercury News* later reported that Little Vo used the money from the cans she collected to ". . . help pay her own bills, but her next-door neighbors said this past week that she collected cans so she could send money to orphans in Vietnam" ("Display of Concern for Victim of Attack," 2002).

Police attention soon turned to her son, An Vinh Nguyen. As was noted in the media, Nguyen gave contradictory statements to investigators ("Woman Fights for Life," 2002). In the days immediately following Little Vo's attack, three articles appeared in the *Mercury News* and the *San Francisco Chronicle*. The following headline appeared in the *Chronicle's* first story: "Man held in brutal beating of mother; Nearly dead woman found in Dumpster" (2002). In a 388-word article, readers learn that a brutal crime was committed, that a son may have nearly beaten his mother to death, raped her, and tried to hide evidence of his actions. The lead for this story set a tone: "The crime was so brutal that even San Jose police called it unbelievable" ("Man held," 2002). Nguyen is identified in the third paragraph of the article as ". . . the primary suspect and was arrested on suspicion of attempted murder" ("Man held," 2002).

The *Chronicle's* first story about the assault featured this quote: "To just dump her body in a Dumpster is unbelievable," said SJPD Sgt. Steve Dixon ("Man held," 2002). It's noted further down in this article that: "Police became suspicious of Nguyen when he gave conflicting statements about where he had been" ("Man held," 2002). It was reported that officers searched the apartment and found areas that had been recently cleaned and undisclosed evidence that linked Nguyen to the crime. "Some areas of the apartment appeared to have been cleaned, maybe to destroy evidence," Dixon said ("Man held," 2002). In its first account, the *Mercury News* also published information about Nguyen's prior criminal record, which included ". . . convictions for drug-related offenses, petty theft and driving violations, including misdemeanor hit-and-run and reckless driving. He also has at least three convictions since 1995 for using a controlled substance ("Woman fights," 2002).

The next development in the Nguyen case did not occur until late August: the results of the DNA tests of evidence in the case were published. "DNA frees suspect in rape, beating/San Jose man spent 3 months in jail over attack on his mother" read a *San Francisco Chronicle* headline (2002). In total, Nguyen spent 113 days in custody for a crime he did not commit.

DNA testing would also eventually play a key role in a second sexual assault case in Palo Alto that occurred nine days after Little Vo was attacked. Unlike the Nguyen case, authorities did not arrest a suspect until two months after the attack; however, because of a purported 'confession,' Jorge Hernandez received substantial press coverage.

Background: The Jorge Hernandez Case

On May 10, at 3:51 a.m., Palo Alto Police arrived at the Palo Alto Commons, an assisted living facility for senior citizens. A 94-year-old woman had just been raped and beaten. According to published accounts and the Palo Alto Police Department's reports, the victim struggled so violently with her attacker that she removed several items of his jewelry: a watch, ring, and a necklace with a pendant.

Unlike the case involving Little Vo, the Palo Alto victim was conscious after the attack and met with investigators right away. She gave a description of her attacker, which was published: a Latino male, possibly with an accent, with short, dark hair in his late teens or early 20s ("Rape of 94-year-old woman," 2002). As in the Nguyen case, the victim's age was mentioned in the press coverage the attack received.

The attacker's jewelry, particularly his ring, gave police their biggest lead in this case. The distinctive ring had a quetzal, the national bird of Guatemala, on its front, and the name "Edwin" inscribed inside. Police used this piece of evidence along with other elements to aid their investigation. Detective work identified an Edwin Hernandez who lived near the crime scene. Authorities soon turned their attention to his younger brother, Jorge.

PAPD detectives first questioned Jorge Hernandez at the Macy's Men's Store where he worked. The *Palo Alto Daily News* reported: "Under questioning at the store and later in the Palo Alto Police Department by Det. Jim Coffman and others, however, Hernandez began acknowledging details of the rape," ("Rape suspect: I'm sorry," 2002). During his interrogation, Hernandez apologized to the victim. Reports of Hernandez's

apology made headlines. Although Hernandez apologized to the victim, he never confessed to the crime outright.

Hernandez qualified many of his statements, which was reported in the newspapers. Hernandez's statements were described as being ". . . filled with conditional statements, caveats and memory gaps that Hernandez's lawyer may seize upon to show the admissions were less than a confession" ("Records detail man's apology," 2002). In another article, Hernandez's attorneys challenged the way in which Hernandez was questioned. "Hernandez's defense lawyers say the interview lasted four hours and was confusing for the young man who is not a native English speaker," noted an Associated Press wire story, ("Palo Alto man pleads innocent," 2002). "Teen Admits Rape, Or Did He?" asked a headline in the *Mercury News.* The beginning of the article mentions how often Hernandez used the words "probably," "maybe," and "if" in his statements to police ("Teen admits rape," 2002). Like Nguyen, Hernandez was exonerated after DNA testing proved that he was not the rapist.

Content Analysis Findings

A total of 44 news articles were written about the Hernandez and Nguyen cases, Hernandez was the subject of the most coverage with 31 of the 44 articles, or 71%, being written about his case between May 9, 2002 and July 30, 2003. Nguyen was the subject of eight of 44 articles, or 18%. (In the text and tables in the Results section, percentages have been rounded off to the nearest whole number; because of this, percentages may not always equal 100%.) Both men were written about in combination in five of 44 articles for the remaining 11%. The facts of the Hernandez case, especially his admissions, are

likely reasons why his story received more coverage. The *San Jose Mercury News* and its Web site, www.bayarea.com, featured 19 of the 44 stories, or 44% of the coverage, about Nguyen and Hernandez. The *Palo Alto Daily News* ran 13 of the 44 articles, or 30% about the Hernandez case. The *Palo Alto Weekly* featured four articles about Hernandez or 9%. The *San Francisco Chronicle* and www.sfgate.com, its Web site, ran six of 44 stories for 14% of the coverage about both cases and the Associated Press wrote two of 44 stories, or 5% about Nguyen and Hernandez.

All of the stories analyzed for this research were hard news stories. The coverage was prominently displayed: 16 stories or 36% ran on page 1A in the *Mercury News, Chronicle,* and the *Palo Alto Daily News.* Seven stories or 16% also appeared in the "A" section and nine stories or 21% appeared on the front page of the local news or "B" section. Three stories or 7% ran inside the "B" section. It was not possible to determine where the remaining 9 stories or 21% were featured because those articles were retrieved from online databases or newspaper archives.

An analysis of the reporting in the Nguyen and Hernandez cases determined that there were two violations of the Joint Declaration Regarding News Coverage of Criminal Proceedings in California (1974). These voluntary guidelines were established during a time in which the media's access to criminal trials was under scrutiny because of concerns about fair trial issues.

The guidelines' Statement of Policy specifies types of information that newsmen should and should not incorporate in their reporting about criminal proceedings. The declaration stated that, although records of convictions and prior criminal charges are

matters of public record, ". . . the public disclosure of this information by the news media could be prejudicial without any significant contribution toward meeting the public need to be informed. The publication or broadcast of such information should be carefully considered." Nguyen's prior arrest record was mentioned in two of the eight stories that were written about him.

