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## A Panel Discussion on a Proposed Code of Ethics for Legal Commentators

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## **A Panel Discussion on a Proposed Code of Ethics for Legal Commentators**

*DEAN DESSEM:* Good morning. I'm Larry Dessem, Dean of the Walter F. George School of Law of Mercer University. My job this morning is to welcome you to the historic Douglass Theatre, and to this year's Symposium sponsored by the law school and the *Mercer Law Review*, concerning "A Proposed Code of Ethics for Legal Commentators."

The *Mercer Law Review* is the oldest law review in Georgia. The legal profession is unique in that our professional journals, the law reviews, are produced by our senior students. The bench and the bar and the law schools rely upon our students to edit and write and produce the law reviews that both chronicle and guide the path of the law.

Our *Mercer Law Review* is the work project of many individuals including the current Editor-in-Chief, Jeffrey Harris and this year's Lead Articles Editor, Jennifer Motos. The permanent staff of the Review is led by Ms. Yonna Shaw. The Faculty Advisor, Professor Stephen Johnson, and Professors James Fleissner, Deryl Dantzler, and many students, have worked tremendously hard and put a great amount of effort, as you will see, into today's Symposium. We all owe them a great debt of thanks.

Now, the dictionary tells us that in ancient Greece and Rome a symposium was a party usually following a dinner for drinking and conversation. As most of you know, Mercer is a church related university so there will be no drinking during this morning's Symposium. There will be, however, a very rich conversation. In fact, this will be a conversation involving distinguished individuals who lead and participate in conversations and commentary concerning some of the most important public issues facing our nation. This morning's conversation will consider some of the core values of the legal profession, of our Constitution and of our country—values such as professionalism and free speech and fair trial.

Through the cards in your program, you will be invited to participate in the conversation as well, and the conversation will continue long after this morning through the publication, both in a hard copy and electronically, of this Symposium in the *Mercer Law Review*.

It is now my pleasure to introduce you to the Editor-in-Chief of the *Mercer Law Review*, Mr. Jeffrey Harris. Jeff Harris is not only the leader of the law review but a student leader at the law school in many other respects. Will you please welcome Mr. Jeffrey Harris and thank him, he and his staff, for the hard work in bringing us this morning's *Mercer Law Review* Symposium.

*MR. HARRIS:* Thank you, Dean Dessem. On behalf of the *Mercer Law Review*, I'd like to welcome everyone to the 1999 Symposium. Each year the law review conducts a symposium on some legal issue that is both timely and interesting, we hope. We have tried every year to pick some topic that's relevant to what is going on in the law. In the last couple of years we've been very fortunate. Last year's symposium dealt with the independent counsel statute, and that turned out to be a bit more timely than any of us would have imagined. And the same thing we think has happened this year in that we have an issue that is really—is literally so relevant and so timely that every one of us when we turn on our television and flip the channels encounter at any time of the day or night a legal commentator, and so we think we couldn't have picked an issue that's more relevant. We also, I think, are indebted to Ken Starr who keeps giving us these symposium topics every year. We don't know what we're going to do next year when we have to think of something new.

But as far as the format of the program is going to go, the first half from approximately 9:00 to 10:15 will be dedicated to a presentation by Professors Levenson and Chemerinsky. They are two scholars who have been instrumental in proposing a code of ethics for legal commentators. That will culminate around 10:15, and then we'll have a short intermission.

You will note in your programs there is a form that if anyone in the audience would like to submit a question to the panel, if you will fill that out and give it to one of the ushers, we will get it around back, and after we sort through them, we will pose some of those questions to the panel. In addition, you will find in your program an order form if you're interested in ordering the Symposium issue. There will be a transcript of this entire Symposium, as well as some academic articles, Professor Levenson's and Chemerinsky's latest article on this, and some scholarly response to that article. So that is the outline for today and hopefully it will go smoothly.

In addition, we also have in the lobby several other proposed codes of ethics. Professor Scheck is going to speak to one of those codes by the National Association of Criminal Defense Lawyers (NACDL). And we also have one from the American College of Trial Lawyers (ACTL), which Mr. McElhaney will address. So that may help you understand the issue a little bit more.

Without further ado, I would like to introduce Jennifer Motos, who is the Lead Articles Editor. She has really done all of the leg work on this Symposium, so I think all of the credit should go to her. She is going to introduce the topic, briefly outline what we are going to deal with today, and also introduce Dean Levenson and Professor Chemerinsky.

Thank you very much for coming and I think you will have an enjoyable morning.

*MS. MOTOS:* Thank you, Jeff. The topic of today's Symposium is "A Proposed Code of Ethics for Legal Commentators." The impetus for this topic comes from the work of two well-known scholars, Professor Erwin Chemerinsky and Dean Laurie Levenson who were the first to suggest that legal commentators—that is, lawyers who offer legal commentary to the media—need their own code of ethics to guide them through the unique ethical dilemmas with which they are faced.

After serving as legal commentators themselves in numerous high profile trials including the Menendez brothers murder trials, the Rodney King beating trial, and the O.J. Simpson murder trial, Professors Levenson and Chemerinsky became acutely aware of how much the public relies on legal commentators to provide them with accurate and thoughtful commentary. They also realized the degree to which bad commentary can damage the public's perception of lawyers and legal experts. According to a recent article in *Trial Magazine*, the two professors are, "on a mission to stop irresponsible and inaccurate commentary."

With their law review articles entitled "The Ethics of Being a Commentator,"<sup>1</sup> and "The Ethics of Being a Commentator II,"<sup>2</sup> Professors Levenson and Chemerinsky sparked the national debate over the need for a commentator's code of ethics. Several notable organizations including the American College of Trial Lawyers and the National Association of Criminal Defense Lawyers have followed Professor Levenson's and Chemerinsky's lead and have drafted their own

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1. Erwin Chemerinsky & Laurie L. Levenson, *The Ethics of Being a Commentator*, 69 S. CAL. L. REV. 1303 (1996).

2. Erwin Chemerinsky & Laurie L. Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997).

guidelines for commentators. The National Association of Criminal Defense Lawyers has praised the professors for their "excellent work." We are very fortunate, as Jeff mentioned, to have the third article in the trilogy, "The Ethics of Being a Commentator III," which will be published in the upcoming volume of the Lead Articles Edition of the *Mercer Law Review*.

At this time, I would like to introduce Professor Chemerinsky and Dean Levenson. As you can see by looking at their biographical information in the program, they both have innumerable achievements and honors. However, I have promised them that I will try and keep their introductions short, and I don't know if I will succeed in this, but I will try.

Professor Chemerinsky is a Sydney M. Irmas Professor of Law and Political Science at the University of Southern California School of Law in Los Angeles. He is a graduate of Northwestern University and Harvard Law School. Prior to teaching, Professor Chemerinsky served as a trial attorney with the United States Department of Justice and spent some time in private practice in a Washington, D.C. firm. Professor Chemerinsky teaches courses in constitutional law, federal courts and legal ethics. Many students here today will be familiar with Professor Chemerinsky's excellent books on constitutional law and federal jurisdiction. In addition to teaching and writing, Professor Chemerinsky serves as a legal commentator and regularly lectures to attorneys and judges in programs for the Federal Judicial Center. He also currently serves on the Los Angeles City Charter Commission which is working to rewrite the Los Angeles City Charter.

Professor Levenson is Associate Dean for Academic Affairs at Loyola Law School in Los Angeles. She is a graduate of Stanford University and the University of California at Los Angeles School of Law. Upon graduation from law school, Dean Levenson clerked for the Third Circuit Court of Appeals. She then worked as an Assistant United States Attorney in Los Angeles where she served as the Chief of the Criminal Appellate Section and Chief of the Training Section. At Loyola, Dean Levenson teaches courses in criminal law, criminal procedure, ethics, and evidence. When she is not teaching, she is typically writing, offering legal commentary, or serving as Special Master for the Los Angeles Superior Court and the United States District Court for the Central District of California. Dean Levenson currently serves as an expert legal consultant for CBS News, CNN, and National Public Radio.

Please join me in welcoming Professors Laurie Levenson and Erwin Chemerinsky.

*DEAN LEVENSON:* Good morning. Thank you so much, Jennifer. We are just delighted to be here. This is a very special time with some very special people, and let me start by thanking those people. You indeed have an august panel that you will hear from today. We're only lucky to be part of them. Ray Brown, Professor Butler, Mr. Johnnie Cochran, Mr. John McElhaney, Professor Barry Scheck, Mary Tillotson; these people are the very top of the profession. They're not the ones, frankly, who need a code of ethics, but they certainly are the ones who can help us in making the presentation to you. So, on a very personal basis, I want to thank them all for coming and being with us today.

I also want to thank a person who I have enjoyed working with, and it's a privilege to work with throughout this time on both the code of ethics and frankly the day-to-day life of being a legal commentator, and that's Erwin Chemerinsky. You don't know how special Erwin Chemerinsky is. She gave you part of his bio. I don't think she mentioned that lately he's been rewriting literally the Constitution, the Charter for Los Angeles in his spare time. He is a man who through his personal life and professional life exudes what ethics are all about so it has frankly been both a pleasure and quite easy to work with Professor Chemerinsky.

And while I'm schmulzing it up and thanking everybody, let me thank Jennifer. We became sort of morning friends—every morning she would call and wake me up, thank you, to put this Symposium together. She worked tirelessly and I think we do all owe her a great debt of gratitude for her work.

What are we going to talk about today? Well, before we begin, frankly, we're going to show you a little bit of a video that raises many of the issues in our panel discussion. We're going to talk about life as a legal commentator. As Jennifer suggested, there's a trial of the century, always a trial of the century for us to cover. Frankly, in Los Angeles, I think there's one about every six months, and we are survivors—that's how I would put it—of those, starting with Rodney King, to a little trial called the O.J. Simpson murder trial, and there was very little press coverage of that one. The "Menendi" boys, as we call them. And now the presidential dating habits. There is always something in the news for us to comment on. And as you'll see, frankly, even people you know are on television commenting. Let me get a show of hands. How many of you have seen perhaps one of your professors on television providing expert legal commentary. Indeed, you someday may be there as well. But I think as we go into this new era where lawyers play a critical role in the presentations of trials to the public, we should understand what our responsibilities are. What is legal commentary and what are the ethical issues raised by it? Let me start with this video,

and then we'll talk a little bit about it before we go to our panel presentation.

(VIDEO PLAYED 9:15 A.M. TO 9:25 A.M.)

*DEAN LEVENSON*: I think you can realize from this video that there are indeed many issues regarding ethics that face legal commentators. I happen to love the fact that we're no longer "talking heads" or "pundits" but we are the "chattering class." In fact, we're going to go over some beginning remarks regarding the area of ethics, which are addressed in our articles, and just summarize them until the panel discussion later where we will go into more of the details.

I want to start out by recognizing that there are many different types of legal commentators. Frankly, anybody who's a lawyer, who answers a question from a newspaper, is indeed providing legal commentary, and believe me those questions can never be too basic. Among the questions I have received are: How many of the twelve jurors does it take to have a unanimous verdict? Here's one: What are the judges thinking? Even scarier: What are the jurors thinking? In the Rodney King case, when a particular witness showed up in a particular outfit, I was asked by the media: Why is that witness wearing chiffon? Obviously, part of the legal expertise. And frankly, it doesn't matter whether you're talking to the *New York Times* or a local chat show. The line has been blurred, and we learned that back during the O.J. Simpson case when the *New York Times* quoted the *National Enquirer*. These rules must apply across the board to all media.

Now another type of commentary is the day-to-day commentary during high profile cases. As we like to say, those of us who provide this, is that we are professional court watchers in some way and in fact we have no life. People think of it as very glamorous. Let me just dispel you of that notion. During the Simpson case, there was a little home we called Camp O.J. It was a parking lot across from the courthouse and thousands and thousands of media were set up in that area. I was living basically like trailer trash. Forty of us from CBS News lived in a trailer at which we did the news. It was such an intense atmosphere that nobody noticed for a week that we had a dead rat in the water cooler. This is the glamorous life. It's also glamorous when the producer looks at me and says, "We've got to do something with your hair," walks over, spits on the top of my hair, wipes it down and says, "Now you're ready to go on air." That in fact is the life, day-to-day life, for someone who is watching a trial and providing commentary.

Now, for some people, they've crossed over. They're not professional court watchers, indeed they're hosts of some of these shows, and then

they have to go from legal proceeding to legal proceeding or trial to trial or sometimes scandal to scandal, providing information and sometimes entertainment to the public. And it's even more difficult it occurs to me, these days when you have the twenty-four-hour news show to fill that air with thoughtful commentary regarding the case. So we have many legal commentators today, and what we want to think about a little bit is what is their role.

But before I do that, I want to mention that sometimes people will ask, "Well, how did you get started in this?" Actually, they usually put it this way: How did a nice, nerdy law professor like you end up on television? And as Erwin might say, "We made the mistake of answering our phones." I know for me one day I got a call during the Rodney King case from NPR [National Public Radio] who said, "Do you know anything about federal criminal law?" Having been a former prosecutor, I thought I'd better answer yes. And before I knew it, I was down at the courthouse watching the trial with no intention of giving up my life to the proceedings. But I knew it was over when they decided they needed to talk to somebody other than the defense lawyer, and the CBS producer yelled out, "Grab Levenson, she's all we've got." Indeed, that's how many of us end up in this world of commentary. But we believe, rather than saying "turn off the commentators," that there is actually a need, a great need, for information regarding our court system to get out to the public. I am heartened by the fact that the public is paying attention. Paying attention to what's going on in their courtrooms, and frankly, paying attention to what's going on in their government. In fact, you should know that the amount of public interest is staggering, not so much during the impeachment hearings, but during that O.J. case. Just the preliminary hearing alone, which took place during a summer when most should have been outside barbecuing drew a viewing audience of over seventy million Americans. They are learning civics from television, and it may not be perfect, but I'd like to say that it's better than *Matlock*. Even if the public doesn't like what they see, there are positives that come out of them watching these cases. Frankly, the Simpson verdict was, shall we say, a bit controversial. On the other hand, it prompted twice as many people in Los Angeles alone to start turning up for jury duty. Knowing that there's such a public conduit for legal commentary and that we do have an effect on the public views, we think it's important that we start thinking about our role, why we should have a code, and what should be in it.

*PROFESSOR CHEMERINSKY:* I, too, want to start by thanking Mercer Law School and the *Mercer Law Review* for arranging the



Symposium, the wonderful panelists for being here, and most of all Laurie.

