

SCANDALS GREAT AND SMALL

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I. INTRODUCTION

The conference theme—Lawyering at the *Edge*—evokes images of lawyers ensnared in legal scandals, lawyers testing the boundaries of the ethics rules, and lawyers at their moral and emotional limits. Lawyers at the edge labor under psychological and social pressures. They are tested and tempted. They are under pressure and under attack. The scandals threaten to overwhelm them.

I will focus on two kinds of cases where lawyers face those pressures. One kind involves lawyers caught up in controversies where the tactics veer toward the vicious as opponents “fight fire with fire”—cases we often describe as “spiraling,” or “out of control,” or having “a life of their own.” Lurking behind those phrases is the notion that rationality no longer reigns.

The second kind involves those public controversies where large numbers of the public use the dispute as a vehicle for vindicating private prejudices and venting personal frustrations. There is a sense of a storm swirling around the participants. The prosecution of the Duke lacrosse players was like that, as were the murder trials of O.J. Simpson and Scott Peterson. In those controversies, the public’s emotional investment relentlessly fueled the social pressures until the narrative reached its climax—be it just or unjust.

But such legal disputes also produce a second compelling narrative—the lawyers’ personal stories as they struggle at the center of the storm to maintain their moral footing. We have seen that narrative in films starring Jimmy Stewart and Tom Cruise.¹ We’ve also seen it in real life, as when prosecutor Michael Nifong hurtled over the edge,² and when defense lawyer Major Daniel Mori remained morally grounded even as he crept toward ethically ambiguous territory.³

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1. See *ANATOMY OF A MURDER* (Columbia Pictures 1959) (depicting Jimmy Stewart as a defense lawyer struggling to defend a questionable client accused of murder); *A FEW GOOD MEN* (Castle Rock Entertainment 1992) (starring Tom Cruise as a Navy lawyer defending two Marines accused of murdering a fellow Marine).

2. See *infra* notes 76-82 and accompanying text.

3. See *infra* notes 100-04 and accompanying text.

To explore the world of lawyers practicing at the edge, I will use a technical definition of *scandal* that is based upon the word's original meaning of "trap" or "snare." I will provide a full derivation and explanation later in this Article and then use it to interpret several recent legal disputes. For now, it is enough to know the danger inherent in any *scandal* is that the participants will become *scandalized*—will surrender to psychological and social forces that may prove to be beyond their control. In this Article, then, lawyering "at the edge" means lawyering at the border of being scandalized.

II. BEING SCANDALIZED, OR NOT

Let us start with two examples—one in which a capital defense investigator succumbed to the scandal and another in which two polar-opposite opponents refused to be drawn into a scandal with each other.

A. Kathleen Culhane⁴

In April 2007, Kathleen Culhane, a non-lawyer investigator doing capital defense work for the Habeas Corpus Resource Center, pled guilty to forging juror signatures on affidavits for the purpose of reversing death sentences.⁵ At one level, one wonders how Culhane thought she could get away with clumsy forgeries in an adversarial system where motivated opponents were scrutinizing each pleading. One also wonders about the deeper psychology behind the act.

Although it is difficult to do armchair psychoanalysis using only media accounts, we do have statements from Culhane, her lawyer, and one of her supporters. Culhane had devoted her life to social justice. "In high school, Culhane joined a group that assisted disadvantaged people in Mexico."⁶ Later, she joined the "frustrating legal world" of capital defense, where she "worked as an investigator for prisoner rights programs, sometimes tracking down relatives and witnesses in the slums and hinterlands of Mexico, Central America, West Africa and Haiti."⁷ Capital defense is as demanding a job as one can find in the American legal system. The positions are under-funded. The legal tests are one-sided. Cops sometimes lie, prosecutors sometimes cheat, and trial court

4. This section is based upon two news stories. See Mark Martin, *5-year Term for Investigator in Forgery Case*, S.F. CHRONICLE, May 1, 2007, at B1; Louis Sahagun, *Death Penalty Foe Gets Five Years in Prison; A Former Defense Investigator Faked Documents to Try to Delay Four Executions*, L.A. TIMES, Aug. 17, 2007, at B1.