Additionally, the Joint Declaration Regarding News Coverage of Criminal Proceedings in California cautions editors to ". . . exercise care in regard to publication or broadcast of purported confessions. An accused person may repudiate and thereby invalidate a confession, claiming undue pressure, lack of counsel, or some other interference with his rights," (1974). This happened in the Hernandez case; he has retained counsel and has filed a suit against the city of Palo Alto, contending that his constitutional rights were violated. The press coverage of the Nguyen and Hernandez cases included information about prior criminal records and purported confessions. Of the 44 stories written, 19 articles or 43% contained references to statements made by either Nguyen or Hernandez. Of the stories that made references to admissions, law enforcement sources accounted for 32% of that information. The number of articles that did not mention anything about admissions was 25 or 57%.

The majority of the admissions concerned the Hernandez case because of the circumstances of the case: he made statements to investigating officers, including an apology to the victim while being interrogated, that became part of the public record. It should be noted that according to information published in the first story about the crime in the *Chronicle*, Nguyen was arrested because he made "conflicting statements" to

officers about his whereabouts ("Man held," 2002). This information was attributed to Sgt. Steve Dixon, a public information officer for the San Jose Police Department.

As Table 1 indicates, 776 paragraphs were written about Nguyen and Hernandez. One-third of them, 255 paragraphs, were negative toward one or both defendants. Examples of information that was negative to defendants are factual information about the crime or defendant that reflects poorly toward them or that could create feelings of sympathy for the rape victims. Reporters who wrote about these cases included perspectives from both the defendant and victim's sides to create a context for readers. Content was also coded as being neutral or positive: 277 paragraphs or 36% were deemed neutral and 244 or 32% were counted as positive to the defendants.

Table 1

Frequencies of Negative, Neutral, and Positive Paragraphs in Coverage

Coverage tone	Frequency	Percent of total cases	Mean number of paragraphs
Negative paragraphs	255	33	6
Neutral paragraphs	277	36	6
Positive paragraphs	244	32	5
Total paragraph count	776	100	18

Stories were also coded using information specified in the American Bar Association's Model Rules of Professional Conduct. These rules indicate what types of information an attorney can and cannot discuss in press coverage while being associated with a criminal proceeding. Because it was likely that the Nguyen and Hernandez cases would have been plea-bargained or have gone to trial if it weren't for the results of DNA testing, it's helpful to examine the press coverage against these rules. Although these rules apply to attorneys, several categories of statements that are named in them as those that should be avoided were included in the coverage, including the existence of a confession, opinions about a suspect's guilt or innocence, and opinions about evidence.

Table 2 indicates that the statements Hernandez made during his interrogation with authorities in Palo Alto were featured in 19 of 44 stories, or 43%. One of those stories stated that Hernandez's admissions comprised ". . . much of the strongest evidence against him," ("Teen admits rape," 2002). It's likely that journalists used the admissions in stories because it was part of the public record. Slightly more than half of the stories, 26 of 44 articles or 59%, included opinions about the suspects' guilt or innocence. Sources of these opinions included defense attorneys in nine stories or 20%; prosecutors in five stories or 11%; law enforcement in 14 stories or 32%; and friends or relatives of the suspects who could have been called as prospective witnesses in two stories or 5%. The opinions of law enforcement personnel were all negative toward the suspects.

Even after their exonerations, police sources in San Jose and Palo Alto were quoted as saying Nguyen and Hernandez still could be connected with the crimes. Those types of police statements in the Hernandez case were described as angering Randolph

Daar, the civil attorney who Hernandez retained to file a claim against the city of Palo Alto for violating his constitutional rights and using coercive techniques during his interrogation ("Cleared man accuses." 2003). Daar said initially, Palo Alto police thought only one person was involved in the assault, but the authorities' theory was contradicted by statements made by police sources in the press following Hernandez's exoneration.

Table 2

Frequencies of Prejudicial Information According to ABA Categories

ABA category	Frequency	Percent of total cases
Admissions	19	43
Prior record	1	2
Prior reputation	12	27
Tests	31	71
Opinions of guilt/innocence	26	59
Credibility of witnesses	5	11
Opinions of evidence	26	59
Opinions of attorneys	12	27

There were also violations of several categories of the Joint Declaration Regarding News Coverage of Criminal Proceedings in California, as Table 3 indicates.

Table 3

Frequencies of Violations of the Joint Declaration Regarding News Coverage of Criminal Proceedings in California

Joint declaration category	Frequency	Percent of total cases
Presumed innocent	7	16
Prosecution version	6	14
Police version	15	35
Defense version	13	30
Paper avoid editorializations	4	9
Called a suspect	40	91
Crime solution given	1	2
Sounding board: DA	9	21
Sounding board: defense	14	32
Sounding board: police	13	30

Violations in the presumed innocent category were determined based on comparing the content of each news story to this criterion from the voluntary guidelines: "Editors in deciding what news to publish should remember that an accused person is presumed innocent until proven guilty" (1974). The selection of sources quoted, particularly those from local police departments, made the defendants appear to be guilty.

These seven stories largely relied on police-supplied information for their content. It's significant that 15 of 44 stories or 35% gave the police's version of the crimes, which indicates that reporters relied on law enforcement to write their stories. How stories were written also made some news articles seem more like editorials; this happened four times.

A Santa Clara County civil grand jury (2003) reported on the police department arrest and information release procedures in the Nguyen and Hernandez cases. A third case, which was not studied here, involved claims of sexual abuse against a Palo Alto daycare worker and was also included in the grand jury's investigation. It is noted in the report that all three cases ". . . involved highly publicized sexual offense crimes" and all the charges were dropped against those arrested once DNA results were available. The press coverage the cases received was cited by the grand jury: "During the period between arrest and release, the arrestees' name, physical description (often with photo), and biographical data were well advertised in the media. The complainant believed this intense media coverage harmed the reputation of the individuals charged" ("Review of Police Department Arrest," p. 1).

To produce the report, members of the civil grand jury interviewed members of the San Jose and Palo Alto police departments, and also spoke with representatives from the Mountain View police department as a neutral comparison. According to the report, the grand jury found all three police departments were in compliance with California state law regulating disclosure of information to the media.

The grand jury noted:

> . . . there's a lengthy list of information that may not be publicly disseminated, in order to protect the accused's right to a fair trial. This includes all prejudicial

> statements, comments about prior criminal history, observations about character or reputation, as well as opinions about guilt or innocence. ("Review of Police Department Arrest," p. 2, 2003)

However, the findings of this content analysis contradict the grand jury's findings. What is compelling is that this study shows that law enforcement personnel were the source for information about the defendants' guilt or innocence 32% of the time. They were quoted in 14 of the 44 stories. More than half of the coverage, 59% or 26 of 44 stories, contained opinions about the evidence.

Opinions about the evidence were occasionally expressed using anticipated results from DNA testing. Test performance or the refusal of a defendant to submit to testing is another ABA category about which lawyers should refrain from making comments. In one *Palo Alto Daily News* article, Eduardo Guilarte, a defense investigator, said, "DNA evidence left at the scene will not match Hernandez," ("Judge says teen," 2002). Guilarte was also quoted in an Associated Press story as predicting that the arrest would be "very embarrassing" for the Palo Alto police when Hernandez's DNA results came back from the lab, ("Palo Alto man pleads," 2002).