Our analysis is based on the premise that what commentators do matters. If what commentators do is irrelevant to the public, there's no point in developing a code of ethics. The commentators serve an important educational function for everyone in society. The reality is that more people learned about the legal system from the O.J. Simpson case than from any other single event in American history. We all know that the law is complicated, both procedurally and substantively. In a criminal trial, there's the need to explain to people simple things like how jury selection is done. Then there are the complicated things such as questions involving the rules of evidence: Should past incidents of domestic violence be admissible? What are the standards of admissibility with regard to scientific evidence? What are the standards with regard to hearsay or relevancy? There are also just the elements of the trial that need to be explained. Indeed during the Simpson case, almost on a daily basis, complicated and difficult legal issues arose. The same thing of course is true with regard to the impeachment proceedings going on in Washington. People want to know what the Constitution says about impeachment. What does the phrase "high crimes and misdemeanors" mean? What are the procedures that are going to be followed? These aren't things that people have any reason to know about. It's commentators that explain all this to the public.

Commentators play other less obvious roles as well. Commentators perform the important task of directing the media to other sources. Probably for every question that I answer for a reporter, there is a question that I can't answer. What I can do is direct that person to a colleague, to a lawyer in the area who has expertise in the field. Commentators also play the important role of putting the events in perspective. One of the things that I discovered in doing daily television during the Simpson case is they wanted to make it seem that everyday's news was significant.

So as a result, the unimportant was portrayed as the important and the significant was portrayed as the monumental, and so there was a need to be able to say, "Here's how this fits within the context of an overall picture." There was a need to constantly remind people that a trial is not a daily sporting contest, but instead is to be looked at much more like a jigsaw puzzle. It's difficult to appraise the significance of one piece of evidence except in the context of the whole that may not be known for days, weeks or even months.

There's also a need for commentators to balance the spin of the lawyers. I have become increasingly aware that there is a key difference between what participants say to the media and what commentators

should say to the media. The participants have a particular mission to accomplish. They have a client or a side for which they advocate. They are going to put things in the context that is best for their side. Ideally, legal commentators are there to try to accommodate, to try to put things in a much more neutral perspective. The desire for a code of ethics for commentators is also premised on the reality that the use of commentators is increasing dramatically in the media. I remember when the *McMartin* preschool case was tried in Los Angeles in the late eighties and early nineties. There was hardly a commentator used at all. It seems to me that the use of commentators began with the federal trial of the officers for beating Rodney King. It was at that point that the media began to turn increasingly to lawyers to explain. The *O.J. Simpson* case, of course, brought more media coverage to a legal proceeding than ever before in American history. There had never before been a case where every network could televise a preliminary hearing. There'd never before been a case where every network televised opening statements in a trial. There were three cable networks that broadcast the entire trial gavel to gavel. There were local stations and radio networks, too. This created a constant need for commentators and, as the video tape showed, all of this exploded with the impeachment trial and the development of the twenty-four-hour news stations. Commentators took on yet another role of just going air time. So all this led us to believe that there is a need for a code of ethics for legal commentators.

Why a code of ethics though? The reality is that ethical issues constantly arise for commentators. I saw this early on when I was doing commentary. I was in a shopping mall and ran into a friend of mine who was one of the prosecutors on the *O.J. Simpson* case, and he mentioned something to me that was going to be happening in the preliminary hearing that hadn't yet been in the news. And I was wondering what I should do with that information. I wasn't sure if he was saying it to me confidentially or not. I was worried that maybe since he knew I was on a local TV station he wanted me to say it publicly and I was being used. On the other hand, I did have information that the public would be interested in. The first thing I did was call my friend Laurie Levenson and ask, "What do you think I should do?" And then constantly over the course of the *O.J. Simpson* case ethical issues would arise. Over and again I would call Laurie and ask, "What do you think I should do?" Then at some place along the way, Laurie and I decided that when the *O.J.* case was over we wanted to write an article on the ethics of being a commentator, and that led us to the first in a series that we're here to talk about today.

The reality is there isn't any guidance on how to do what commentators do. The code of ethics for lawyers doesn't speak to the role of being a commentator. Being a lawyer and being a commentator are inherently quite different. The code of ethics for journalists doesn't apply because commentators aren't journalists either. We believe that a code of ethics for commentators can serve many functions. It can improve the quality of performance by commentators. Think about what any code of ethics is designed to achieve. A code of ethics for lawyers, the code of ethics for doctors, they're meant to set a standard of professional conduct. They are meant to deal with things like competence, conflicts, and financial issues. A code of ethics for commentators can do all of that. A code of ethics for commentators can also provide guidance to those who will be enrolled in the future. Frankly, I made a lot of mistakes as a commentator. I did some things that I'm very embarrassed about in hindsight. Ideally, those of us who have done this can help those who will be doing it in the future. By setting a code of ethics, they can learn from our mistakes.

A code of ethics for commentators can also help commentators in dealing with the media. There are many times when as a commentator I wanted to say to the media, "No, I just won't do this." Many local TV stations in Los Angeles did daily wrap-up shows on the O.J. case. And I was on one of these and they wanted us to grade the lawyers on a daily basis and I refused to do that. I said, "You can't grade somebody's performance on a daily basis because you can't really evaluate today until you see what's going to come. This isn't a sporting event." And for a time I thought they were going to simply replace me with somebody else who was willing to do the grading. It would have been great if I had a written source, a code of ethics for competence, that said lawyers just aren't supposed to do this when they're serving as commentators. What actually rescued me in that instance is that early on in the process, I had to go to do a talk at another law school and they asked Laurie to come and fill in for me. When they asked Laurie to grade, she said "absolutely not." And once Laurie had said no, that lent some credibility to my position, much as a code of ethics would.

Also I think a code of ethics for commentators can help the media. The reality is most journalists haven't been trained on how to use commentators either, and so this code of ethics would provide some guidance to reporters as to the appropriate and inappropriate use of commentators.

And finally, I think a code of ethics for commentators can improve public confidence in commentators. There has been much justified criticism launched at the pundits. I think what we need to do, those of us who serve as commentators, is say to the public, "We are sensitive

about our role and the importance of our role.” Legal commentators perform a great public service. When we go on television we speak to a classroom, much greater than anyone will see in a law school. But if we perform our role poorly, then we misinform the public. We give the public a bad image of lawyers and legal commentators. A code of ethics would improve this. So we believe a code of ethics is essential.

We also know that it must be a voluntary code of ethics. The reality is a code of ethics for commentators regulates speech. Any regulation of speech is to be dealt with very carefully under the First Amendment. Although the bar can have a mandatory code of ethics for lawyers and the medical profession can have one for doctors, there can't be a mandatory code of ethics enforced against commentators. I'm not sure what the entity would be to enforce it anyway. If there was a mandatory code of ethics, in any way enforced by the state, we'd run afoul of the First Amendment. And so what Laurie and I have sought to do over the last few years is to encourage the development of a voluntary code of ethics for legal commentators to try to achieve all these goals.

*DEAN LEVENSON:* Now, in saying that we won't grade lawyers doesn't mean that many of them, including those sitting in the room today, would not have deserved an A+. It's simply that we shouldn't, as one of my good friends would say, rush to judgment during any of these proceedings.

I want to reiterate as Erwin said that even though we can't have a mandatory code of ethics—and I agree with him, the First Amendment would seem to prohibit that—a voluntary code could make a lot of difference. It can be a guide for the good, as Erwin mentioned. When the media comes to you and asks you to do something you don't believe in, you could say to them, “Gee, I'd really love to engage in that sleazebag tactic, I'm just not allowed to do it.” As he mentioned, we don't all have to make the same mistakes.

And very importantly, we can help in their decisions of who to select as commentators. Now you need to know a little bit about how some of the media—you can't group them all together—select commentators. I knew that this was a different type of business when during the O.J. Simpson preliminary hearing, I turned on one of the major networks and who did they have as their legal commentator? Patty Hearst. Now for those of you who don't remember Patty Hearst, Ms. Hearst was herself a convicted felon, charged with engaging in a group called the SLA [Symbionese Liberation Army] in a bank robbery. I thought, what could be better than a person who's been convicted to do the legal commentary? Better yet, here was her legal commentary as she looked at the female judge in this preliminary hearing: “How can she wear that

nattily draped scarf and pearls with a robe? It just doesn't work." Indeed, we might be able to do a little better with our legal commentary.

How are some other commentators selected? Well, the phone rings and the questions are: Are you available? Do you have a pulse? What do you look like? Do you speak in monosyllabic words? How well can you hold your own in a cat fight? Some standards other than this may be helpful for the media. And finally, another reason to have a nonmandatory code would be a bit like chicken soup. It couldn't hurt. When was the last time you heard someone say, "Oh, those lawyers, they just have too many ethics"?

So what are we going to put into this code? Well, a key provision, and you saw Barry Scheck say it on the screen, you heard Erwin mention it, and I agree, the first provision has to be competency. It has to be the most basic rule no matter what you're talking about. You must know the subject matter. And you can do a lot of harm by giving wrong information. When you think back at some of the trials including the O.J. and the McVeigh case, every time there was a mistake, it went out on the public airways that there might be a mistrial. Those of you in law school know it's actually very difficult to end up with a mistrial, and yet the public was fearing that the whole fiasco would occur again. Or here's another one, the Unabomber, Ted Kazinsky. People were saying, "Well, he will walk free if he's found insane." No, not even in California. And finally, here was my favorite. When the Jones case was dismissed by Judge Wright, we heard, "Well, that'll make Ken Starr disappear." Nothing will make Ken Starr disappear.

At minimum, commentators have a duty to be competent. Now, what does competency mean? First of all, it means knowing the law of your jurisdiction, and not all the law is the same. You're proud to know that Georgia's law is not like California's. Federal law is not like the states'. Nobody's is like the Ninth Circuit's. And if you're a commentator, you're going to have to go out and research it. It was not unusual for us during these trials to be up all night, literally, anticipating the motions in the case. Of course, you must also know about the facts of the case, and that means following it, and I have a problem with those who just dip in for a moment.

Now, there are many ways to follow a case. You can watch it in person, and that's the best way because the courtroom milieu teaches you much more than a pulled record or even watching one camera angle on television. There is reading the transcripts, and there is even reading the pleadings and the court orders and talking to the participants. But hearsay and sporadic coverage does not seem to do justice to the public.

How about experience? How much is needed? Well, my answer would be it depends on the type of commentary. If you're being asked a strictly

legal question such as what are the elements of the crime, then even if you have not tried a great number of cases, you might be able to answer that question. However, if you're being asked a question about the merits of strategy in a proceeding, I would hope that you've actually been in the courtroom and had to make some of these strategy calls. For example, was it a good idea to have O.J. try on the glove? Come to think of it, anybody might know the answer to that one. But in general, strategy calls, somebody should have the experience.

Competence also means other things. It means a willingness to say, "I don't know." Now, think about that for a second. You know your law professors. The ones you respect the most are the ones who don't try to pretend they know the answer to every question. But when they say, "I don't know, I'll find out," you trust them. And the same thing for legal commentators. I don't think we can be expected to be experts on all subject areas, so our duty is, when we don't know the answer, to tell the media that and perhaps help them find the right expert in that proceeding. It is not to predict. That's something that Erwin and I feel strongly about and yet other commentators have disagreed. I don't believe commentators should read the crystal ball, particularly on jury verdicts. First of all, you're bound not to be right. It's very hard to read jurors, not just in California, and I think when you do so, and you start predicting verdicts, and they come out the other way, you have in fact undercut the jury's mandate.

And finally, scoring a proceeding, as Erwin mentioned, is truly misleading. That leads the public into believing that a trial is like a basketball game, whoever scores more points wins. There's a different dynamic that goes on in a proceeding. There's much more to know about the proceedings than just the proceedings themselves. Cases take on a life of their own. For example, in the Simpson case, when the civil case came, I knew I was doomed. It wasn't enough that I had sat through every golden moment of the criminal trial, but there were now twenty-two books out, each and every one of them beautiful prose on the case that I felt that I had to at least go through to be prepared to address matters in the civil case. Or the Lewinsky matter now. Now, you know, I've had an education. In fact, I have two children and one on the way. I actually thought I knew what sexual relations meant. But indeed there has been more to learn about that as well. So when you go into legal commentary, there's a broad education to be had to keep you competent.

And finally, let's not forget the nuts-and-bolts of speaking to a lens. You know, they don't really give law professors training on how to be movie stars, and we don't consider ourselves movie stars. They don't even give you training on how to talk to a lens, and how to answer

things frankly and mostly in seven-second sound bites. Do you think that sounds ridiculous? Well, let me tell you a story. At the end of the O.J. Simpson case, the criminal case, I was on live with Dan Rather when the verdict came out. And the question that Mr. Rather posed to me was the following: "So, Professor Levenson, in the ten seconds remaining what does this verdict say about justice?" And I answered, "Well, Dan, that's an issue that will be debated for years to come." It's very difficult to know what to say, how to say it, how to look when you say it—the tricks of the trade.

The number one priority, indeed, for commentators is to be competent. We're seeing a particular challenge in these impeachment proceedings because, as lawyers, we may know the law. Many of us—and we're all former federal prosecutors, the world is full of former federal prosecutors—we hopefully know what obstruction of justice is and what perjury means. But this case is about politics as well, and I'm thrilled to say that I've spent most of my life avoiding politics. I had to get a quick education. To be competent in this case, I think many of us believed we had to read the Senate Rules on impeachment, read up on the Andrew Johnson impeachment, read the other recent cases of judicial impeachment, read the briefs on both sides, and of course spend those very meaningful moments pouring over the Starr Report, because when you are a legal commentator and you venture into the world of politics, you have to be competent in that area as well. So that would be the first standard we would set in our code of ethics.

*PROFESSOR CHEMERINSKY:* A second important standard concerns confidentiality. Every professional code has to deal with that issue, and the issue comes up for commentators as well. I alluded to one way that it could come up earlier. Many commentators know many of the lawyers involved in cases. Laurie and I each knew some of the lawyers involved on both sides of the O.J. case, and it's true of all the recent high profile cases in Los Angeles. Sometimes, in talking to those lawyers, matters regarding the case come up. What should be regarded as confidential, what not? It can even require the commentators to think about whether it is appropriate to talk to the lawyers about the case. There's no right or wrong answer. I made the decision that I did not want to speak to any of the lawyers that I knew in the Simpson case about the Simpson case while it was going on. I actually served on boards with a couple of them and when I ran into them, I tried to avoid talking about the case. I had something to gain by talking to them if they were willing to talk. You could learn things; you could put things in perspective. On the other hand, there was also a real danger of being used because they know that you're going to be in the media. They want

to get a certain message out. They can use you in that way. It also poses the difficult question of what is confidential and what isn't?