5. Sahagun, *supra* note 4.

6. *Id.*

7. *Id.*

errors by the thousands are casually brushed aside and declared to be “harmless.” It’s a world where defense lawyers who sleep during trial are not considered ineffective. Courts are unmoved by statistics showing the bias with which the death penalty is imposed. And proof of the errors caused by false confessions, false witness identifications, and failures to use DNA testing have failed to create a groundswell of support for death penalty moratoriums. The process should be a scandal to the public, but it mostly threatens to scandalize only overworked and sometimes vilified capital defense workers. Culhane’s working environment was one in which the rare victories usually meant simply delaying the legal machinery of death.⁸ Capital defense workers never quite achieve their goal of awakening the public’s outrage about the injustice of executions. Culhane, who viewed the death penalty as the “brutal legacy of lynching”⁹ and who saw her capital defense work as part of her larger social justice work, fought on nonetheless.

Culhane did post-conviction investigations for Michael Morales, who had been condemned to death for the brutal murder and rape of Terri Winchell in 1981. Years later, the trial court judge wrote a letter to the governor on Morales’s behalf, seeking the governor’s clemency and asserting the judge’s belief that Morales was wrongly convicted.¹⁰ Here at last was a case with a realistic chance of reversal. To bolster the judge’s letter, Culhane tracked down some of the jurors, but they offered no support. So, “frustrated and desperate,”¹¹ Culhane “spent a few all-nighters”¹² in a hotel forging juror affidavits.

Predictably, the crude scheme unraveled. Culhane is now serving five years in jail. Even by her own account, Culhane’s fraud didn’t “ma[ke] a ping in the legal system.”¹³ She tarnished the reputation of the lawyers she had worked with, slandered the honorable calling of capital defense lawyers and, according to lawyers for both sides, “compounded the suffering of [the] friends and family”¹⁴ of Morales and Winchell alike. Although the self-destructive act was a total failure both morally and practically, Culhane remains unrepentant.¹⁵

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

B. *Terry Stewart and Robert Tyler*¹⁶

Two attorneys were pitted against each other in two California-based litigations over same-sex marriage and workplace benefits for domestic partners. One, Terry Stewart, who heads the Office of the City Attorney of San Francisco's litigation unit, was a lesbian living with her partner, Carole Scagnetti. They decided not to participate in San Francisco's controversial same-sex marriage program until final victory had been won—a decision that made the internationally visible litigation a very personal matter for Stewart. (Stewart's litigation team at the City Attorney's office included lawyers who had taken advantage of the program and who were therefore fighting for the legitimacy of their marriages.) Together, Stewart and Scagnetti had become legal guardians of an African-American teen whose family situation had deteriorated. Stewart describes herself as a Jack Russell terrier, meaning that once she sees her goal, she's obsessive and tenacious, "digging and pushing and working hard."¹⁷ To support her mayor's decision to issue same-sex licenses despite a California voter initiative limiting marriage to man-woman unions, Stewart tirelessly dug up obscure precedents from the 1800s and from English common law.

The other attorney, Robert Tyler, is a married, suburban father of four working for a Christian-based advocacy group, the Alliance Defense Fund.¹⁸ Tyler, assisted by some big firm lawyers, had earlier opposed Stewart in federal appellate court over whether San Francisco could force employers to offer benefits to domestic partners.¹⁹ Now, Tyler opposed Stewart in the same-sex marriage litigation.

If ever there was an asymmetrical pair of lawyers opposed in a high-stakes, controversial case with personal implications, you'd think it had to be Stewart and Tyler. But, to the amazement of some, the two treated each other cordially, professionally, and even with personal appreciation. When she made a guest appearance at my legal ethics class, Stewart said that some of the attorneys aligned on her side of the case would pointedly ask her why she was friendly to Tyler, to which

16. This section is based upon two sources: (1) my memory of a guest lecture appearance that Terry Stewart made to my legal ethics class at UC Berkeley School of Law on March 17, 2005; and (2) Susan Beck, *Breaking the Marriage Barrier: After Leaving Am Law 200 Partnership to be S.F.'s Top Litigator, Attorney Leads the Defense of its Same-Sex Wedding Policy*, AM. LAW., June 1, 2004, <http://www.law.com/jsp/article.jsp?id=1085626353274>. Rather than include a footnote to the Susan Beck article for each sentence in this section, I will provide additional footnotes only for direct quotations from that article.

17. Beck, *supra* note 16.

18. *Id.*

19. *Id.*

Stewart replied that he had always been courteous to her.

III. SOME THEORY ABOUT SCANDALS

I am not exploring the concept of *scandal* simply to draw up lists of good lawyers who avoid being “snared” and bad lawyers who do not. Nor do I suggest that getting along with your adversary as well as Stewart and Tyler did is the desideratum of lawyering. Rather, I wish to explore the concept because it provides an early warning system for recurring ethical dangers, a chance at diagnosis when lawyers are losing control, and a plan for action when one finds oneself in the confusing world of scandals.