Hernandez's attorney, Maria Fonseca, also told the *Daily News* that DNA evidence obtained from the jewelry that the rapist was wearing during the attack would not match Hernandez or the rape victim, thus indicating an unknown person was involved with the attack ("Doubts cloud," 2002). Once obtained, the results of the DNA testing led to the exoneration of Nguyen and Hernandez. The fact that DNA tests were involved in their cases was reported in the press in 31 of 44 articles, or 71% of the coverage. Of those 31 stories, 28 were published after the DNA results were made public. These

articles included follow-up news stories questioning what authorities in both cases did wrong in their investigations. The district attorney's office was the source for 48% of the information about DNA testing.

The *San Jose Mercury News*, *Palo Alto Daily News*, and *Palo Alto Weekly* wrote five editorials about the cases after the suspects were exonerated, and the *Daily News* also published a letter to the editor and a column about the Hernandez case. These seven articles were not included in the content analysis of news stories, but were analyzed separately. The tone of content in the five editorials was different than the 44 news stories—the editorials condemned how authorities chose to investigate and prosecute Nguyen and Hernandez. Of the 54 paragraphs in the five editorials, 10 paragraphs or 19% had negative content; 16 paragraphs or 30% were neutral; and 28 paragraphs or 52% were positive in tone. The 10 paragraphs in the editorials that were coded as negative in tone featured recap information, in this instances it was details about the evidence that led authorities to arrest Nguyen and Hernandez. Recap content is used in journalism to summarize developments so that readers who have not been following a particular story can quickly learn background information.

The letter to the editor questioned the *Daily News'* coverage of the Hernandez case. It was written by Lars Smith, a friend of Hernandez's, who believed the newspaper showed "extreme unprofessionalism in how it portrayed Jorge Hernandez . . . . you clearly showed a bias. You thought he was guilty before you knew the full story" ("Hernandez case," 2002). Smith wrote he believed the paper ruined Hernandez's image and that its editors owed Hernandez, his family, and friends a ". . . prompt and heart-felt

apology." Nguyen and Hernandez were mainly referred to as suspects in the press coverage, even after they had been cleared of charges, headlines or sub-headlines referred to them as "cleared suspects."

As Table 4 indicates, the majority of the articles written about Nguyen and Hernandez, 27 or 61%, appeared after they were exonerated because DNA evidence failed to connect either of them to the rapes. However, these 27 stories contained negative content because they included background or recap information about the initial crimes that was negative toward Nguyen and Hernandez.

Table 4

Frequencies of Time Periods of Coverage

Time period	Frequency	Percent of total cases
Pre-arrest	2	5
Arrest to arraignment	6	14
Arraignment	7	16
Arraignment to preliminary hearing	2	5
Exoneration and beyond	27	61

Neither of the four reporters nor the two editors interviewed for this research had ever heard of the voluntary California Press-Bar Guidelines or knew if their news organizations adhered to them. Terry Francke (2004), general counsel for the California First Amendment Coalition, said in an interview that he thinks most reporters haven't heard about the guidelines: "They are not widely and energetically promulgated."

He noted that these voluntary guidelines were formed to show the courts the press was making an effort to express:

> . . . on the record, a kind of principled awareness of the Sixth Amendment and what it implies, that you know, perhaps the courts would take it upon themselves, either institutionally in terms of rules or court or in particular cases to make press access much more difficult. And so it's a way of at least going on the record and saying 'We acknowledge that there is a right to a fair trial. We will try as much

> as possible to respect that,' but as I say, most journalists don't know about it. (Francke, 2004)

What's stipulated in the guidelines may conflict with what reporters are told to do their jobs (Francke, 2004). Francke said that, when reporters are told to go out and get a story better than their competitors on deadline, ". . . even if they're aware of guidelines, they're also aware of what they're being told to do in the immediate case." Francke said this is indicative of a tension between the ". . . diverse objectives and imperatives of the court, of the court system and the press." The courts aren't in the business of informing people; their business is to do justice:

> . . . If they fail to do justice in every case, then that's a fundamental constitutional failure of the greatest consequence. On the other hand, you know, reporters are not in the business of doing justice . . . they believe that if they do their jobs right, justice will be done, but it's not their job to be just, so to speak, in everything they write. Their job is to get as much information out there as possible, (to) certainly make sure that it's accurate and relevant and fair in a general sense. . . . For example, I don't think any journalist would consider it fair to report only the prosecution's allegations or the police's allegations if, that is, it's possible to get information from the other side. (Francke, 2004)

Sometimes, however, that is exactly what happens in crime reporting. There are constraints on crime reporting that make it difficult to get a balanced account of information, particularly since it usually takes a while for an arrested suspect to get a lawyer, noted Richard Cole, a journalist with the *Palo Alto Daily News*, during an interview. Cole covered the Hernandez case for his paper. "Even if you have a lawyer, they don't know the facts of the case. They haven't seen the police reports, they haven't seen anything. There's not much they can say." As far as talking to defendants after they've been arrested, Cole (2004) said no defendant ". . . in their right mind should be talking to the press."

Francke (2004) explained that, even if a defendant has retained counsel, the attorney is going to be cautious about media access to his or her client:

> Because that's something the lawyer can't control. From the lawyer's perspective, defending a client is all about controlling, particularly controlling information. There are practical reasons why it's harder to get the defendant's side early in the story unless it's one of these rare cases where 'well it's not me because I was in Cleveland and I can prove it, end of story.' But it's usually more, more complicated than that.

The first article about the Nguyen case that appeared in the *San Jose Mercury News* stated Nguyen had been convicted several times of drug-related offenses, petty theft, and driving violations, including misdemeanor hit-and-run and reckless driving ("Woman fights," 2002). The story also includes information that Nguyen had at least three convictions since 1995 for using a controlled substance.

Linda Goldston and Rodney Foo wrote that first story. Goldston, who has worked as a journalist with the *Mercury News* for 30 years, said during an interview that she doesn't always think publishing information about a suspect's prior record is relevant, but agreed that, if that information appeared in initial reports, it's likely to appear in follow-up stories (L. Goldston personal communication, March 3, 2004).

Goldston (L. Goldston, personal communication, March 3, 2004) said she wasn't a big fan of just running a record to show that ". . . we know how to check the court file":

> Some editors believe and some reporters believe that any kind of criminal record is fair game because it's public record. Ethically and legally, you're perfectly within your rights to publish any kind of criminal record. (I) just don't think it passes the test on this particular case.

She thought including information about Nguyen's criminal record might have been more relevant if he had prior convictions for assault, sexual assault, or stalking.

Seven journalists were asked how they work with official sources, such as public information officers at police departments or district attorney spokespeople. Cole (2004) said he's skeptical of these official sources:

> There's no question that police like to make things look as drastic as possible and so does the DA. . . . This is an adversarial criminal justice system and they're one side of it and they have their agendas. And there's also political agendas, being tough on crime, this sort of general, general stuff. So I certainly use them a lot, I work with them a lot, but I also am skeptical of them.