There's also the possibility of having conversations with judges in cases. Many of us know judges as well. The judges technically shouldn't be talking about a case with anybody other than the parties or their law clerks. The reality is sometimes judges do talk about it. What then if you hear something from a judge? Can you then still even be a commentator when the judge issues a ruling that you spoke to the judge about?

What about confidentiality with regard to journalists? I think Laurie and I both had the experience during the Simpson case where journalists we dealt with regularly would say, "This is my scoop for tomorrow, don't tell anybody about it." Each of us would then go to do other media things. How can we honor that promise with regard to confidentiality? And so there's a need to deal with issues of confidentiality. What Laurie and I decided was it's important that the code of ethics put the burden on the commentator to clarify what is confidential and what isn't. It's a commentator's responsibility to ask in talking to a lawyer, judge, or journalist on the case, "What is it that I'm allowed to repeat from this conversation, and what is it that I'm not allowed to repeat from this conversation?" And if the lawyer says, "Don't repeat this," then the burden is on the commentator to keep the information confidential. And so we would encourage the commentator to clarify confidentiality, and we believe that the code should state that the commentator must maintain confidentiality if information is learned with a promise of secrecy.

There's another problem with confidentiality that arises and that's when lawyers who are involved in a case later become commentators on it. We saw that of course when some of the lawyers in the Simpson criminal case became commentators in the civil matter. Laurie and I became very concerned about that. The reality of course is under the codes of professional responsibility the duty of confidentiality is permanent. It doesn't end once the trial is over. When somebody is on live television there is the need to formulate an answer in a split second. The human brain isn't uniquely divided in terms of where information is learned. Seems to us there's a great danger, when somebody learns confidential information as a lawyer and then serves as a commentator, that it might be revealed. So our belief is if somebody has served as a lawyer in the matter, in any capacity, they should not then be a commentator on the same matter later.

Another aspect of a code of professional responsibility, in addition to competence and confidentiality, concerns conflicts of interest. Think about the Code of Professional Responsibility for lawyers. Many of the



provisions of course deal with conflicts of interest. Conflicts of interest arise for commentators as well. There's the reality that they might have had prior relationships with the parties or the lawyers. It's a small legal world. It's not surprising that many who have served as commentators have served as co-counsel or adversary counsel of someone involved in the case. It's also possible that the commentator made a mistake in the outcome of the case, direct or indirect. For example, early in the Simpson proceedings, the district attorney had to make a decision as to whether or not to seek the death penalty. Some of the commentators in the Simpson case were criminal defense lawyers in Los Angeles with clients who were also awaiting a decision by the district attorney as to whether to seek the death penalty. Because of the proportionality analysis, what the district attorney decided in the Simpson case could affect whether the death penalty would be sought in their case. That is an important involvement.

Also there can be relationships based on political or organizational affiliations. I had the experience during the Simpson case while I was serving as a commentator for the ACLU [American Civil Liberties Union] of Southern California and was appearing on many issues. I was a member of the board of directors of the ACLU of Southern California. How I should handle that as a commentator? And I will let Laurie tell her own story about the lawyer for the ACLU of Southern California who was appearing in the proceedings. Now the usual answer to conflict of interest is disclosure. So I tried to be very careful whenever I had any form of conflict to disclose to the reporters. Then I discovered that it never appeared in the print story. It never appeared in the sound bites that they used on radio or television. Whatever the disclosure I gave, it never made it, or was never conveyed, to the public. The media time is too precious and they didn't regard it as sufficiently important. And so Laurie and I decided that a code of ethics should include a burden on the part of the commentator to disclose any conflict of interest, a burden to do everything possible to communicate that to the public, and also a burden on the media to disclose conflicts of interest to the public. In order to evaluate the worth of somebody's words, it's essential you know where they're coming from and what their conflicts are, and therefore the media should be conveying that to the public.

As we've watched the recent proceedings, we realize that there are some key distinctions that need to be drawn with regard to the role of the commentator. It's crucial to distinguish when the commentator is there as a neutral describer of the law from when the commentator is there as an advocate. It's fine for the commentator to be in both roles, but the commentator should be clear in his or her mind which role is being served, and that should be communicated to the public as well.

There are times when I have seen my sole task, as best I can is simply to describe the law impartially. And there are times when I'm giving my opinion. There are even times when I'm there to advocate a particular viewpoint. And I need to be clear to myself and to the media, and the media should be clear to the public as to how they're using the commentator. Also I think it's important to draw the distinction between the participants who are speaking to the media and the commentators who are speaking to the media. Those are vastly different roles.

Laurie mentioned that the last eighteen months I served as the chair of an elected commission to rewrite the Los Angeles City Charter. It turned out to be intensely political and it's been very much covered by the media. It's been a different experience to be the subject of the media rather than a commentator. When I read stories that begin by making fun of my voice, my hair and my glasses, I realize I like being a commentator much better. Being a subject has changed the way I read the newspaper. Ever since I was old enough to read, I'd always start with the sports section and then go to the front page. Now I start with the editorial page to see what they're saying about me. As recently as yesterday both Los Angeles newspapers had editorials about our commission. And then I go to the metro section where they usually cover us. Then I go to the front page to see if there's anything about us. And then I go to the sports section. But the reality is that, as a participant, I often have to speak to the media off the record. As a commentator, I don't ever need to speak to the media off the record. As a participant I often have to be very guarded about what I say. As a commentator, I express my opinion, I say what I know; if I don't know, I say "I don't know." As a participant, I have a particular goal that I'm trying to achieve. As a commentator, I'm just trying to inform and educate the public. And I think that any code of ethics for commentators needs to draw a clear distinction between the individuals who are participants in matters when speaking to the media and those who are commentators. There are burdens on commentators that may not be there on participants, but there are also ethical duties of participants that may not be there for commentators.

*DEAN LEVENSON:* Well, as Erwin mentioned, you can get yourself into the knotty issue of conflicts. I think I win for this one. During that O.J. Simpson case when the ACLU lawyer showed up, I was hooked up live to do commentary, and I looked down and who was the lawyer? Happened to be my husband. I was asked over my ear piece for my commentary. "What did you think of that new lawyer?" the New York producer asked. I thought I'd provided the best commentary of the day

when I looked up and I said, "Oh, that guy, I think he'd be great just standing there naked saying nothing." It's probably best at those moments to explain your conflict of interest.

Indeed, conflicts come up in many ways, and what we've realized as we've continued to analyze, and I will emphasize, is that this code of ethics is more of a process than just something you set in stone. Nobody came down off the mountain and handed us a code of ethics. That's why today's program is so important, because we have an opportunity to work with it and reframe it. And there are many issues we might consider while we're doing that. One is this idea of how do participants in a proceeding provide their opinions as opposed to a descriptive analysis that we would expect most commentators to provide. That's why we're intrigued, in fact, a bit questioning of the NACDL proposal that Mr. Scheck has drafted that has in it a provision that says it's a responsibility of the commentator to educate the public about what it means to be liberty's last champion. What is that about? Does that mean that lawyers from that particular organization, when they provide commentary, are not supposed to be perfectly objective? What does it mean to be liberty's last champion? Is the media to be used as a bully pulpit? How much of this type of role should be included in the code of ethics?

There are other issues that the code of ethics needs to address. Things like, what happens when the commentator has access to people who are under gag orders? Now in that role, are they free to talk to them, and is the problem the person who might be violating the gag order, or is the commentator/lawyer an officer of the court and therefore should not engage in those practices? Likewise, when you have jurors who are dismissed and the media is chasing after them, and you might have an idea of how to reach them, do you participate in that or do you maintain your role as an officer of the court?

There are issues regarding the business of being a commentator. Now I will say this for those who are guilty. If you don't have your own show, don't give up your day job to become a legal commentator. Neither one of us went into this for money. Neither one of us became rich off doing it. Frankly, we do it as a public service. But we've all seen, and I think you know who they are, those lawyers, not those who are hired by the media full-time to have a show, but those lawyers who go on for commentary to use it as a blatant mechanism for lawyer advertising. Is this appropriate? Do we want the media to be used in that way? Now, much to their surprise, they often get many more letters from people who are in prison than people who can pay their retainer, but they may not know that when they go out to do their commentary. There's no way to legislate that people, lawyers, must provide public service. Indeed, it's

probably unconstitutional to bar payment. But are there any restrictions that should be put on how, when and why a commentator is paid?

And then the issues of remedy. If you have a voluntary code, how are you going to enforce it? Is it the function, the responsibility, of other commentators to blow the whistle? It doesn't make you real popular, to blow the whistle when you see a commentator doing something that you think is inappropriate. Should we be talking about each other in this way? Is it our job to educate the press regarding the role of a commentator? It became frankly a very difficult and personal question for me when one of the criminal lawyers in the Simpson case, not Mr. Cochran, not Mr. Scheck, became a commentator in the civil case. I could foresee the conflicts he would have. Was it my responsibility to bring those to the attention of the media?

These are just some of the miscellaneous issues that our code of ethics is trying to address. And we are very pleased to see that people are starting to worry about it. Worrying about a problem is the first step toward solving the problem.

*PROFESSOR CHEMERINSKY:* As we've watched the commentators in the recent impeachment proceedings, we've come to the conclusion that merely a code of ethics is not enough, there needs to be professional training of those who are serving as commentators and using commentators. We've been distressed at times to turn on the television and radio and hear people who claim things about the law with regard to the impeachment that are just flat wrong. I've been very distressed when I've heard commentators repeatedly giving the definitive answer as to what "high crimes and misdemeanors" are when of course there is no constitutional answer. The answer is in the "ayes" and "nos" of those who sit in the House of Representatives and the Senate. And so we believe, since commentators are here to stay, we should not only have a code of ethics, but also begin to develop some way of training people to become commentators. We have some suggestions in that regard. First, professional ethics courses should consider the ethics of speaking to the media. An ever-growing number of lawyers are going to have the opportunity to speak to the media. As media attention to the legal system increases, more and more cases are going to be covered by the press, and so in professional responsibility courses in law school there should be consideration of when it is appropriate for a lawyer to speak to the press. When does it serve a client's or side's interest to make statements to the press? What statements are appropriate? There's a rule in the Model Rules of Professional Conduct that deals with

statements to the press.<sup>3</sup> Law students should be educated with regard to it and the cases interpreting it. And also some of you in the class, at some point, will be asked to be legal commentators. At least a short amount of time in the classroom should be given to raise some of the ethical issues that we're talking about today. None of this need take a large amount of time out of a professional responsibility course, but it shouldn't be ignored either.

Journalists should also take professional responsibility courses with their field. They should have some training in the appropriate use of commentators and the ethics of using commentators. The reality is commentators develop without any overall thought as to their best use or their ethical use. Journalists should be encouraged to be as much a part of this process as lawyers and law professors.

Second, continuing legal education programs should be devoted to the ethics and practice of being a commentator. Most states now require some form of continuing legal education for lawyers. One of the courses that can be offered should concern being a commentator. As Laurie mentioned earlier, some of this should just consider the practice, or trade, of being a commentator. Again, the many mistakes that I've made might be able to help others avoid them. I was slow, but it took me a long time to realize that when you're on live television, you don't have to answer exactly the question that's put to you. As a law professor, I tried very hard to answer the question that was put to me. But often the anchor is just saying the first thing that comes to his or her mind. And if it doesn't seem the appropriate question, then it's okay to sort of answer it but then say what you think is important. It took me much too long to realize that it's okay to say to the anchor during the commercial break, "You know, you might want to think about asking me about this; this might be the appropriate thing to talk about." Then you realize that most anchors really appreciate it. It took me a long time, much too long to realize that when people come to my office for a sound bite, if I have one point I want to get across, to say the same thing over and over as much as possible to almost every question, because the reality is they're not going to play the whole interview consecutively. They're going to cut it up. And the only way I can have any control over what I say is to get that same message across over and again. Now these things may be obvious to you, but since it took me a while to learn them I figure, well, maybe other commentators can learn from them.

There are other things, just in terms of practice craft, that commentators learn. It took me a long time to ask before we start, "Where I am supposed to look? Should I look at the camera or look at the anchor?"

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3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6.

So those things are important. But those things of course pale in comparison to the need for training with regard to the ethics of being a commentator, and continuing education courses can do that.

There's also a need to educate the public with regard to the role of commentators. This of course is much more difficult to do because now there's an obvious forum or venue for such education. But commentators have this responsibility. We can write op-ed pieces in the newspaper. We can write essays in magazines. When we're participating in media shows, we have the opportunity to talk about commentators. We should discuss the ethics of being commentators as well. The premise for all of this is that for good or ill, commentators are here to stay. Commentators can do so much good. We believe this can best be achieved by developing a code of ethics for commentators.

As Laurie says, it's not an event but a process. We applaud the efforts of groups like the National Association of Criminal Defense Lawyers and the American College of Trial Lawyers to develop a code of ethics. We hope others will join them and us in this endeavor.

*MR. HARRIS:* Thank you Dean Levenson and Professor Chemerinsky for that presentation. I'm fairly confident that the panel will have some response to your proposals today, but we're going to have to wait until after the intermission. We'll take a ten minute intermission, and set up the panel on the stage. If anyone has questions, there will be an usher standing right here, and if you want to fill out your questionnaires, bring them down and give them to the usher. I'll see you back in ten minutes. Thank you.

(INTERMISSION 10:15 A.M. TO 10:25 A.M.)

*MR. HARRIS:* Welcome back. I'd like to begin by introducing Professor Fleissner, who has agreed to moderate this morning's panel discussion. He's uniquely qualified to serve as a moderator in this capacity because, although he serves on the faculty here at Mercer Law School, he also has served as a former federal prosecutor.

*DEAN LEVENSON:* Who hasn't?

*MR. HARRIS:* He also is currently the Senior Associate Independent Counsel on the matter of the *United States v. Henry Cisneros*. And in addition to that, he has also served as a commentator. But, as I thought back in the green room, the qualification that is probably going to best serve him is that he's used to dealing with unruly law students, and this panel is going to be handful. So I'll turn it over to Professor Fleissner.