In an interview, Mike Frankel, a former law and justice editor with the *Mercury News* and its current Palo Alto bureau chief, explained that reporters do their own investigations when they learn about a crime from the police to draw their own conclusions and to ensure that police and prosecutors aren't going beyond their rights during an investigation and infringing upon people's constitutional liberties. Frankel (2004) said the press, prosecution, and media can at times have an adversarial relationship:

> And clearly our goal is to be fair in every way possible to get their side of the story, and that sometimes angers the authorities—the prosecution, the police—who often try to keep us from talking to these people because they have, you know, their sides of the story and we're really vigilant about making sure that's reported.

Goldston (L. Goldston, personal communication, March 3, 2004) noted that public information officers may not always have all the information about a case from investigating officers, particularly if the investigation is ongoing: "I approach all officials with great skepticism. (The) role of a police/public information officer is to tell you as little as possible."

In the Nguyen coverage in the *Mercury News* and *Chronicle*, information that was provided by Sgt. Steve Dixon, the San Jose Police Department's public information officer, was quoted. Goldston used statements from Dixon in several articles she wrote about the Nguyen case, including: "I've seen some pretty bad cases of elder abuse. I can't remember one where they put a mother in a dumpster like a piece of trash" ("Woman fights," 2002).

Goldston (L. Goldston, personal communication, March 3, 2004) said given the nature of the crime, she thought it was perfectly acceptable to use this quote in her story:

> The public has the perspective that reporters want to get comments to sell newspapers . . . when you have a case like that, it was a horrific case, (she was) raped and tossed into a dumpster like a piece of trash. (It's) perfectly suitable to run that quote by Dixon . . . I pride myself on fairness. I in no way feel that that particularly quote was inflammatory.

Another reporter, Ray Delgado, covered the Nguyen case for the *San Francisco Chronicle*. His lead paragraph included a paraphrased statement that incorporated a quote from Dixon: "The crime was so brutal that even San Jose police called it unbelievable" ("Man held," 2002). This story also featured quotes from Dixon about how areas of the apartment where Nguyen was arrested appeared to recently have been cleaned, ". . . maybe to destroy evidence."

In an interview, Delgado (2004) said he interviewed Dixon over the phone and wasn't able to speak with Nguyen or anyone associated with him for the initial story. When asked if he believed Dixon's quotes were inflammatory toward Nguyen, Delgado said "no," adding:

> I believe that they are police characterizations of a specific incident and it's the police that are making those characterizations. And they're the ones that are

> quoted making them. So, in some ways, the police are telling us 'this is a sensationalistic story.' And in other ways, the newspaper decides to treat it as such and just because the facts . . . in the case as presented by police.

Delgado (2004) said he doesn't conceive of readers being potential jurors and also thinks it is up to readers to make any connections between what sources tell the press about a suspect and beliefs they form about a suspect's guilt: "The reader, I think, also has a responsibility in knowing that, you know, this is a suspect in a case and hasn't been convicted." However, he said he thinks it's common that most people tend to associate guilt with a suspect when information about the crime and arrest appears in print.

Although Delgado (2004) said he was comfortable with the stories that he wrote about the Nguyen case, in hindsight, he said he wished he could have had done his reporting differently:

> I wish there were a better system of checks and balances in favor of his (Nguyen's) rights that could be, that I could have used against what the police were saying at the time. Because the police reported this as . . . a really horrific crime and seem to tie him to the crime in many different ways without being explicit in what those ways were. That certainly crossed a threshold for journalistic responsibility for writing about the story, in my mind.

He wrote one story about Nguyen's exoneration and said had he been a reporter in the *Chronicle's* San Jose bureau, he might have written more stories about what the San Jose Police did wrong in this case. At that time, Delgado (2004) was one of the paper's afternoon general assignment reporters based in San Francisco: "It was one of those good stories that you just had to let pass."

Because Nguyen has filed a lawsuit against the city of San Jose, Dixon declined to comment about the types of statements he made to reporters that were used in the Nguyen coverage. He also declined to comment about how he works with the media as a

public information officer (S. Dixon, personal communication, February 25, 2004). Similarly, Det. Natasha Powers with the Palo Alto Police Department declined to comment about press coverage in the Hernandez case because of a civil lawsuit (N. Powers, personal communication, March 25, 2004).

Another *Mercury News* reporter, Sean Webby, who covered the crime beat for its Palo Alto bureau, wrote seven articles about the Hernandez case, and said in an interview some public information officers are far removed from the cases about which they're commenting or may be administrators, not police officers or investigators. He also said it can be difficult to verify what an official source has told a reporter:

> When police officers tell you about a situation, and have a fact pattern that they'd like to present to public through you, . . . I believe it's your duty to do your due diligence and check the information out, but to a certain extent, you've got to report what they're telling you. (Webby, 2004)

Webby (2004) said the Hernandez case was a "classic example" of the limited things journalists can do to check out information. He also said he makes it a point to talk to as many people as he can during his reporting, tries to evaluate what people might be trying to achieve by giving him information, and if their emotions are ruling what he's being told.

Frankel's successor as law and justice editor, Dennis Akizuki, said in an interview that what the police say carries weight with the public and reporters have to follow their gut instincts if they don't feel the facts the police are presenting are meshing:

> If the cops say something, and somebody's a suspect, people, most people, are going to believe it. I think you do have to have some skepticism . . . . It's very serious when you publish someone's name in connection with a crime, you know, you can't take that back. (2004)

Attribution is also critical, particularly when deadline constraints don't allow a reporter to verify information (Akizuki, 2004):

> I think that's important in . . . especially in initial crime stories, is you need to kind of attribute where the information is coming from. That's very, very important. You can't make it sound like 'this is the way it happened, definitely.' You're trying to say 'this is what police are saying happened.' . . . It's not necessarily what happened—it's what's their version of it, based on their investigation.

Bureau chief Frankel (2004) noted that it's important for reporters to know who among their official sources has reliable information:

> . . . a lot of times, we take with a grain of salt some of the stuff that some of these public information officers say because they're really, especially on TV, they're just speaking for the camera. . . . And the detectives, a lot of times, don't give them that kind of information because, you know, they may be saying it one way, and it comes out of the PIO's mouth another way.

Of the 31 articles written about the Hernandez case, 19 or 43% referenced the admissions he made during his interrogation with the Palo Alto Police Department. Law enforcement was the source of 14 or 32% of these admissions. Excerpts of those statements were made available to reporters and are included in court documents. Although Cole later had an opportunity to review the entire affidavit, when he wrote a story, "Rape suspect: I'm sorry," he used the excerpted affidavit as a source in his reporting. He said the excerpted affidavit is indicative of an adversarial legal system:

> . . . . That's what prosecutors and police do. They take the parts that serve their interests, which is putting somebody behind bars, and they present their best case and the defense is supposed to present its best case and the judge or the jury decides. (Cole, 2004)

Frankel (2004) said, in his view, reporters in California have a harder time getting access to information from legal and law enforcement sources than in a state like Florida

where journalists could attend depositions: "They can only give us limited information and they can extract a lot of the stuff that we would hope to be able to report."

Cole said after his story based on the police's affidavit with excerpts of Hernandez's statements was published, Hernandez was angry with him: ". . . in the Hernandez case, I had a problem because we had done the first story off the affidavit and he never forgave us for that." When asked why he thought Hernandez was upset with him, Cole said he was likely responding to:

> The fact that it sounds like he was guilty because it was the police who write the affidavit, the fact that it was a front page, headline story about him allegedly raping a 94-year-old woman. . . . Sometimes people get upset about the headlines, which, of course, I don't write. (2004)

Cole (2004) said, "although sometimes my stomach flip-flops a little bit" when he reads the headlines that accompany his stories:

> . . . We are a free tabloid that has to be picked up. I mean, people have to see something that makes them pick it up . . . . Sometimes I look at them and say, 'ouch.' It's stronger than I wrote the story, but then the story's there.

He said he writes balanced stories and is careful to always attribute information. Cole said he had contact with Hernandez's defense attorney and investigator during his reporting on the case.

> In their case, what they did is they called me back and said, 'We don't think our guy really did it.' I mean, and at that point, I started writing stories saying, 'Now they're saying maybe now he didn't do it' and boom, he got cleared and that was great. We were the first people to write that perhaps he hadn't done it. Now, had we also written the original affidavit, you know, with all the stuff that police said? Absolutely, and we'd do it again. (Cole, 2004)

One of the principles in the voluntary guidelines about criminal proceedings is that editors, in deciding what news to publish, should remember: "readers, listeners, and

viewers are potential jurors or witnesses" (1974). When asked how she approaches her job, Goldston (L. Goldston, personal communication, March 3, 2004) said the notion of readers being potential jurors doesn't affect her reporting. She said she was careful about what she puts in her stories and she doesn't use anonymous sources.

When she goes out to cover a story and gather information, she described herself as being like a vacuum cleaner:

> When you're in the field, you gather as much as you can, because you may only have one chance to get it. People clam up before they're interviewed by cops, before an attorney gets to them. You get back in the office, take a look at your notes (and) you decide what is appropriate or ethical or legally acceptable to say (L. Goldston, personal communication, March 3, 2004).

Goldston (L. Goldston, personal communication, March 3, 2004) noted that in addition to the editing a reporter does, newspaper editors also work to make sure "stupid stuff" doesn't get in the paper. She explained that "crime stories are like a puzzle, you move pieces around and see what fits. Intellectually, they're interesting." Goldston recalled sensing that she knew something was wrong with the Nguyen case when she showed up at Little Vo's apartment building to do her interviews:

> The neighbors were extremely reluctant to talk; (it) just didn't feel right. He'd been living there. It just didn't feel like he had been the one who had done that. If you had raped your mother, you're not going to throw her in a dumpster very near your home. I had skepticism from the very beginning. (L. Goldston, personal communication, March 3, 2004)

Goldston (L. Goldston, personal communication, March 3, 2004) said when she learned that Nguyen was exonerated of the charges, she felt that her instincts had been validated:

> It takes 48 hours to do the simple DNA testing that was used to determine it wasn't him. It was in one of my stories. They didn't send the panties for testing.

> Contrary to violating this guy's rights, forgive me, but it was because of my story that the truth came out. They blew it. The DA blew it—it was in the police report, but the DA blew it. Both the police and the DA dropped the ball.

Goldston (L. Goldston, personal communication, March 3, 2004) said she considers how people she writes about might be affected by her reporting:

> The standard I use is: 'Is it fair? A fair description? A fair assessment? A fair comment?' But I will not back away from my statement before. If I'm in the field, if it's there, I'll get it. (Journalists) absolutely do care about fairness. If you don't, you won't last long because people won't talk to you.

Webby (2004) said he doesn't give a suspect's Sixth Amendment rights consideration while he's doing his reporting:

> My philosophy about privacy rights and fair trial rights, and you know all of the rights that newspapers stories sometimes infringe upon . . . can potentially infringe upon, it might sound controversial to you, but while I'm aware of them, I tend to just focus on getting the truth.

In an interview, Scott Herhold (2004), a 30-year veteran reporter who also writes for the *Mercury News*, said that, when he was covering the crime beat, he didn't consider a suspect's Sixth Amendment rights, either:

> I guess I believe that there are a lot of people in this whole process, each trying to do a different job. And my job, as much as possible, is to find out as much as what's happening of significant public interest and trying to print that. My job is not trying to withhold things.

One of Herhold's concerns about withholding information in newspaper stories, beyond the names of sexual assault victims or child molestation victims, is that the public is deprived of having a check on government agencies: "The process of justice itself is, I think, an important thing and to the degree that we withhold information or withhold names, we make it a lot easier for the government for example to put people away in prison and not have anybody know about it." A passionate First Amendment advocate,

Herhold (2004) said publishing information allows a spotlight to be shone on potential abuses by "cops and DA's."

Akizuki (2004), the *Mercury News*' law and justice editor, said it can be tough to balance information in crime stories:

> I think you do have to be fair to the suspect . . . I've been part of discussions where we do talk about that . . . just because we have information doesn't give us carte blanche to publish everything that we have.

This issue of censoring out information or the reporter functioning as a gatekeeper arose in an interview with Webby, who said in his reporting career that people have confessed crimes to him:

> In one case, somebody confessed murder to me, so what's my duty then? I mean is my duty to make sure that he gets a fair trial and not poison the jury pool? . . . . Or is it my job to write a newspaper story and say the guy said he killed somebody and put it out there. Well, I think it's the latter. I'd like to think that those things are kind of in me, and I've thought about them, and I've already kind of resolved them, but at the end of the day, I'm going to err on the side of being aggressive and let my editors work out those questions. (Webby, 2004)

Webby (2004) said he knows newspaper readers are potential jurors, but ". . . pretrial publicity is something that I can intellectualize, and I can think about it and my editors can think about and ultimately, does it make it so that I don't write about something because I'm worried it will poison a jury pool? No. I think about a lot of things, and it doesn't affect my gathering process."

Herhold (2004) said reporters' awareness of how what they write affects people or the impact a particular story has can cause a slight chilling effect. ". . . Your real responsibility lies not to the subject of your story, but to your readers. And I think that's

what you've got to keep in mind. Obviously there are some times of balancing that with a sort of pragmatic attitude."

Akizuki (2004) said the *Mercury News* strives to be fair and balanced in its coverage for all readers, not just those that may be jurors:

> I don't know if that's a conscious thing, where I think to myself, we're doing a story: 'oh everybody's a potential juror.' I think, you know, that's sort of like basic. People are potential jurors no matter who the reader is.

Webby was asked if he thought this sentence that appeared in the nut graph in the first article about the Hernandez case was prejudicial: "It was a crime that sent a shudder through even veteran sex-crime investigators, who said they could not recall a rape victim as old" (Rape of 94-year-old," 2002). He said he didn't recall writing that particular sentence, but that it was designed to put the crime in context for readers who aren't faced with a ". . . barrage of sex assaults. 'Maybe there's lot of elderly rapes. Maybe this is isn't such a big thing. Where does this fit in?'" (Webby, 2004)

Cole (2004) said he considers the public's right to know and a suspect's Sixth Amendment rights unrelated issues:

> People have interests in criminal cases that have nothing to do with the rights of the accused. These are two separate things. People want to know if crimes were done by some anonymous person. If your neighbor's killed, you want to know, 'Did her husband do it?'"