*PROFESSOR FLEISSNER*: Thanks, Jeff. Ladies and gentlemen, we live in a century in which many of the historical milestones of public life have been trials. These trials are major events that mark and define periods of the century and often become the focus of intense public attention and vehicles for confronting vexing social issues. We also live in a century that has witnessed an unprecedented increase in access to information through the media. Even before television, cases like the Lindbergh kidnapping case were extensively covered. In the new information age, it is easy for the public to indulge its keen interest in information about the most recent significant trial, and when proceedings are broadcast live on television, trials can become shared national experiences in real time, like the Simpson case.

Given the public's demand for coverage of the continual succession of sensational trials and the media's growing ability to supply it, the label "trial of the century" has become an empty cliché. However, it may be accurate to say that these trends have combined to make this the century of the trial. If the twentieth century deserves that mantle, it is possible that a hundred years hence, the next century will vie for that title because there is every reason to believe that many of the milestones of the next century will be trials and that public and media interest will continue. That is why our topic today is so important. Legal commentary by attorneys has become an inherent part of the coverage of the continuing series of significant trials and may profoundly affect the public perception of these landmark national events.

Several years ago, as you have heard, Dean Levenson and Professor Chemerinsky helped provoke an important dialogue about the idea of a code of ethics for legal commentators. Thanks to their leadership, that dialogue continues today with this distinguished panel. Your programs contain biographical information detailing the impressive careers of the panelists, and I suspect a good measure of that information is already known to you, so I simply will extend some brief words of welcome to our panelists.

You have already been introduced to Dean Levenson and Professor Chemerinsky. And I'd also like to let the two of you know, Dean and Professor, that you have a devoted fan club among the student membership of our law review. They are very grateful for and impressed with your generosity and graciousness in helping develop this Symposium. Thank you, and again welcome.

Next to Dean Levenson is Mr. Raymond Brown. Mr. Brown brings substantial experience as a trial lawyer, a legal commentator, an anchor of several TV legal affairs programs, and as a much sought after speaker and teacher. I'm proud to say that Mr. Brown has served as a faculty

member of the National Criminal Defense College which is based at Mercer University. Mr. Brown, welcome back to Mercer.

Next, I'd like to welcome Professor Paul Butler of George Washington University Law School. Before joining the law school faculty, Professor Butler gained experience as a judicial law clerk, an attorney in private practice, and an attorney with the Department of Justice. Professor Butler is a very well-regarded scholar who is frequently asked to provide legal commentary in the print, radio and television media. Thank you for being with us today.

The gentleman sitting next to Professor Butler is Johnnie L. Cochran, Jr. As one of the most accomplished and best known lawyers in America, Mr. Cochran brings a special perspective to our topic. He has handled many high profile cases under the glare of media scrutiny, including cases as a prosecutor, a criminal defense attorney, and a civil litigator. You may have even heard of one or more of those cases. Now he has become one of the most prominent legal commentators of our time, including hosting his own TV program. His is a household name and, Mr. Cochran, we're delighted to have you in our household today.

We are also very pleased to have with us Mr. John H. McElhaney, a partner of the Dallas firm of Locke, Liddell & Sapp. Mr. McElhaney not only brings to the table extensive civil trial experience and appellate experience gained during a distinguished career as a litigator, but he served as a member of the ethics committee of the prestigious American College of Trial Lawyers and was instrumental in drafting a set of guidelines for legal commentators. Welcome, sir.

Next is Professor Barry Scheck of the Benjamin N. Cardozo School of Law. Professor Scheck provides an excellent example in my opinion of the contributions a law professor can make as a pioneering scholar, an outstanding teacher, a superb practicing lawyer and a force for the betterment of society through efforts like the founding of the Innocence Project. He too brings a special outlook to our topic, handling many high profile cases, serving frequently as a legal commentator and participating in the writing of the National Association of Criminal Defense Lawyers' "Ethical Considerations for Legal Commentators." Professor, welcome.

To Professor Scheck's left is Mary Tillotson. Ms. Tillotson brings to our discussion the perspective of an accomplished and respected career journalist, and she is not a former federal prosecutor. She is host of the popular CNN talk show *CNN & Company*. Her career has included work as an anchor and correspondent covering the White House, the Congress, national elections and political conventions. Ms. Tillotson, thank you for joining us.



Let me say a word about the format for this discussion. There is no rigid format. I'll pose several questions to the panelists and then recognize others wishing to respond and let the discussion run its course.

Having heard introductory remarks by Dean Levenson and Professor Chemerinsky, I'll begin by directing a general question to our six other panelists beginning with Mr. Brown, and the question is this: WHAT IS THE STATE OF LEGAL COMMENTARY IN THE MEDIA? IS A CODE OF ETHICS FOR LEGAL COMMENTATORS A GOOD IDEA?

*MR. BROWN:* I think a code is not a good idea. I think the state of commentary is wildly uneven, like the state of commentary and public discourse on a wide variety of issues in public policy. If I were on television, that's probably all I'd get to say. But let me explain a little bit of my answer.

I listened very carefully to Laurie Levenson and she reminded me of my yoga teacher because she is—my yoga teacher, right now I guess you can't put your chin on your toes—my yoga teacher is professionally putting her chin on her toes and then saying, "Well, don't worry about how far you get into the pose, it's just being in the moment that counts." And so there is a difference between process and result. Debate is helpful, and I'm glad that Professor Chemerinsky and Laurie Levenson have done what they've done. We need to have conversations, but for the following several reasons, a code of ethics for commentators is a bad idea. I also say this knowing that my good friend Barry Scheck, who I've known for more than two decades, is an advocate for such a code.

First of all, there are profound problems to process that result from codes that are aspirational and voluntary. They remind me of the constitution of the former Soviet Union, much talked about, little followed. No matter how noble the thoughts may be; no matter how sound the logic. So I think as a general principle, codifications that kind of float in air free-standing and are disregarded willy-nilly because they are essentially unenforceable create problems. That's the kind of thing that usually my friends who are prosecutors are talking about in terms of statutes that are not used. I think that we have had a discussion here which insults the concepts of journalistic efforts to the extent that the idea of being conflict-free and competent is at the heart of these proposed ethical rules. Any journalist who doesn't honor those principles should be defrocked.

*DEAN LEVENSON:* Thank you.

*MR. BROWN:* And so I think that we are assuming, in a way that reflects a certain amount of hubris, of which all of us at the bar are

capable of on more than one occasion, that journalists have no ethics. In fact, no principle articulated here is one that could not be discussed with journalists and wouldn't be applauded by them, and I noticed at the end of Professor Chemerinsky's very interesting and articulated comment about conflict that the one he talked about which had the most punch was that we should make sure we talk to the journalists about how subtle conflicts can be among lawyers. So to the extent that this is a conversation that ignores journalistic ethics I think it creates overlap and is an example of the arrogance of our profession. I think however there is a good reason for that, and that is Professor Levenson and Chemerinsky have taken on a huge, huge concept which we call the media.

The media, first of all, differs—there's a difference between the local newspaper and CNN, and a wide variety of differences in outlets in between. But more important for a person in this discussion, in fact the first principle articulated by Professor Chemerinsky about why we should have commentators, is that there is a pedagogical function to be performed. Well, guess what? On Ms. Tillotson's show, on Court TV, and on a few isolated islands in the chain in this archipelago there are places where the focus seems to be informational and pedagogical. But understand the mass media in particular is a large capitalist enterprise, owned by global corporations whose interest is the bottom line. And by the way, you're the prime demographic they're after, and they want your dollars, and they want to entertain you in order to do it. So in most places the line is frequently blurred. Entertainment is the prime focus, and so to that extent you have, once again, a set of standards that will be used largely to be placed at the bottom of the kitty litter box, they will be ignored and that, I think, is a bad idea.

There is at least one other principle that is important to understand and that is something that poisons this debate. At the time that Barry proposed his code, I was a member of the NACDL board. We had some spirited debates as we often do. But the subtext among many younger members in the organization who would hear these old guys like Barry Scheck, who is—I mean, Barry, we're the same age but he's old—we can't walk down the streets without people running up to him and kissing him and embracing him and hugging him, wanting his autograph, and the response of younger people is—and this really isn't just aimed at Barry but to those of us who've been in the media—you guys have got yours, and now you want to draw up all these rules designed to keep us out. At first blush, you might say, well, that's kind of an unreasonable response but let's go back to the canons, I mean the reasons that we don't call them canons anymore is that we know they were not canonical when they were proposed. It is true that the bar is

something like a feudal guild, less like a capitalist enterprise, and it does have some first principles. But it also has self-protection at its heart. And so for example, when Canon 20, which barred lawyers from talking to the media, was proposed with the original canons in 1908, along with Canon 27 that banned advertising, its purpose was in large measure, according to Henry Drinker, who was chair of the first grievance committee, to keep the Russian Jew boys out of the profession. These large east Europeans coming in were potential clients, and the old liners in Philadelphia and elsewhere who dominated this profession didn't want lawyers rising from those immigrant classes as competition. So you have to look beyond. By the way, I'm not suggesting that either Laurie or Erwin or Barry or anybody here is proposing a codification because they really want to steal all the limelight. I am suggesting, for example, it might be a lack of grace for a lawyer to use his moment in the sun to get clients. Guess what? We live in a raucous, capitalist society and it's going to happen. And our posing of codes ignores the fact that the people who will take the time to understand, for example, that you already have an obligation under Rule 1.6<sup>4</sup> will be people who will be mindful of these problems anyway.

And then my last point—I promise this is my last—all of this sucks energy away from what is a far more pressing problem, and ironically in the American College of Trial Lawyers' rules this is where the bulk of the emphasis is, and that is the fact that the great dark secret in the criminal justice system is ineffective assistance of counsel, and the many, many defendants who are poorly represented. A lesser problem, but still a tremendous problem in the civil justice system, is the unevenness of representation, and as that relates to this discussion today, a failure to understand the ethical and moral imperatives of Rule 3.6<sup>5</sup> which are vague, evolving, and in flux. That is the rule that governs extrajudicial statements and is the real issue we should be focused on. It is the lawyer who talks to the cameras when he has a client and perhaps isn't conscious that his own ego is driving that conversation. It's the lawyer that doesn't understand, if you start a duel in the media about a case, you may be in deep trouble and you may very well lose. It's the lawyer who doesn't learn those little lessons that Professor Chemerinsky gave you at the end of his talk about how to use the media effectively. Those are the issues that we should be focusing our energies on. We should certainly talk about commentators and we should castigate others. And one final word. This conspiracy of silence is not something that I think we ought to subscribe to. It is true that

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4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6.

5. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6.

there is something of grace that says I didn't read the discovery and it's unfair for me to use this person to dog Johnnie or to dog somebody else. But the other truth is that if you're not going to tell truths, that if you're not going to see when lawyers do blatantly unethical things, which they sometimes do on the media, if you're not going to challenge them, if you're not going to speak about it, then stay off the media.

*PROFESSOR FLEISSNER:* Professor.

*PROFESSOR BUTLER:* Janet Reno, in her early days as Attorney General, was asked to rate the United States criminal justice system on a scale of one to ten, with ten being the best of all possible systems. She gave it a one. I think that's a little harsh, but I agree with her more than I disagree. I have very little respect for criminal justice in the United States, and I'm especially concerned with gross racial inequities in the system. In terms of that disrespect, and especially in terms of correcting it, I'm proud to be on this panel because no one has done more than Johnnie Cochran to help correct those conditions, especially in his civil rights work in Los Angeles, and no one has done more than Professor Scheck, especially in his extraordinarily important Innocence Project.

When I think about these inequities, I get angry. I want to do something about it, and so in addition to my scholarship and my teaching, I do legal commentary. The Chinese character for revenge is a character that means "tell ten families." And so when I do legal commentary, I tell ten families. What does that mean? It means that I have an agenda. It means that I have opinions. It means that I have friends in high and low places. But you know what? I challenge you to find a lawyer, a journalist, indeed a human being, who doesn't have opinions. I think objectivity is a myth, and so I'm not entirely in fear of what it would mean to disclose one's interest, because I think the public understands that we all have interests.

I'm glad we're having this discussion because I think it's important. I want to highlight three concerns I have with the proposal for a code of ethics. Lawyers shouldn't predict the outcome of cases. We've heard that. Well, why not exactly? I teach criminal procedure. Of course, I'm a former federal prosecutor. If Greta Van Susteren asked me, "There's this motion to suppress the bloody glove, should it be suppressed? Will it be suppressed?" Why can't I answer those questions? I think that's an important teaching moment if I'm on CNN. I get to educate the public about the Fourth Amendment, which absolutely means that that glove should be suppressed. I get to educate the public about judges' disrespect for the Fourth Amendment, which almost invariably means

that it will not be suppressed, regardless of what the Constitution demands. I think those are two important things for the public to know, and I'm not sure why I shouldn't be able to use the access that I have to the public to communicate that lesson. I'm not sure why I shouldn't be allowed to tell the public: "Those police officers beat Rodney King, and they ought to be convicted."

According to the proposed code, you have to know a lot. In fact, you have to read all the transcripts or you have to be familiar with all the evidence. I have a concern about that, actually, two concerns. One is a concern about a certain elitism in that proposal. Another though more basic concern is what's "everything"? If we talk about Rodney King, there's a revision of that trial. Just looking at what was presented to the jury isn't enough to understand that case. Just watching the famous video tape that was presented to the jury isn't going to give you all the information you need to know. You should have watched the whole tape from when the police officers first encountered Rodney King until when they left him alone. So what is the limiting principle here? Is it just what's presented to the jury that we should be familiar with, or is it more in order to make truly informed decisions? I'm not sure that there is a limiting principle that would work.

I'm also concerned about a certain elitism in that proposal. As I think Mr. Brown pointed out, it's often the case in codes of ethics. According to this proposal, you should read all the transcripts, or better yet, as Laurie mentioned, you should attend the whole trial. Well, who can do that? And I feel especially qualified to make that point on this panel because on this panel I'm speaking for the little guys.