Webby (2004) said he established a rapport with Hernandez and his family while covering the case:

> One of the things I think is important for crime reporters to do is to instantly and aggressively and continually reach out to the people who have been charged with crimes. I don't only want to hear the police story of things; I don't only want to hear the prosecutor's story of things. I want to hear about them. A, I want to

humanize them. B, I want to get the story from their side if they have one. And C, I think it's only fair I did that in that case.

Webby noted that crime news reporting is not an exact science. Innocent people get arrested and go to jail and guilty people walk the streets:

> It just happens ever single day. The best you can do is hope for a clean process. And that's our job, is to really look at the process and really look at these things and try to sort it out as best we can. But it never, you know, we can never get to the bottom of it. And I think to a certain extent that the newspaper business is a snapshot of what the truth is that day. . . . . You try to do your best to get at it, but if you can't, the best you can do is to take a picture of a moving situation. And crimes are moving situations.

Brian Welch (2004), a deputy district attorney who prosecuted the Hernandez case, noted in an interview that he prefers the cases he's assigned receive no publicity:

> My general feeling is I hate when any of my cases get any kind of pretrial publicity because I always fear that as a result of the pretrial publicity, I'm going to lose jurors who follow the news, and I don't want to lose those kinds of jurors. So I'm happy when my cases don't receive any pretrial publicity just because I think jury selection will go a little bit better for me and I'll be able to hold on to jurors who follow current events.

In an interview, Assistant District Attorney Karyn Sinunu (2004) said she likes the jurors seated on her cases to not know the particulars of a case they're going to be hearing because: ". . . we want them to be fair and to keep an open mind. We want them to be intelligent and have common sense, and usually those are people that follow the news," she said.

When asked if he thought the pretrial publicity the Hernandez case received would have affected the jury selection process, Welch (2004) noted: "It definitely would have affected the jury." Welch (2004) also said Hernandez's lawyers would have probably asked for a change of venue had the case gone to trial:

> We wanted to try the case in Palo Alto; I'm sure there would have been a motion by the defense, at a minimum, to move the case into a San Jose courtroom. Because if you try the case in Palo Alto, your jurors by and large come from Palo Alto and the neighboring communities. If you try the case in a courtroom in San Jose, you're getting more San Jose jurors. I think at a minimum there would have been that motion because it did receive so much press coverage in the *Palo Alto Daily News*."

Cole (2004) said he thought the investigators in the Hernandez case didn't pay attention to "little flags" that went up because of the nature of the crime: "They wanted that kid. The community was in an uproar. And they probably, I think personally, they had some evidence, it wasn't great evidence, but it was some evidence." Although members of the police department told Hernandez they had evidence that put him at the scene of the crime, which is a legal interrogation technique, Cole (2004) said upon reading the entire police affidavit, it seemed to him that Hernandez was just going along with what the officers were telling him:

> . . . and once you read through all of those interrogations, it was quite clear that he was just saying, 'well if you tell me I did it, then I guess I did it.' And to me, you know I talked to people afterwards, and we front-paged that story when we did it, because you really got the feeling of they didn't play by the rules that they would generally do in an investigation of this case. They wanted the guy, they'd take anything and they did. And because of the heinous nature of it, because of the public issue of it, 'My God, this poor, defenseless woman,' I think they just didn't want to see those little red flags and say, 'Wait a minute. This isn't exactly going, he's not acting the way a guilty person would act.'
>
> And they just keep going and going. There was nobody who wasn't upset, either, from right to left. And I think in this town, that basically meant you've got to find a solution. And usually, Palo Alto police, who I think are probably the most professional police I deal with in terms of being careful, in terms of being politically correct, watching the rights of the defendants, for some reason, when it came to sex crimes, the gloves were off.

Cole said the Hernandez case raised feelings of wanting to solve the case with law enforcement and legal personnel, including a judge. Santa Clara County Superior Court Judge Diane Northway was quoted in the *Palo Alto Daily News* as being horrified by the photographs of the rape victim, which she saw during a bail hearing, and as commenting: "I can only express my shock and horror at these pictures" ("Judge says teen," 2002). Her comments are noteworthy, considering that judges hear about crimes every day. Northway ruled that Hernandez's bail shouldn't be lowered and also said he may be a flight risk. Cole (2004) said he was surprised to hear a judge express feelings about a crime: "But judges are political, too. . . . You have to understand the nature of this crime. It really resonated across the spectrum."

The same article that described the judge's reaction also contained statements made in court by Welch, the prosecutor, and Maria Fonseca, Hernandez's attorney, which reflected their respective beliefs in Hernandez's guilt and innocence. Cole (2004) said he had spoken with a defense investigator as well as Fonseca in his reporting of the case, which led him to believe Palo Alto authorities had made a mistake:

> I've been doing this for 30 years and my instinct was, from the first call from them, that they were probably going to be right because lawyers don't do that. Lawyers don't call you up and tell you their client is innocent.

Welch (2004) said Fonseca also told him Hernandez was innocent:

> That was my greatest fear with the Hernandez case. That after we filed the case, there was so much sentiment that we had the wrong guy. But it was coming from a defense attorney, and it's not unusual that we get that. . . . I guess it's a little unusual for a defense attorney to say to you point-blank, 'You've got the wrong guy, I'm here to tell you you've got the wrong guy.'

The press coverage the Hernandez case received concerned Kathleen "Cookie" Ridolfi, a professor at Santa Clara University Law School and the director of the Northern California Chapter of the Innocence Project, an organization founded by former O. J. Simpson defense attorney Barry Scheck and Peter J. Neufeld that uses DNA evidence to free wrongly convicted inmates. Ridolfi (2004) said in an interview that most jurors do not come into a courtroom with a "blank slate," adding that press coverage often influences jurors' opinions:

> And when there is specific information about a case added through the news media, well then certainly coming into a case, these jurors come in with oftentimes pre-formed opinions about the guilt or innocence of the accused. And that's hard to overcome.

The facts the media had available in the Hernandez case, his apology to the victim, might have had a strong effect on jurors, according to Ridolfi (2004):

> The reports in the newspaper that he apologized to the victim, which were words taken out of context, have a strong influence on people's perceptions of whether or not this man is guilty or innocent. Certainly it does. There you see a direct connection between what was stated to the newspapers, what people read, [and] what opinions they form, which are not necessarily correct.

Randolph Daar (2004), the attorney who's representing Hernandez in a civil lawsuit, said in an interview he "absolutely" believes most people associate guilt with suspects when their names are in the media because readers and viewers don't believe in the presumption of innocence in the criminal justice system: ". . . people don't carry the presumption of innocence in their hearts . . . . You see, people don't go by the constitutional principles."

Daar (2004) said he thought the press coverage Hernandez received painted him in a negative light. "You know what the scary thing is, what if they didn't find the DNA?