On Thursday, I got a call from a *New York Times* reporter about this panel. He couldn't get in touch with anyone else who was on it, so he asked me what it was about. I told him what I knew about the panel. He said, "Thank you very much." He was about to hang up and then he said, "One more question." I said, "Sure." He said, "Who are you and what are you doing on this panel?" And I thought that's a pretty good question actually. But you know who I am? I'm John Q. Commentator and, in a sense, my name is legion. Most of the people who do legal commentary on the local news or on talk radio, who local reporters call up for their local papers, they're not Johnnie Cochran; they're not Barry Scheck. They're practicing lawyers, hard working law professors, and they don't have the time or the access to go to a trial everyday. Actually, it's probably not fair to say that they don't have the access, but they certainly don't have the time to go to a trial everyday or to read all of the transcripts. Thanks to Mr. Cochran, there's a new respect for African-American lawyers in this country, and so people are interested in what we have to say; thanks to people like Ms. Tillotson, there's also

respect now and access for women lawyers. All of these people have jobs. They've got bills they have to pay. But they also have very important views, and so if there is a requirement that they spend their time, again, learning everything there is to know about these cases before they're qualified to answer the limited questions that reporters ask, then we're not going to have people like these working lawyers and working law professors on television. In fact, I suspect the main people we'll have will be people like the woman we saw in the video who quit her job in order to do this full-time, and I'm not sure how that would advance legal commentary.

My last point, is it a proposal that's likely to be adopted? I don't think so, and not even if the adoption is in a voluntary sense. Media access, legal commentary, is about power. Okay. It's about access. It's about influence. It's about power. This theatre is it—by the way, is it named after Frederick Douglas, the Douglass Theatre? It's not Frederick Douglas. It's another Douglass.<sup>6</sup> Frederick Douglas said something relevant about power. He said power concedes nothing without a struggle. It never has and it never will. Ethics codes are about morals, so what they're about in this instance is someone else's view about a moral way to use my power. In my responsible use of power, my access to the media, I'm not sure I want to follow someone else's morality about the responsible ways to do that. I need to do that on my own terms, precisely because as Erwin and Laurie have so eloquently pointed out, the stakes are high. Thank you.

*PROFESSOR FLEISSNER:* Mr. Cochran.

*MR. COCHRAN:* Thank you very much, Mr. Fleissner. And to the college and the panel and to the audience, it's a pleasure to be here with you today. I certainly have the same concerns that Messrs. Brown and Butler have about any thoughts of elitism, but I don't see these voluntary rules quite in that same way. First of all, I'm very sensitive to the argument that the good lawyers don't need them and the bad lawyers won't follow them because they are voluntary, but I approach this from a little different category.

First of all, to endorse what Professor Butler has said, I think this whole idea of legal commentary is a very, very important aspect of American society, and I think that it is encouraging to see that there are a number of women, minorities, people of color, as legal commentators,

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6. The historic Douglass Theatre in Macon, Georgia is named after Mr. Charles Douglass, an entrepreneur who established the theater in 1921 to serve African-American citizens in the Macon community.

something we haven't always had in this country. So it's a burgeoning industry that's here to stay. I think as Professor Chemerinsky said, it's here to stay and it's going to continue to evolve. But there's another side of me that endorses what I know Barry and the others are trying to do with regard to this code of ethics, and this whole idea of competence, I don't think, necessarily excludes. I think it can be used to enhance, and I tell you why. I'm thinking of my—now I'm stepping back from being a commentator and becoming a participant as Erwin talked about—I have seen what happens when you have some of these commentators who aren't necessarily competent or, perhaps more than that, who lack experience or get co-opted by the process. And that's a real problem.

In Los Angeles, and Laurie would know this person I'm talking about, we have a defense lawyer who covered the Simpson trial everyday for a local station. So we started off feeling, well he's an African-American. We felt very secure that here was a guy who knew what he was doing and he'd be very fair. Somehow during the course of the process, he got caught up and maybe they told him, "Look, you've got to take this position in favor of the prosecution." He was their best friend. Now, he's a former police officer. We took to calling him "Officer so-and-so," even though he's a lawyer. He thought he was going to get a television show out of it. He got totally co-opted.

I'll tell you why I have this concern. Think back to October 2, 1995. As many people will know, that was the day we knew a verdict was coming out on the Simpson case. The verdict was announced at ten o'clock Pacific time, on October 3rd. I venture to say that ninety-nine percent of these commentators told the American people, "Tomorrow, O.J. Simpson will be found guilty." People back east sent out for pizzas that were never eaten, they were so upset. By virtue of all these prognostications by people who had placed their own personal views in it, it had gotten so co-opted and carried away. I don't mind so much them having an opinion at some point, but what concerned me was many of these people had never tried a criminal case. You saw the gentleman, Mr. Barrington, who's only tried two cases. It's really hard to educate the public when you haven't been there, when you haven't picked a jury, when you haven't cross-examined, when you haven't dealt with these expert witnesses, when you haven't seen closing arguments. When a jury listens to a case that lasts one year, and you have more than one thousand exhibits, and the jury comes back in four hours—they haven't had a chance to go through those exhibits. These jurors are from that community. They're not going to find somebody guilty by having done that. When that jury comes out at perhaps two o'clock and says "We have a verdict," and the judge says, "Well, take these forms back there, you've got to make a decision as whether he was armed or the degree

... ” If anybody had had any experience, they would have known the jury that comes back eight minutes later, they can't have determined whether he was armed or it was first or second degree. Anybody would have known or should have known that that was going to be “not guilty.” But these commentators, they missed them. That eluded all these so-called experts. Now we were still nervous, make no mistake about it, but we understood that in eight minutes this jury that had been there a year and were paid five dollars a day were not going to find this guy guilty under these circumstances on this case.

Having said so, I endorse the need for additional commentators. Now should that exclude people? Maybe some who haven't had experience. But I endorse clearly what Raymond is saying. This idea that we see people who never got a chance to talk before. How many of you saw this young lady Cheryl Mills this week? You know, now it's a new day when people are applauding a young African-American, who works in the White House, who perhaps gives the most stirring closing of all these lawyers, and I think that's very, very important. And yes, Paul, I think it is very important for you to be able to talk about the Fourth Amendment. One of the reasons why I believe in cameras in the courtroom and the importance of knowledgeable commentators is that—and Barry I think will endorse this—one of the great moments of the trial for us was to see Dean Gerry Uelmen<sup>7</sup> talk about the Fourth Amendment. We would sit there in awe. He understood the Fourth Amendment. And when we had finally at the end of the trial—the affiants of the search warrant had been destroyed, one had committed perjury, Detective Fuhrman, and the other had been accused by even Ito of lying in the declaration, and Gerry Uelmen stood up and said, “What about it? Where is the credibility? How can you not suppress this evidence?” Judge Ito basically just shrugged his shoulders, “You know, what am I going to do here?” That needed some lawyer who understood, to say, “Wait a minute, these judges are looking the other way on the Fourth Amendment.”

That's a fundamental thing for kids who understood for the first time about the Fourth Amendment. That's very, very important. This was a civics lesson. So when you see in the closing argument where I stood up and talked about an obligation to send a message if you're the conscience of the community—I've been giving this same message for thirty years to mostly white jurors because they are the conscience of the community—so nobody needs to criticize you. You know, I'm not sensitive about that, but to criticize you about that, they don't know

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7. Gerald Uelmen served as Dean of Santa Clara University School of Law from 1986-1994.



what they're talking about. You do that in every case. And you've seen it in other cases; later on, of course, in the cases of Nichols and McVeigh. They talk all the time about sending messages in these horrible cases. But for that time, people said, "Oh, that's a terrible thing to say." But they never tried the cases. So how should they be the ones translating?

But there are enough competent people who have the experience to do that. And, yes, you do need some efforts in confidentiality. I think that doesn't necessarily mean that you don't have a reason to do it. The reason why I became a commentator—I mean, I would never give up my day job—when I went to Court TV, I wouldn't be at the vagaries or the mercies of people around television. Believe me. This is a situation where I wanted to—it seemed to me there was so much to do, there was so much misunderstanding out there about just the role of an advocate. The trial, the way I saw it, was about the effective assistance of counsel. And if that's what it really is—when Barry talks about liberty's last champion—if we have a system that has a strong prosecutor, a strong judge, and weak defense counsel, what kind of system is that? It falls apart. So we were trying to be effective advocates. We can't make our decisions based upon what's popular. We need to make it based upon what's right. Somebody has to speak up about that. We clearly have an agenda about it.

The only other thing I'd say with regard to this whole thing about commentators, I think another reason we need this is that we need to point out some of these things. Now I notice that people who are very much of a conservative persuasion tend to go on these shows and are much better prepared than the other commentators. In fact, if you listened to the comments, and I saw them yesterday, they've all read the *Federalist Papers*. They've all done—they've really done their homework, and that's because there are a couple of institutions that give them their information. They speak from the same hymn book. Many of the people, the moderate, liberal people are just speaking from their hearts. You know, they're all, "Gee, this is the right way and the thing to do," and it's a very difficult battle, so I think that there needs to be this kind of balance if we're trying to convince the American people and educate them.

And finally, I do endorse this, but I think I endorse it primarily because it's voluntary. It has to be voluntary. But I want qualified people to do it and I do think overall you have to give your opinion. I'll give you an example about a trial. It is not something that lends itself to keeping score. If you—Barry will tell you this—when we would leave court, and at night we wouldn't watch a lot of television, but we'd call each other, and as the media would describe what happened in court that day, we thought they were talking about a different trial. That

really is the truth. They would say things like, "Defense suffers staggering blow as Judge Ito denies two more defense motions." Well, he denied most of our motions. He denied seventy-five percent of our motions. But what had we done in cross-examination? What had we done to the witnesses? That was where the battle was. So they gave this message out there that probably was not altogether fair, and that troubled us a lot. And so I think that it's hard to prognosticate at the end of each day.

And another good example, if any of you followed our good friend Roy Black, and we were covering that trial on Court TV, in the Marv Albert's trial. I remember the first day, they would say, "Why did the prosecution bring this case?" I think Geraldo was saying, "Let's dismiss it today." The next day they brought that lady in there and the whole thing changed. By the third day they entered a plea of guilty. Be very careful about these prognostications. I think, like the Fourth Amendment, when you have a strong feeling, do that. I think that's very appropriate. But sometimes it's hard to do.

And yet finally, this idea of grading the lawyers. I suppose that when I have clients that come in and retain us, what we say ultimately to them is, "You know, judge us at the end of the proceeding; don't judge us at the end of each day; let's look at the end and see how things work out." That's what this really is all about, and I think commentators need to remember that. So I do applaud these efforts in this ever burgeoning field. A need for education, a need for competence because it's very difficult. I'll end with this statement that one of the ways you know that you're involved in a high profile case is that in my neighborhood the trashmen came on Thursday but my trash was always empty on Tuesday. Now having said that, when the *New York Times'* lawyer quotes the *National Enquirer*, and you become the focus of some of these things, it sometimes could be painful if you would let it distract you. So this is a major, major business vying for audiences like you. It's very important, and I think bottom line, there needs to be at least some guidelines set out to help guide us through this force, not necessarily cut back but to have some standard out there because I think most people do want to be ethical in their responsibilities.

**PROFESSOR FLEISSNER:** Mr. McElhaney.

**MR. McELHANEY:** The question posed to us, "Is a code of ethics for legal commentators a good idea?" I think in addressing that, it's well to step back a little bit and ask, "What are the vices we're trying to cure? Why are we concerned about it?" And there are really some conflicting signals that are at the heart of this question. For instance, are we

trying to constrain what is told to the public because we're concerned about influencing the verdict in a particular case? Are we trying to keep the trial process pure and not let public information out so as to run the risk of an unfair trial? That's one consideration.

Secondly, is it just a more abstract concern about whether we want to keep misinformation from being sent around, and that of course has some very profound First Amendment implications. The questions are, "Should we be that paternalistic," and, "Should we regulate people?" Do commentators really have a right to be wrong? Are we going to try to ethically constrain people's thought processes in the content of what they want to say to the point where we're making it unethical to be wrong?

And then finally there's been sort of an overriding, but not overtly talked about concept for many, many years of the history of the American Bar's attitude and treatment of free press—fair trial issues being misused as a cloak for keeping the legal process secret from the standpoint that we don't want to breed disrespect for the system. We would rather have the public not know all of the intricacies because if they get to see it too close, they get to see the imperfections and the warts on the system. There will be a public lack of acceptance and maybe breeding disrespect for the law, so that this has some cynical overtones as far as, do we really want to be that paternalistic about things? I think there are some analogies between our present dialogue regarding commentators and the free press, fair trial issues that began really in 1934 following the Bruno Hauptmann trial for the kidnapping of the Lindbergh child. That case was the Johnnie Cochran-O.J. Simpson case of the century at that time. Radio had just really come into its own and this case was being broadcast on radio. They had commentators there at that trial, and there were more journalists covering that trial than were assigned to go to France during World War I. It was a terrific, big splash in the media, and the American Bar became so distressed with the apparent circus-like atmosphere in the public's belief that justice was not served by that conviction, and because of the hysterical reaction of the public, that it promulgated free press guidelines and recommendations in the ethics code for the first time beginning in 1936. Those codes had First Amendment problems and they ultimately, in 1976, got to the United States Supreme Court in a very important case, *Nebraska Press Ass'n v. Stuart*.<sup>8</sup> In that case, voluntary guidelines of the press and the bar association, negotiated and set out very thoughtfully as voluntary guidelines, were ordered to be enforced by the trial judge in a very sensational murder trial in Nebraska. The press didn't like it. The press said, "You're infringing on

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8. 427 U.S. 539 (1976).

our First Amendment rights,” and they appealed it on up to the United States Supreme Court. The United States Supreme Court agreed that these guidelines could not be judicially enforced. They were a violation of the First Amendment. The American Bar and many local bar associations had worked very hard. I have a briefcase full of the free press, fair trial guidelines that have been adopted, and the ABA still has them enforced. But with that *Nebraska Press* decision, they fell away and are today largely disregarded.

A problem therefore I think by analogy is, where are we going with guidelines such as are being proposed now? Since the two professors, I think, very wisely say, “Look, we’re taking First Amendment issues out of this equation because we recognize that there are First Amendment problems; we want this to be a voluntary code.” They nevertheless have the problem now—I say “they,” but we have the problem as to whether voluntary guidelines are really going to be a lasting thing and will be enforced in the sense of being honored voluntarily. Or will they go the way of the free press, fair trial guidelines that are largely ignored these days? I think experience has shown us that both lawyers and the press are to a great extent incorrigible in the sense that there are very definite canons that prevent the participants, the lawyers in a case from commenting publicly and trying the case in the media. And the Supreme Court several years ago in the *Gentile* case,<sup>9</sup> basically upheld the right of bar associations to regulate speech and to regulate participants in a trial to keep them from trying their case in the press.

So the question then becomes, how far can we go in jawboning the press, jawboning lawyers to voluntarily extend those concepts to the commentator situation? My belief is that these are worthwhile guidelines and I think the real issue is, can they be sold and can we sustain an effort to continue to educate the lawyers and the participants and the commentators to obey them and to honor them, realizing that we have an inherent tension between the concepts of a fair trial and a free press? The framers of our Constitution made no attempt whatsoever to prioritize between the First Amendment right of free speech and the Sixth Amendment right to a fair trial. And the tension that exists in those two concepts is something that overrides the entire thinking process. For instance, there have been quotes from some of these free press, fair trial cases. Nothing is of higher concern and importance than the manner in which criminal trials are conducted and the public’s right to know, since it’s really the public’s business that’s paramount, or at least a very, very high goal. On the other hand, a fair trial is one of the

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9. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

most fundamental of our freedoms. So to the extent the commentators are tipping the scales or influencing public opinion on those issues is really an insoluble situation, and I think the most that can be done is to recognize that we need to continue to pay attention to it.

*PROFESSOR FLEISSNER:* Professor Scheck.

*PROFESSOR SCHECK:* Actually, how far and how much can you accomplish with these codes? While our experience at the National Association of Criminal Defense Lawyers indicates to me, as far as lawyers go, only a little. I think it might be useful for me to just describe a little bit of what happened when a version of this—and you'll notice it doesn't say code. It says ethical considerations. It doesn't say guidelines. It says considerations. The lawyers didn't like the idea of codes or guidelines precisely because you may call it voluntary but the bar always has a right to discipline lawyers. There was an understandable fear that whatever is said in a code or a set of guidelines or frankly even ethical considerations, if you violate your own groups norms, they can actually take you up in front of any board for using conduct that's "not in the best image of lawyers," or "not befitting a member of the bar." It's like a catch-all provision in virtually every code in the United States. They can discipline you for it, in theory. So people were worried about that.

Interestingly, the other thing that people worried about had to do with free speech. People were afraid that any kind of a code was going to restrict their right to state their opinions exactly as they wanted to state them. And one of the things in Erwin's and Laurie's first article,<sup>10</sup> where they talked about neutrality and balance and objectivity which, in some ways, in their second article,<sup>11</sup> they kind of retrenched from, and I think correctly, we really heard very loudly from our members. "Look, you can't tell us what to say, that's just not right." And I think that is correct.

And Laurie mentioned this one—what do we say in our code? I was very pleased to see that the American College of Trial Lawyers and the National Association of Criminal Defense Lawyers, in the end, when we finally talked to our members and figured out what we could get done, we basically came out in exactly the same place. Number one is competence. That's always the number one thing. If we can have competence everything else would be easy. Number two, when we talk about being liberty's last champions, that's just the motto of our

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10. See Chemerinsky & Levenson, *supra* note 1.

11. See Chemerinsky & Levenson, *supra* note 2.

organization. In fact, what it says is there is a constitutional responsibility to act as advocates for the accused. And when you read further, all this means is the only thing we tell our members is, it's our duty to insure adherence to the presumption of innocence, the burden of proof the government must meet to foster respect for the system of trial by jury, and to seek to improve the public's understanding and appreciation of the Constitution. So basically we were only saying "remind them of the Constitution."

You know, other people in the organization were saying, "Well, if you go on the air, you should never criticize a criminal defense lawyer because it's one of ours." And that's completely ridiculous. If somebody is doing a terrible job and if you think in objectivity and in fairness that's exactly what needs to be said, you have to say it. There should be no lock-step rule. In our introduction we say our purpose is not to constrict or censor the free speech of our members or establish any requirements that commentators always be even-handed or that they should always take one predictable point of view. And, you know, that's really where we came out. Let me say that, by the end, we noticed—the third thing we said—we have a duty to avoid conflicts of interest and we have to protect the privilege. If you really analyze it, what we're saying is, why don't you just follow the code as it exists? So this was finally, in a sense you might say, watered down to certain basic principles and everybody eventually unanimously voted for it including Raymond.

But the debate is good. I mean, I think that actually a lot of this is in some respects misdirected, when we as lawyers have a responsibility to police our own. There have been many absolutely astonishing things done by lawyers once a microphone was placed in front of their faces. They just absolutely forget what our codes are. The poor ol' lawyer that represented Mark Fuhrman, for example, during the Simpson case, when it turned out that Fuhrman had committed perjury. All of a sudden he gets on television and he says, "Oh, my God, I can't believe he said that. He's a liar, et cetera." Saying all these absolutely horrible things to cover himself when ethically all he had to do was make what we call a noisy withdrawal. He just says, "I now resign as Mark Fuhrman's lawyer. Read what you want into it."

What happened with Bob Kardashian, our colleague and a person that I like a lot, and his book with Lawrence Schiller in the O.J. Simpson case, was absolutely outrageous. To print a whole book and all these confidential memos, which are then turned around and used in the civil trial without permission of the client, is, you know, very much an ethical violation. What about the lawyer for Paula Jones, the first lawyer, who when he resigned from the case said, well, "While this woman's defense is being paid by conservative lobbyists groups, she didn't say anything

to me initially in our conversations about any peculiarities of the President's . . . ahh, ahh . . ."

*DEAN LEVENSON:* We get what you mean.

*PROFESSOR SCHECK:* Right. And finally he said, "Well, she and her husband are from the nut circuit." Now, I mean, you know, maybe he believes all of that, but it's outrageous for these kinds of things to be said, and I can go on and on to tell you about some of these things. They are properly covered by a code because all it's really saying is your normal responsibilities as a lawyer do not disappear when you get on television, and the same thing is true for conflicts of interest. I mean, some of these things that were mentioned, well, how could you do commentary on the O.J. Simpson case, the civil case, when you represented him in the criminal trial? And to just to tell the audience, "The client says it's okay for me to say this."

Initially, when I was approached by all the networks to do this, I was saying, "Gee, you know, I don't know if I can do this." The first thing I said after the Simpson case on an ABC *Viewpoint* is that somebody ought to write a code of ethics for commentators, and, thankfully, Laurie and Erwin started writing their thoughtful pieces on this. So I went to the client and I said, "I don't know if I can do this, but I don't think I should do this." He says, "I really want you to do this because I have some of my lawyers on television, not Mr. Cochran, who are saying things and they don't know the facts of the case. You've got to get out on the air." I said, "Well, listen"—and this is the most important thing Erwin and Laurie in their piece say they think there should be a waiver in writing. I think that the "in writing" part is just their way of saying "make sure you do it" and "it's important." But they didn't say, and I think they should say in the third article, the most important part of it is you have to say to the client, "Look, I am not going to reveal anything that's privileged, and I obviously have a duty of loyalty to you with respect to the old case."

Frankly, in terms of bias, it's a no-brainer. Everybody on television knows I had a duty of loyalty to the client, and so they know anything I say as his lawyer is going to be interpreted in that light on these new proceedings, because I still have that duty to him. My experience with this was fun because Jack Ford, thank God, was the only person I went on with and he's a very good lawyer and a knowledgeable guy. He would ask me questions like, "I bet you can't answer this question. How did you prepare O.J. for possibly testifying?" I said, "You're right, Jack, I'm not going to answer that question. I can't answer that question." He went on and on, it was amusing. Unfortunately other people actually

answered some of these questions. It was insane. But I told O.J., “The point is that you’ve got to realize, Mr. Simpson, that if I say anything like ‘the plaintiffs had a very good day.’ All of a sudden people are going to read more into that and it’s going to look like I’m going against you. That’s a danger. That’s a risk. No matter how hard I try, no matter how quick-witted I might be, no matter how much I want to protect you in terms of my duty of loyalty, if I say something that is just, in my observation, true about what happened, it can be interpreted against you.” Finally, I asked O.J., “Do you still want me to do this, because there’s no way in the world I could avoid these risks.” And he said, “Yes. All right.” So then you can do it. And I don’t even have to disclose that I was his lawyer in the criminal case, everybody knew.

Now, on the other hand, disclosures of conflicts is one of the more interesting and difficult issues as was indicated in that setup piece on *The Newshour with Jim Lehrer* that we saw at the beginning. They cut it off, but one of the interesting things was Ann Coulter who had been working with the lawyers from the Federalist Society on the Paula Jones case. Actually, we had a discussion that was interesting because it turns out she became—she went on television and Ann was saying, “Well, I’m a lawyer of course, but I regard myself as a journalist,” and she had actually heard the Linda Tripp tapes at the very, very beginning it was recently revealed. She even told some television producers that she had heard the Linda Tripp tapes, yet she was getting on the air and talking all about these things and nobody knew that she’d heard the tapes, so the question arises of whether she should disclose that. That’s more of a journalism question I think than a legal question in terms revealing her own bias.

There are other commentators who have had conflicts. I tried the Louise Woodward case in Massachusetts, and this woman that was on television, a former prosecutor from Massachusetts, Wendy Murphy. You know, she’s knocking us everyday, and then I find out that her husband had been retained at some point before the end of the trial to represent the family, the Eappen family, and that was not disclosed. Things like that are just going on across the board, which I just think are not even hard questions. These are easy questions in terms of disclosure. But one of the harder questions in the final analysis, I think, is that all of this—we as lawyers have to do something to clean up our act against the worst of us who really violate our own rules.

But the real point of these codes as far as I’m concerned, and we put in the NACDL considerations, is that we believe all members of the bar have unique responsibilities when offering expert legal commentary about legal proceedings that arise from the ethical norms of our profession. These norms—this is very understated—occasionally conflict



with the demands of journalism and commerce. The electronic and print journalists who request our expert opinions and observations may not always encourage or facilitate our best efforts to advance fully informed and professional commentary. Please. That is the number one problem. As I indicated in that *Newshour* piece, there's no way that you can say anything useful in a food fight where you have a minute-and-a-half and people are just yelling at each other. Thoughtful commentary. What are you going to say? "I have a conflict to disclose. I'm a friend of Ken Starr." Boom, next person. You wouldn't even have a chance.

So the real thing to do is to direct this at the news, the people who produce these shows. You ask me about the state of legal commentary today, since the Simpson case, it's gone way downhill. There's more of it and it's worse. Gresham's Law of Commentary. The bad is driving out the good. Ratings; what's really happened is people have understood now that these trials and these proceedings are "infotainment" and, certainly in the cable industry where they're dealing with smaller audiences in the first place, you know, you can get a comparatively large cable audience if you just put this stuff on wall-to-wall and it's all repetitive. Much of it frankly is virtually unwatchable, and a lot of this is just basically driven by show business, "infotainment." As a colleague of mine said, "People now see law less as a system of aspirations structuring our civic life than as a celebrity-filled entertainment medium." Many of the people that run these networks, you know, you sit down and talk with them and some of them I've known a long time, Andy Lack, or David Weston, who was a Supreme Court clerk and a very smart man, or Andrew Hayward of CBS News, you know, the people that are running the cable stations they know it, but nonetheless for purposes of ratings they begin to structure these programs so it's harder and harder to have real legal journalism.

I have to make a disclosure. Steve Brill and I have been friends since we were in college together in 1968, and as he first put together Court TV, consistent with what he was doing in the *American Lawyer* magazine, it was real legal journalism. That was the intention and that was the direction, and he really stood for something. It was terrible that he eventually had to leave that, although maybe legal journalism's loss was journalism's gain generally. I would command to your attention *Content* magazine. *Content* magazine frankly is the only hope for a lot of this. That is a magazine that Steve now puts out that evaluates the media, and it's very hard-hitting and it's very well informed and it really critiques people. I've heard a lot of these producers from some of these shows say, "Well, I'm thinking about the story, but now I have to think a little harder because maybe it'll be covered in *Content* next week." And it may be a magazine only read by journalists to some extent but

you don't want to be skewered there in a really good way. So I think it's really the nature of the medium.

Two books in closing that I would recommend to your attention that talk about the problem in news in general and the nature of the television institution that affects the legal journalism as much as any other. One is an old book by Neil Postman called *Amusing Ourselves to Death*. He's a McCluinite type scholar from NYU. He wrote a wonderful book about the effects of television and how it changed the way we do presidential elections. How television changed the nature of presidential elections is what is changing, to some degree, the nature of the way we do business in courts and how televised trials have changed it. They do change behavior and not always for the good. The second book I would command to your attention is James Fallows' book called *Breaking the News*, and it is a critique of television political journalists. So much of it is saying, "Well, look, you look at a lot of these leading TV commentators . . ." Fallows is saying they never really tell you the full details of the Medicare bill or the health care legislation or all the different proposals because that's boring. Instead, they're more eager to talk about political spin than the more difficult contents. So much of that happens now in our legal coverage because the full details of it are hard to talk about, hard to prepare to sell, hard to do the really time-consuming work of being competent to get on the air and talk about these things. It's easy to talk about strategy and spin; that takes almost no preparation.

The last point on this. I'm amazed with all the commentary about the Clinton matter, and I got out of it because I realized that I couldn't read everything. When I was covering the McVeigh trial for NBC News and the Today Show, I read the transcripts everyday. When I was covering the O.J. Simpson civil case, it was part of my contract that I wouldn't be paid by the appearance, but I would be paid by the time because I wanted to read the transcript of the civil trial and, believe me, I tried the criminal case, I knew all the facts, but I had to see it everyday. I'm amazed that with all the resources going into this, why is it the first time that I have ever heard that when Monica Lewinsky went to President Clinton and asked, "What should I do with the gifts?" and the President said, in the *Starr Report* it's quoted, "Let me think about it," that there were ten other statements? Eight times, as Cheryl Mills eloquently pointed out, the President said "I don't know;" in the ninth one he said, "Let me think about it" or "I don't know." And it was only the tenth one they used. Now, obviously, that's a very good point for the defense, and I don't want to necessarily take sides on that. What amazed me is that with all this viable material available, why didn't the people who were paid to cover this full-time ever tell us that before?

Why didn't somebody go through all the prior statements? If we were trying the case, we would do that. You would read all the grand jury testimony. You would read all the prior statements. If you're covering it full-time, my god, it's like trying a case, you should be there. There's a passivity in the press. It's astonishing.

I am telling you, in the Woodward case, there was no one that read anything about pediatric head injury, admittedly an arcane and difficult subject. There were very few people that knew much about DNA or even tried to educate themselves during the Simpson trial because it's hard. Well, if it's at the core of the case, you've got to learn it. It's amazing that we went months in the whole Clinton scandal with a lot of us, a lot of people saying, "Well, maybe if he perjures himself in front of the grand jury, then that must be impeachable." Well, there are plenty of arguments that it would be impeachable, but the President's defenders were sort of conceding it before he admitted that he was having the affair. Nobody was talking to Michael Gerhardt, the great scholar of impeachment, or others who really began to research and understand what is or is not an impeachable offense. That came later. It should have been earlier. So there's so much you can point to, even in the biggest stories. It's, maybe it's in part a legal failure, but it's really a journalistic failure, and until we demand of the television people that they raise the level of coverage, we get what we deserve.