What do you think would have happened? Think about that. . . . Don't think people didn't see that in the paper, 'I'm sorry.' " The press coverage Hernandez received is cited in the civil suit claim that was filed in Santa Clara County Superior Court against the City of Palo Alto and the county's crime laboratory. "The police not only released information about Mr. Hernandez's arrest, but supplied the press with excerpts of his alleged confession" (*Jorge Hernandez v. City of Palo Alto,* 2003).

The civil suit's "Statement of Facts" noted that a Palo Alto Police Department's press release contained many statements that were obtained in an "unconstitutional interrogation," so Hernandez's name was ". . . widely publicized in the media as the perpetrator of this horrendous crime." When incarcerated, Hernandez was ". . . subjected to the harassment and contempt of other inmates who followed the news story and believed Hernandez to be the actual perpetrator" (2003). His feelings of intimidation while in custody were also mentioned in one story written following his exoneration. Hernandez said he was afraid of other inmates, ". . . most of whom were taller than he stands at 5 feet 5" ("Cleared P.A. rape suspect," 2002).

Daar (2004) said it's important for Hernandez to have his day in court so the public can be informed about what went wrong in his case:

> Well, the DA released him, but the DA never conducted nor do we know if the police ever conducted any kind of investigation as to what caused the police to arrest and incarcerate and stop looking for the 'real killer' for a month. You'd think any kind of a governmental entity would look at that problem and try to analyze it.

The stories that appeared after Hernandez and Nguyen were exonerated had fewer paragraphs with negative information toward both men in them. Elements that were

negative were mainly follow-up paragraphs that are used as summary devices so that new readers were given enough contextual information about the cases.

California First Amendment Coalition attorney Francke (2004) said the aftermath-type stories are popular with journalists:

> It would be very different if the press were indifferent to the fate of those who were arrested and wrongfully accused. But usually they're not because that's, just in kind of the standards of what causes people to be journalists, that's a terrific story.

He said journalists who are assigned to their paper's crime beat realize they will typically write many " 'people versus so and so stories' very routinely." These types of stories won't ever result in Pulitzer Prizes; rather, it's the stories where the press can save someone from injustice that can transform journalists' careers.

Accusations of sexual assault carry a significant stigma, unlike crimes such as car theft or burglary, Francke (2004) said:

> It's a kind of stain that people being what we are, is always going to leave some of us wondering, 'Well, there must have been a little bit of fire or there wouldn't have been any smoke.' . . . And so there is, I think, at least a principled argument that could be made, in sex assault crimes, you not only do not release the name of the victim, you don't release the name of the accused.

Conversely, to ensure parity, Francke said there's another argument, which he doubts would be advanced by many in the media: that the names of both assault victims and perpetrators become public.

As Francke (2004) noted, defendants' chances of receiving positive press coverage are slim:

> . . . you have to admit that in the early stages of certain kinds of crimes, the vast majority of information given out by the government or teased out by the press is not going to make the defendant look very good.

CHAPTER 5

Summary And Conclusions

The stories that were written about Nguyen and Hernandez contained prejudicial information. Of the 44 stories written, 19 articles or 43% contained references to prejudicial statements about either Nguyen or Hernandez, and of the stories, law enforcement sources accounted for 32% of that information. Police quotes contributed to the negative impression about both men that was created in the press coverage, even after DNA evidence exonerated them. This finding is similar to what other researchers determined about the role law enforcement plays in making prejudicial statements, which has been documented in relevant literature (Imrich, Mullin, & Linz, 1995).

As the civil grand jury noted, their cases were highly publicized sexual assaults. Although the grand jury's report cited "slow police work" in the Nguyen case, including delays in giving the district attorney police reports and crime scene evidence to the county crime lab, it treats the police departments too kindly ("Review of Police Arrest," p. 4, 2003). The grand jury must not have read the coverage of the case, which included statements from law enforcement personnel about areas that should not be discussed, because it did not comment about those published opinions. Rather, the only information about facts released to the media stated that this was done in accordance with governing penal codes. As several sources interviewed for this research and the editorials written after the exonerations stated, without DNA evidence, it is likely that Nguyen and Hernandez would have been put on trial or would have been urged to plea bargain for crimes they didn't commit, resulting in lengthy prison sentences. The stakes in crime

reporting are high because, once negative information about defendants, including opinions from official sources, is disseminated, those perceptions are difficult to shake. Of the 44 articles, 27 or 61% were published after DNA exonerated Nguyen and Hernandez, but they still contained negative information. The use of background content in journalism appears to guarantee that once negative information appears in the press, it will be referenced in future articles. It's likely that, if and when Nguyen and Hernandez have obituaries written about them, the accusations they faced might be mentioned in those stories as well.

Although the researcher has had the benefit of hindsight to analyze press coverage, what was written about Nguyen and Hernandez is still troubling. Reporters who wrote about these two cases faced certain obstacles that seem germane to most crime stories: Getting access to defendants or their attorneys for initial story reporting is often impossible. Journalists play a valuable role in informing a society and crime news is of interest because people like to know what's going on in their communities and neighborhoods. The civil grand jury found that the Nguyen case and the Hernandez case were anomalies of mistakes in police work. It was unusual that two violent rapes against elderly women occurred within 10 days of each other and that both suspects were exonerated within weeks of one another. What went wrong in this cases? Were police and prosecutors overzealous in their investigations because the crimes touched them in an emotional way? How could key pieces of evidence in Nguyen's case not been tested for DNA until after he had been in custody for nearly four months? In the Hernandez case, did investigators stop and ask what Hernandez was really apologizing for during his

interrogation? Or, as Richard Cole of the *Palo Alto Daily News* suggested, was he charged because of a public outcry to make an arrest, which that clouded the police's judgment?

All reporters interviewed for this research said they view official sources with skepticism, but that didn't stop them from including information from police in their stories. What's interesting is that in the five editorials that were written after the exonerations, no mention was made in the press about the extensive coverage given to these cases. The editorials encouraged the videotaping of police interrogations and soul-searching by the district attorney's office. As one editorial noted, the defendants' reputations were ". . . shattered as a result of false accusations," ("Wrongly accused," 2003). The media is a good watchdog most of the time, but it's important to remember that Nguyen and Hernandez's reputations were "shattered" in the pages of the *Mercury News*, the *Chronicle*, the *Palo Alto Daily News,* and the *Palo Alto Weekly*. And, although these media outlets also covered and called attention to what went wrong in their cases, those follow-up stories also included summary information about the crimes and their arrests, which was negative. Where was the examination of their journalist's own reporting? How come one of these editorials only mentioned Hernandez was still a suspect six months after his release? ("Wrongly accused," 2003). This editorial and others like it didn't forcefully question why police kept saying Hernandez was a suspect. Another editorial called the San Jose Police Department's initial theory about the Nguyen case, that he staged a sexual assault to hide an attempt to kill his mother "implausible in retrospect," ("Police must investigate," 2002).

Several reporters who were interviewed said they don't think it is their job to consider how readers, many of whom are potential jurors, will react to what they write. This is wrong. Journalists play a role in shaping public opinion; it is irresponsible to deny this role. Dennis Ryerson, the editor of the *Indianapolis Star* and former editorial page editor of the *Mercury News,* wrote that it is a good idea for all journalists to have stories written about them so they know how it feels to have their names in the press (Ryerson, 2003). Ryerson said he has been "livid" about "inaccuracies and a lack of perspective and context in some stories" that have been written about him because of promotions he has received or his involvement with journalistic organizations.