*PROFESSOR FLEISSNER:* Ms. Tillotson.

*MS. TILLOTSON:* Unlike Mr. Butler, I do not have an agenda, at least on the job, and that's because his function, and the function of people who are reporters, and I do tend to think of myself as that, are quite different. I think also when we talk about "commentator" and "analyst," that we're confusing two different terms. I think that Mr. Butler raised that point on what he said as a commentator, and I think they should be free to say whatever they wish and the people in the news business then should disclose what their agenda is. An analyst I think of as someone who does what I do, and I do hope they will approach what they disseminate to the public as objectively as they can. I would agree with Mr. Butler that the idea of an objective human being is a myth. I think we're all ensnared by where we grew up, and when we grew up, and whether daddy was George Bush or a truck driver. But you can have objective news copy, and by that you try to include honestly, accurately quoting, not just two, there are usually more than two points of view, but all of them. And again reveal in the news copy, if you're using Paul Butler as an interview, what his agenda is. Let your viewers know that; let him say whatever he wants.

It is perhaps naive the way in which a free press works in a democracy, but I think you see we're the last bastion of liberty. The naiveté is that let anybody say anything as long as you're honest. The public, which is the final repository of power—you folks, me, all of us at this table—if we hear enough, with nobody pulling their punches in the press, ultimately—maybe not tomorrow, maybe not ten years, maybe not thirty—but ultimately the people, who have the power through electing people by choosing judges that make the laws down the road, will come to a more just and humane and fair way to run the country. Because I think those are the overarching rules for my business—be accurate, be fair, be all-inclusive—I think it is a standard that certainly could apply and stand legal analysts in good stead. Unfortunately, I think in my own business we all can see that standard operating in a breach rather than in a positive fashion, but it's at least what we in journalism do strive for.

I have no objection to Laurie Levenson's and Erwin Chemerinsky's idea of a code for legal analysts and/or commentators and the specifics of what conflicts there may be. For example, if you have a client who may face a death penalty and you're then asked to comment on another case, those are things that someone in your profession, your looming profession, knows much more about than I do. But accuracy is not going to hurt anybody. I have no objection to the standards. I think as far as the analysts go, they're redundant because of analysts taking part as working, disseminators of information, which is what people in television do. I was interested when Mr. Cochran was talking about the Simpson verdict. I remember that night very well. I happened to be out with a bunch of other reporters that evening, and I kept hearing that legal analysts had said since the jury had been out such a short while it meant he was convicted. And I sort of rolled my eyes and thought, well, my, I would have thought they would have spent more time if they were going to send the guy to prison, that the easier decision was let him walk, and that the short time they were out suggested he was going to be acquitted. But my suspicion, frankly, totally unscientific, is that there were a great many people who were legal analysts who thought the case had been proved against him. They chose to believe that he had been convicted because they thought he should be. They were wrong, weren't they? I think that gets at the heart of the most serious problem for accuracy in either reporting or being a neutral analyst, which is trying to screen out of your copy your own personal predispositions.

I think most of the mistakes that get made and get past an editor are mistakes of laziness, and that goes to the most extraordinary suggestion from Professors Levenson and Chemerinsky, which is that attorneys who are actually going to talk about cases should have to listen to them. I'll

tell you I feel only mildly guilty that I'm not sitting and listening to the Senate trial today because I'm supposed to talk about it Monday. I hasten to tell everybody that my VCR is cranking it out so I can watch it later this evening. And my personal belief is that it behooves me, as somebody who is going to be asking the questions, to watch it. I would hope the person we're relying on to answer the questions would watch it too. I'll give you a couple of examples. During the O.J. Simpson trial, we had a defense lawyer from San Francisco maintain that Mr. Cochran and Barry Scheck and all the others on Simpson's defense team had proved, beyond question, that the window of opportunity for O.J. Simpson to leave his house, kill two people, and get back to his house to meet the limo was seventeen minutes. I don't think Johnnie Cochran would maintain that that was beyond the question of a doubt proven by the defense on the previous day in that case.

I'll give you another example. We had a former federal prosecutor on this week who maintained that there was absolutely no need to call Betty Currie and Monica Lewinsky as live witnesses before the Senate because they were in total agreement in everything they said about the transaction arranging for the gifts from President Bill Clinton to Monica Lewinsky to wind up under Betty Currie's bed. Now it is possible to believe that O.J. Simpson should have been acquitted, and to make that case, even without the mistaken argument that there was only a seventeen minute window in which he could commit that crime. It is possible to make an argument that Betty Currie and Monica Lewinsky should never be called as live witnesses before the U.S. Senate. But if you really trust the public to be won to your point of view, because there's a factual basis for that point of view, you don't have to cheat and fudge the facts. As I say, I don't think the people who made those two misstatements on my air did it out of any malicious attempt to change anybody's mind. I think they were just lazy and had not paid sufficient attention to the case.

But the most egregious sin of all in television, and Erwin referred to it, is the crunch for time, and I will tell you, as future commentators and analysts, that when you have to spend even ten seconds correcting a misstatement, it is ten seconds that somebody didn't get to say something that's accurate. Again, to me, a commentator is like the editorial page writer. He or she should merely be identified. An analyst is comparable to the news copy where a necessity to commit no sins of omission is much more important. As for the question of whether these should be voluntary rules, of course I think we would all agree that the First Amendment would make that not only desirable, but necessary. I do not believe most broadcasters would think it their job to enforce those rules by pulling their punches on what questions got asked.

The more serious problem to me is the predictive questions. "The jury is out, what are they going to do now?" I can remember covering a trial for CNN and, frankly, I can't remember what the charge was or who the defendant was, my only memory—this has been years ago—was an anchor at CNN asking me live on the air after the jury had gone out whether I personally thought that they should convict or acquit. And I said I thought as a reporter covering the case it was inappropriate for me to answer that. I don't think there's any code that is going to prevent you as an analyst, or a commentator for that matter, from being asked stupid questions. As Mr. Scheck said, some lawyers will actually answer them, but you don't have to. I think you as potential lawyers are even more important than journalists who, as I've said, even by implication I think belong to a noble profession, at least in theory. I think yours is even more noble, at least in theory, in that we journalists by definition are relegated to being observers on the periphery if we're doing our job properly, which is why we shouldn't presume as reporters to say which side is going to get aired before the public. But as lawyers, and by that I mean advocates, not analysts, you're players. You are an active part in the policy decisions that get laid rather than the observers, and so it's a great pleasure to be here today to talk to you about those people who are straddling both your profession and mine.

*PROFESSOR FLEISSNER:* Those opening statements make my job very easy because they put a lot of the issues on the table, and after listening to Dean Levenson's and Professor Chemerinsky's seamless presentation to us before, why don't I recognize both of you if you want to make some responding remarks?

*DEAN LEVENSON:* Okay. Very quickly, since I know you might have questions too. First of all, I want to thank the panel for the very thoughtful comments. You'll see them all in our piece and of course we'll give you credit for all the good stuff and take the other stuff as our own. I want to add this. I didn't say this enough in my opening presentation. I'm really proud to have worked with the journalists that I've worked with, not all of them, but the ones that you see today I can categorically call outstanding and I would say professionals. The problem that's been denoted by someone else is that the media is a big group, and there are some good reporters and there are some not so good reporters.

I want to just comment briefly on Professor Butler's comment where he says that, in fact, legal commentary can be a form of revenge, and objectivity is a myth. I certainly respect and would never try and silence a voice of people who have opinion. But as Ms. Tillotson pointed out, it is important that the public understand what that agenda is, because

otherwise we are just all "law professors," and in the general public mind, I'm not sure the public expects law professors to have a particular agenda. In terms of predicting the outcome of cases, I think there's a big difference between whether the evidence *should* be suppressed and whether it *will* be suppressed. Unless you know everything about this judge or if you actually watch the proceeding, that's a real hard question to answer. You could certainly say, in my experience, judges don't suppress it. But I think it's actually fairly demeaning to say that you know what the judge absolutely will do, and I think in fact it can be dangerous to take one parcel of evidence and give a comment on it.

I think that was what happened with the Rodney King video tape. People watched a portion of it and said the defendants should be convicted. No question somebody should be held responsible and convicted for that, but there were four defendants in that case, and not all of them are seen on that tape beating Rodney King. And when they were not convicted, for reasons that came out in detail in the trial, the public had a very severe reaction to it. In part I would say because the public was misled by commentators and the media in general as to what would happen.

*PROFESSOR BUTLER:* Maybe the jury was wrong and the public was right.

*DEAN LEVENSON:* Well, I think that in this particular case, having watched the actual Simi trial verdict there might have been part of both; the jury might have been wrong on some counts, and right on others. But there was no sophistication in the presentation to the public, and I think that would have been helpful. In the end who was hurt? The very community that was outraged by the verdict.

*MS. TILLOTSON:* I was mentioning to Erwin when we snuck out to get coffee in that intermission, I happened to be at the White House the night of the Rodney King verdict, and the first comment from President Bush that evening, and remember these fellows had been acquitted in Simi Valley, was, "Well, the government will appeal." The government cannot appeal on acquittal. And one would think that somebody on the White House legal staff had chatted with the President about this verdict prior to that statement and, you know, if you're a reporter, often you're not close enough to the President to get a question to him. But it took a while for anybody in my line of work to kind of remember, whoops, no we can't do that. Now ultimately, as we know, they went on with several charges and retried the guys, but it wasn't an appeal because that was foreclosed, and it's that sort of basic disinformation

that I'm talking about. It wasn't intentional; it was just kneejerk and kind of dumb.

**MR. BROWN:** I think there's a danger that maybe the interpretation of the criticism of the code is somehow that we're in favor of incompetence. I don't think that's what it is, but I think there are other mechanisms like—for example, I mean, I've been an analyst, a commentator, an anchor on television and a trial lawyer, and for twenty-five years I've tried cases and I have been so wrong in guessing the outcome of cases I was involved in. That is a heavy weight that keeps me from making a lot of predictions. But in the last analysis, what's going to keep me from making predictions is my experience that it is an unpredictable event, and that I will look like a fool in making wrong predictions. It is the free market of ideas that will in many ways even this process out. If Professor Butler makes eight wrong calls in a row, he will either stop predicting, get better at predicting, or not be on television anymore. So there's an area when you have to let the free interchange of ideas take place. Now that's separate from the fact that I've seen, more times than I like to admit, a lawyer on television, who I know hasn't been in the courtroom for twenty years, talking about some nuance of cross-examination. That is a separate question, but that comes back to journalism.

**MS. TILLOTSON:** If Professor Butler wore fringe suede jackets, he might have a long life before the camera.

**PROFESSOR SCHECK:** If you want to read something about that see this week's issue of *Content* magazine, they have how all the pundits did. And they show all the different pundits with respect to the Clinton case, and their wrong guesses and right guesses, you know, because Steve's keeping a score card. But with respect to these verdicts, analyzing—

**MR. BROWN:** And I was right on yours.

**PROFESSOR SCHECK:** About that, since everybody has been discussing it, I actually went back and did a content analysis of what the pundits were saying about the Simpson verdict, and what is very interesting is that after closing arguments, all right after the evidence was in, everything was heard, even those people who would make the distinction—I think Ms. Tillotson has got this one on the money—the pundits would say, "Well, I personally think that he should be convicted but based on this evidence and the way the case went to the jury I



believe . . . .” When you counted it out, it was amazing. Most people said it’s probably going to be a hung jury.

The second prediction was if it’s not a hung jury it’s going to be “not guilty.” And most of the pundits, even though they didn’t like this themselves, said the least likely outcome is a conviction. Then the note came out from the jurors about the time, which I knew what that note meant, but other people were interpreting it differently about having Alan Parks testimony read back. All of a sudden what happened was all these people who frankly during the O.J. Simpson civil case were in trailers when the verdict came in they all started cheering wildly and screaming, which some journalists themselves, you know, noted was a strangely inappropriate reaction. But all these people wanted a certain result, and when this note came back, even though experience would have taught you don’t go by that, they abandoned the predictions that they made based on their own analysis of the evidence and what they thought just a few days earlier, and all started saying it’s going to be a conviction. So that to me was the most interesting thing.

The greatest danger is what Laurie is talking about, the Rodney King case. I was a commentator on Court TV. I saw the entire trial. I knew that the officers, putting aside the fact that it was probably a verdict based on an all-white jury and the fact that it took place in Simi Valley, put on a much better defense, many of the defendants, and the commentators, were not talking about that.

*MR. BROWN:* It seems to me that there’s a difference between being wrong and being a blathering idiot. It’s a distinction I revel in because I’ve been wrong a lot and I like to think I’m not a blathering idiot. But it does seem to me that we’re not apportioning responsibility with any effectiveness. The truth is that I don’t make predictions because I know how unpredictable the process is. That’s my ego. That’s my sense of pride. If a journalist, or a journalistic organization, allows lawyers who have tried two cases to make commentary about trials, that is a violation of basic principles of journalism. We ought to talk to them.

The third thing you talk about, Barry, is the totally separate but important issue which is the general decline of news coverage in America, that is a sixty-five percent reduction of international coverage in five years, no coverage of war crimes, tribunals and that kind of stuff. That’s a separate question about editorial judgment and ownership and management of the media. None of those problems are solved by your code, that from what I’m hearing at the moment only says, “Look at the code we’ve already got, the Model Rules or the Model Code, and follow it.”

*PROFESSOR FLEISSNER:* Professor Chemerinsky.

*PROFESSOR CHEMERINSKY:* I disagree with that last comment. I think a code of ethics can be much more detailed than the code of professional responsibility for lawyers because it deals with different issues. Now it's said that it's aspirational so it doesn't matter, but I do think there is a tension between that and Mr. Brown's second point. The second point was that it insults journalistic ethics. Journalistic ethical codes are completely voluntary and yet they have a great effect. The reality is that a code of ethics for lawyers, for commentators, can help educate commentators on how to behave. Those that have not been in the role can learn from a code of ethics.