David Shaw, a media columnist with the *Los Angeles Times*, agreed with Ryerson's premise of journalists being the subjects of articles as a way to broaden perspective and to increase appreciation for fairness. Shaw said reporters and editors are ". . . trained not only to set aside their opinions but to ignore the potential impact of their stories as well. They're supposed to gather facts, report them and let others worry about the consequences" ("Fairness would increase," 2004). There is a drawback to not considering how a story affects people, particularly those who aren't public figures:

> It can make us less sensitive than we should be to the impact our stories can have on individuals we write about . . . we write about average people, people who didn't willingly enter the public arena, and it's to them that I think we should be more sensitive, more careful with our facts *and* our interpretations. (Shaw, 2004)

Shaw shared some advice a former editor gave him about substituting his own name for a subject's name whenever something could be construed as negative or critical. The editor told Shaw to reread the story to see if it still seemed fair and accurate. As Shaw noted:

> I've done exactly that more times that I can count. On several occasions, I've modified my language, removed or toned down a phrase, made an extra call or two because when I read my story with my name in it, I realized it didn't seem quite as fair as I originally thought. (Shaw, 2004)

The initial facts seemed stacked against Nguyen and Hernandez. If the reporters involved with their cases had substituted their own names in the copy, would the quote selection and some narrative detail remained the same? It is doubtful. Sean Webby (2004) of the *Mercury News* said newspapers give a "snapshot of the truth of each day." Reporters and editors have to decide what to include in that snapshot, and sometimes they make decisions that aren't fair, or that portray an arrested individual as guilty. Journalists do their jobs best when they portray as many sides of a story in their work, and it can be difficult to get a spectrum of voices in crime stories when a deadline is near and an investigation has just begun. As several reporters noted, it is important to get as much information as possible in the field, but just because it is been gathered, doesn't mean it is going to make it in the story.

The journalists interviewed for this research said they were concerned with fairness, but is it fair to a defendant to publish information from a police officer who suggests a crime scene was cleaned to destroy evidence without another point of view to counter that opinion? Is it enough to expect readers to be objective and recognize the sources of information quoted in a story and that they may be reading only one side of the story? The presumption of innocence did not come across in the batch of initial stories written about Nguyen and Hernandez.

All of the journalists interviewed for this research had either studied journalism in college or had extensive professional experience, but none of them had heard about the

voluntary California Press-Bar Guidelines. This is somewhat surprising, but as Terry Francke said, the guidelines have not been widely promulgated. Several *Mercury News* journalists said the paper offers periodic media law training sessions with its attorneys, but these are on an ad-hoc basis. More formal training for journalists about guidelines and Sixth Amendment issues is needed. In modern journalism's 24-hour news cycle, it is important for guidelines like these to be known and discussed in newsrooms. Journalists play a role in the legal system by reporting about it, and being part of that process warrants constantly evaluating whether what appears in their pages is fair.

What's troubling is the mindset some journalists interviewed for this research appear to have: although they are concerned with fairness, ultimately, they don't give suspects' Sixth Amendment rights as much consideration as their First Amendment rights as members of the press and the public's right to know. Given the deadlines of journalism, consistent and meaningful evaluations of coverage may not be possible, especially in cases that involve exonerations and false confessions. It's not known whether the news organizations that reported the Nguyen and Hernandez cases engaged in the kinds of soul-searching they recommended authorities do. The problem is that all it took to soil Nguyen and Hernandez's reputations was one publication of their names associated with the rapes.

Contributions to Study of Media Law

This study is important because it provides data that contradicts the findings of the Santa Clara County civil grand jury. The information public information officers in the San Jose and Palo Alto police departments shared with the media, including quotes,

was negative toward Nguyen and Hernandez. Members of the grand jury were likely not familiar with the American Bar Association's Model Rules of Professional Conduct or the Joint Declaration Regarding News Coverage of Criminal Proceedings in California. If they had used these guidelines in evaluating the comments published about Nguyen and Hernandez, their findings would have been different. This study showed that the news articles written about Nguyen and Hernandez did contain prejudicial information that violated categories of the American Bar Association's Model Rules of Professional Conduct and the Joint Declaration Regarding News Coverage of Criminal Proceedings in California.

These violations include information about the admissions Hernandez made during his interrogation, opinions about the evidence in the two cases, and views about each man's guilt or innocence. This study found that law enforcement officials are frequent sources of opinions about a defendant's guilt, which is similar to the findings of Imrich, Mullin, and Linz (1995). They also found that the more unusual the circumstances of a crime, the more likely the case would receive pretrial coverage. This finding is supported in this research because the victims in these cases were elderly women, and it initially was reported that Nguyen had sexually assaulted his own mother. It is likely that the publication of admissions from Hernandez's police interrogation resulted in his case receiving more press coverage than normal.

The interviews with journalists and attorneys bring a behind-the-scenes element of realism to the data obtained from the content analysis. Another significant finding is that, of the 776 paragraphs written about Nguyen and Hernandez, 32% were negative in tone.

The interviews conducted with veteran journalists who covered the cases showed why negative information about defendants appeared in initial crime stories; most defendants do not have attorneys who are prepared to speak on their behalf immediately following an arrest. Journalists appear to have more opportunities to contact official sources, such as the police and district attorney's office personnel, who are prepared to provide information about a case. Criminal cases do not have to involve high-profile defendants such as O.J. Simpson or Scott Peterson to involve high-stakes issues of conflict between the First Amendment and the Sixth Amendment.

Limitations of the Study

This study was conducted on two criminal cases. Ideally, a content analysis would be conducted on a number of cases, including cases that went to trial. Another limitation of the study is source availability. Ongoing civil litigation precluded two police sources from commenting about the press coverage; their perspectives would have been enlightening. Similarly, despite multiple attempts, it was not possible to reach Nguyen and Hernandez's defense attorneys for comments about the press coverage.

Directions for Future Research

Revisiting this topic after the civil suits filed by Nguyen and Hernandez have been decided would be compelling, assuming that they would be free to comment about the nature of the press coverage they received. A future study could examine the attitudes police officers have toward defendants who are accused of committing high-profile crimes, such as sexual assaults. Does the nature of the crime affect the types of opinions information police officers share with crime reporters? Another intriguing study

would be to follow a developing crime story by immediately analyzing articles as well as interviewing the journalists assigned to cover the cases to obtain data about on-the-spot decisions they and their editors make regarding coverage.

An examination of the roles the Internet and the electronic databases newspapers use to archive stories have in pretrial publicity is an additional research opportunity. Databases give journalists rapid access to previously published information. If a journalist is writing about a defendant who has a prior record and received press coverage, it is likely that information will again appear in the press. Future researchers may also choose to follow cases of local or national interest that involve prejudicial pretrial publicity. The findings of this study demonstrate that pretrial publicity presents significant risks to defendants. The media's coverage of crime news and the public's interest in it guarantee that these issues will continue to be part of American journalism.

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