Also, I think most who are in the role will try to be ethical, and a code of ethics can help them. I discovered that part of the process of writing about this subject has caused me to be much more self-reflective. I am much more aware when I'm now speaking as a reporter. Am I trying to be neutral and present both sides, knowing that objectivity is impossible? Am I expressing an opinion, in which case I should preface it by saying, "My opinion is"? Am I being an advocate for a particular view, in which case I should identify that, or am I even a participant? I think that kind of self-reflectiveness is good and could be encouraged by a code.

I don't think such a code, in Mr. Brown's words, insults journalistic ethics. I find that often journalists aren't aware of nuances with regard to lawyers' competence. I get calls because my name is in people's rolodex and I return phone calls. They called me for example in the Simpson case about the family law aspect. I know nothing about family law. There's no reason for them to know that. It's my responsibility to tell them, "I don't know enough to talk about that." They don't know how much I've followed a case. In the Oklahoma City bombing case, I didn't follow it. They didn't know this. It was my responsibility to say, "I can't be a commentator about this."

Legal commentators can advocate their role to others. It's said here that much of what goes on is entertainment, not education. I reject that distinction. I try to be entertaining at times in class. I occasionally tell jokes, but not very funny ones. But I don't think that makes me less of an educator. I think that people can both learn and be entertained at the same time. Now I know one of the most important things that a commentator could do is say, "No, I won't participate." There are certain shows I've decided that I wouldn't participate in. If it was just a matter of a show where people are yelling over each other, I have no desire to participate in that. At the point which the show became, "Yes, it is impeachable because he lied," and, "No, it isn't impeachable because it's

about sex," this isn't something that's contributing enough. But each of us as commentators can decide who we'll talk to and when we'll talk to them.

And the final thing I want to talk about is the claim that what Laurie and I are doing is keeping people out of being commentators. I don't want to exclude anyone from being a commentator, but I do hope the quality of commentary will improve. Now, the real charge of keeping people out is based on our statement that in order to be a commentator, you need to follow the proceedings that you're commenting on. I don't know how else you can be a commentator if you're talking about what went on without following it. During the Simpson case, I either listened to every word or read every single word in a transcript. I found repeatedly one week that I would be referring to things that went on days or weeks earlier. How could I have known that?

Laurie and I were at a cocktail party at one point and we were with a commentator from one of the major networks who was priding himself on the fact that he watched none of the Simpson trial. He would just read the wire service copy before he went on. How can you do that and really give good coverage? There are times when I'm comfortable answering a purely legal question, let's say the meaning of the Fourth Amendment, without watching the trial, but if I'm going to be talking about what went on in the trial, I feel a need to watch it. Do you need to watch and read every word? I don't think you need to go that far. All I'm saying is knowledge is better than ignorance, and the more you know the better a commentator you can be.

**MR. McELHANEY:** This may be a softball question to the two professors but why do you say that commentators should be prohibited in the code from making predictions, when everybody, you can argue, has a right to express their opinions and a right to be wrong if they're willing to take that risk? Even in your own Southern California Law Review article<sup>12</sup> you cite in a footnote that there is no evidence that commentators' statements materially prejudice adjudicatory proceedings. So if we're not really worried about it causing a bad result or an improper result in a trial, isn't what you're doing really is just trying to protect the commentators from being embarrassed, and is that really a worthy canon?

**DEAN LEVENSON:** Humiliation, that's up to each commentator. I guess—I don't know—I strongly discourage, that's the phrase I would use, predictions for a reason, because I think they can have a dangerous

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12. See Chemerinsky & Levenson, *supra* note 1.

effect. I think the predictions in the Simi Valley Rodney King case by those who only watched the video tapes that there would be a conviction, and then the public's reaction when that prediction didn't come true can tell us how dangerous predictions can be—now that's not *the* reason for the riots, but certainly commentators did not help the situation. I think when commentators in the O.J. Simpson case predicted a conviction and the jury came back with an acquittal, the obvious thing, the response then was, the jury must be wrong because our great, holy, knowledgeable commentators said they should have convicted. So it seems to me that it can be misleading and that's the concern I have. You know, you can predict, but realize that you may be wrong; you may be misleading the public, and a far better service in commentary is to tell them, "Based on my experience, this is what happens." But to predict what happens now; it's probably more educational to the public to say you can't predict. It's very difficult to predict what a jury is going to do.

*PROFESSOR FLEISSNER:* Professor Butler.

*PROFESSOR BUTLER:* The remarks that Laurie just made suggest that legal commentators have a certain function of instilling public confidence in the criminal justice system, and I'm not sure I understand why that's so.

*DEAN LEVENSON:* Not in the least. I think very much that if the commentators can criticize judges, go for it. And they can criticize juries. They can say "we've got an almost"—it wasn't all white—"an almost all white jury in Simi Valley." "This is a community that loves police officers," and, "There were problems, significant problems in the prosecutors' presentation of the case and, therefore, even though the video is very compelling, you know, we may not end up with a conviction." That seems to me a much better presentation to the public than, "Gee, look at that video tape. They're going to convict."

*PROFESSOR BUTLER:* I agree, but the commentators who looked at that evidence responsibly and said, "If this jury is responsible, it will convict these officers because there's been proof beyond a reasonable doubt," they are describing the world. And I think that what Laurie is doing is shooting the messenger, because if there isn't a conviction there has been a miscarriage of justice. It's not the commentators or the people who were wrong about that. It is the jury.

Just real quickly with this issue of objectivity. If I think that the criminal justice system is racist, then I'm disqualified from being a commentator, at least without a parental advisory warning. But people

who think that the criminal justice system is not racist, well, somehow they're objective in a way that I'm not, and I have a problem with that.

*PROFESSOR FLEISSNER:* Mr. Cochran and then Ms. Tillotson.

*MR. COCHRAN:* I think one of the beauties of this whole burgeoning field is the fact that we have diverging views as you've seen on this panel. I think it's healthy for the audience to see that. I mean I just wanted to respond to something that Laurie said. I thought that one of the problems, one of the fallouts of those who said that there would be a conviction in the Simpson case was that after that there was this tendency to blame the jury. I know that we on the defense felt very strongly about coming to their aid. I'm a big believer, generally, in jury verdicts, even if I think it's an unfair verdict, like I thought the Simi Valley verdict was. I thought when the case got sent up there, there was a problem that clearly the lawyers made. The DA's office made a serious mistake, I felt, but I don't like to attack jury verdicts generally because I think that's so ingrained in the system that is probably more of a problem, but I would certainly comment about judges. I thought that what happened in our case, the Simpson case, in addition to that, the prosecutors came out to attack the jury, which was really a difficult problem and it forced us to speak.

One other thing that we talked about on this whole thing, the whole thing of ethics, of lawyers speaking out, I wanted to say this to you young lawyers and to people who will ultimately speak on cases. Much of the time you don't want to speak out on cases. You want to resolve it in the courtroom. But very often what you do is dictated by what your opponent is doing. In the Simpson case again, as an example, we had to respond because the prosecutors and the police everyday would have press releases. If we didn't respond, they were totally poisoning, we thought, the panel of jurors. We had to respond. At that point, many people thought it would be a hung jury. We knew that it was also possible to be another jury trial down the road, but we thought we had an obligation for our client to get in there and at least square the facts up or at least level the playing field. Sometimes you have to do that. You'll have high profile cases where you have to do that. A lot of times you don't. I think lawyers don't go out looking for press, especially after a while when you're experienced, but when the other side has a media machine, you have an obligation, to the extent that appropriately and ethically you can do it, to get involved, and I think that's another side of this whole thing of when you talk to the press.

But one final caveat. When you talk about commentating and all that stuff, don't let your clients talk. One of the biggest problems, and

talking about Rodney King, one of the biggest problems they had was the day I saw him roll out there and those lawyers let him give an interview. It came back to haunt him at the trial. That's maybe, just some advice I will throw out for free.

*MS. TILLOTSON:* I would loudly second Erwin Chemerinsky's "just say no" policy if you figure this is something that's only going to humiliate you and you're not really competent to talk about. Those of you who ultimately are going to end up behind a microphone or in front of a reporter scribbling notes on your golden comments some day, nobody can make a fool of you without your distinct cooperation. And do not assume that because somebody is in TV they're going to protect your dignity and your professional reputation for you. Don't assume that at all. You at least will have a day job, presuming you finish and pass the bar. I don't have that. But now and then, someone will ask me to do something that I just disagree with and I get to say no. I was amused at your four-shot with all the "tththththththth." There are people in television who think that's exciting, and they want to achieve that look, and there has been resistance among some of us at CNN to that. Why? Because nobody can hear anything. You are the final protector of your own professional, not to mention personal, reputation. Don't ever give it to anybody else.

*PROFESSOR FLEISSNER:* Mr. Brown.

*MR. BROWN:* Just two comments, maybe even my last, because I think they're important. The first is I think that part of the problem, though I suspect I would agree with the articulated values expressed by the professors, is that I don't think that we should be, as a group or as a craft, in a position of telling other lawyers, "predict/don't predict"; "criticize juries/don't criticize juries"; "verdict yes/no." I think that that's a gross interference with basic concepts of how our process should work in terms of a free exchange of ideas. Standards of competence ought to be in existence in journalism or we should be attacking the people who are putting people on.

But the other point, which is what I made earlier, and it sort of relates to what Johnnie said a moment ago is this: that the real problem is with the participants. Lawyers representing clients, who allow clients to speak, who do not themselves understand when they have an emotional or a psychological conflict, who when you really get to the one because—my concept of "just say no" applies to the concept of a lawyer as a participant talking to the media by and large—but in those small percentage of cases where it's in the client's interest for the lawyer to

talk, it is frequently done with a lack of skill and there's nobody to train lawyers to deal with those issues. So to the extent that we want to put some focus on standards, I mean for example, I think I heard Mr. McElhaney—but it's such a nuanced argument it's hard to really know—he talked about *Gentile*. *Gentile* established certainly the right to regulate in this area with respect to lawyers, but more importantly was Justice Kennedy's dicta about the fact that essentially you can fight back. If you're a defense lawyer, the prosecutor talks first and what that's meant is in the last ten years the standard of who can say what where has really loosened. I mean it's really hard to say, and I don't propose to answer that question today, but I'm saying the issue about substantive justice, whether a lawyer in a case talked in a way that might influence a jury, that's an issue we should be talking about. I mean, I hope they keep writing on the commentator question because it's helpful, but where the minds need to be focused is on how do we deal with the endless parade of lawyers or participants who either screw their own clients through banality, screw their own clients through incompetence, or wind up talking on the media in ways that are damaging and damage the substance of justice, the fabric of which is our secular faith in this society? And that's where the issue is and that's one of the reasons why this debate is taking us down essentially a side track.

*PROFESSOR FLEISSNER*: I'm going to recognize Professor Scheck.

*PROFESSOR SCHECK*: The simple answer, Raymond, is that we have to discipline them, but that's a separate question than the commentaries. I think that—

*MR. BROWN*: But we don't discipline, Barry.

*PROFESSOR SCHECK*: No. Let's talk about—I think that as much as I support these kinds of aspirational rules, well considered, I think that's not going to get the job done because the real issue frankly is the quality of legal journalism. And make no mistake about it, whether you call yourself an analyst or a commentator or whatever, if you're on regularly, you're a journalist. Because, Erwin, when you were confronted in the supermarket and the district attorney told you something and you decided to keep it private, in law school—I hope you know, what are you? If they drop a subpoena on you, you're going to be a journalist real fast if you wanted to keep your mouth shut, as opposed to just a lawyer.

The key to me is watchdogs. Rather than simply have voluntary codes, which can only go so far frankly, what I think is beneficial about what Laurie and Erwin have done and the debates and discussions that

it's raised is it has begun to point out the bad examples. But what we have to do with our own profession is we have to police people. We have to give positive reinforcement to those people who are doing good jobs and we have to really rake over the coals those people who are disgracing us and screwing up, and debate the tough issues. And in terms of entertainment. Look, there are bad entertainment values that have infused this whole industry. There are producers that will say, "I want this one because you're going to disagree with this one and I want to see you fighting," and they literally talk in the ears and they tell you, "Go after him, go after him and respond to that," and they get rating scores.

*MS. TILLOTSON:* Those are the ones you say "no" to.

*PROFESSOR SCHECK:* Right. There are plenty of them and they're getting more audiences and it's almost like it's—a lot of it is gossip, a lot of it—they want see the regulars. I want to see how so-and-so reacted to this today, even though so-and-so is clueless as to what is really going on because it's not their area. But entertainment, I agree, Erwin, entertainment doesn't have to be divorced from good journalism. I mean, the questions in my mind to these cable stations is why—why isn't there a *60 Minutes* for cable; why isn't there a *Nightline* for cable? The truth of the matter is you can do good journalism and have the biggest audiences because you have credibility. And so a big opportunity is being wasted where aggression is law, the bad, easy stuff, it's cheap to produce where you don't have to pay people to do research.

*MS. TILLOTSON:* Jerry Springer is not on cable. I must say that.

*PROFESSOR SCHECK:* Have you watched *Internight* lately?

*MS. TILLOTSON:* I don't watch a lot of TV. It is a business, and part of that, though, I think what CNN is doing with *Cold War* is quite fine. The reality is that we're not on everybody's TV set, and some of the crappiest stuff you're ever going to want to see is on ABC, NBC and CBS. I get defensive about this because I will tell you, during Simpson, the networks were so furious that we were covering real life and getting a share of their soap opera audience, and so it was shocking to cover O.J. Simpson, and the only reason it was shocking to them was because it was eating into their soaps. Forgive me. It's not all just cable, Mr. Scheck.

*PROFESSOR SCHECK:* I agree.



*DEAN LEVENSON:* You know, I guess we designed this code in part to be a bit of a wake-up call, sometimes even hit a few nerves. Looks like maybe it's doing just that. There's a need—in the end I'm not sure any of us disagree. I think we agree that there's a need for improvement in our legal profession and the function of lawyers in the legal profession. There's a need for diversity of opinions and people and background and coverage, and there is a need for us to be the best we can be whether we be the journalist or the commentators who are assisting the journalists. In the end run, that's what we hope our code will do and we are so grateful to these panelists in helping us do that.

*PROFESSOR FLEISSNER:* Ladies and gentlemen, in my dictionary there are two definitions of the word "pundit." The first one is: a source of opinion. And the second one is: a learned person. And of course we want our legal commentators to meet both parts of that definition. Obviously, our panelists meet both parts of the definition, and their efforts will be instrumental in expanding the class of learned pundits. I am cautioned against overstatement by all the talk about the trial of the century, so let me say, acknowledging the date on the calendar, this has to be, at least, the best panel of the year.