A. Sources

My experience comes from several sources. One is my legal experience in litigating, counseling, providing expert opinions, and in teaching professional responsibility courses. My litigation experience has taught me the most about scandals, because the litigator is directly engaged in the fight. By definition, civil litigators in an adversarial posture face each other aggressively and symmetrically. The client “turns to”²⁰ an attorney who then “turns against”²¹ the adversary. Almost any civil litigation or trial can go awry if participants and lawyers lose control and reprisal is met with reprisal. These, as I will argue below, are the classic signs of a small, private scandal. I have certainly been involved in at least one matter like that. I have also helped lawyers manage emotional disputes, both public and private. Additionally, some of my understanding of lawyering scandals has come from reading, teaching, and discussing lawyering disputes—including discussions such as those we had at the “Lawyering at the Edge” conference.²²

B. Definition

The dictionary says that a scandal is any disgraceful or discreditable

20. PAUL BRAND, *THE ORIGINS OF THE ENGLISH LEGAL PROFESSION* 46 (1992).

21. *See, e.g.*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 21 (10th ed. 1996).

22. I’ve also heard from lawyers who have been embroiled in great public scandals. I have interviewed or spoken with military lawyers who have defended Guantanamo detainees (Lt. Cmdr. William C. Kuebler and Major Tom Fleener); a member of the O.J. Simpson “dream team” (Santa Clara University law professor Gerald F. Uelmen); a trial lawyer (Wazhma Mojaddidi) who defended a Muslim-American convicted of terrorism; a lawyer who defended the City of San Francisco’s issuance of marriage licenses to same-sex couples (Terry Stewart); a public defender who represented sexually-violent predators (Andrea Flint); a former federal prosecutor who helped convict the radical lawyer Lynne Stewart (Christopher J. Morvillo); and a criminal defense lawyer who has participated in many famous, controversial homicide trials (J. Tony Serra).

event.²³ In modern usage, the word often describes celebrity news or trivial events that attract attention but that would be perhaps best ignored. Even when used to describe weightier controversies, the word “scandal” retains a connotation of something overblown, of reactions that are more emotional than rational.

But the word has complex meanings and deep theological roots, reflecting its ability to capture a persistent feature of human social psychology. Hebrew scriptures made literal and figurative use of the words *mokesh* (meaning “snare”) and *mikhshol* (meaning “obstacle” or “stumbling block”).²⁴ Often the words referred to external dangers, such as opponents, false gods, and evildoers.²⁵ But the authors’ folk psychology perceived an additional, internal danger: “It is not only, or even primarily, however, our enemies who set snares to entrap us; it is we ourselves. Our own desires . . . suggest that the enemy is within.”²⁶ Repeatedly in the scriptures, a protagonist earnestly pursues a desired object only to learn, too late, that the object was an obstacle.²⁷

When the Hebrew texts were translated into Koine Greek as the Septuagint, the translators rendered those Hebrew terms as *skandalon*, a Greek term for “snare.”²⁸ Because the Septuagint was the source for many New Testament quotations from Hebrew scripture, and because the psychological notion of offense remained central to early Christian thinking, the terms *skandalon* and *skandalizo*, made forty-nine appearances in the New Testament.²⁹ The term is usually translated in English as “scandal” or “stumbling block,” but is also rendered with cognates of the words for falling, deserting, hindrance, causing sin, and giving/taking offense.³⁰ The term retained the dual uses of internal and external traps and denotes moral dangers to participants and spectators alike.

As with any trap, there is a danger that a scandal will not be recognized until it is too late. Scandalized participants typically and earnestly believe they must pursue a particular course of action, unaware that their self-destructive agenda is set by a larger social dynamic. Spectators are drawn toward morally offensive events and then stumble over the very moral errors they found offensive.

23. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY, *supra* note 21, at 1042.

24. DAVID MCCrackEN, THE SCANDAL OF THE GOSPELS: JESUS, STORY, AND OFFENSE 22 (1994).

25. *Id.* at 22-23.

26. *Id.* at 23.

27. *See id.* at 25.

28. *Id.* at 193-94.

29. *Id.*

30. *Id.* at 194.

In Roman Catholic theology, a scandal is a sin of giving offense to others, of leading them astray, of leading others to emulate your sins.³¹ Leaders can create scandal, in this sense, as captured in the adage that “a fish rots from the top.” Peer groups, too, can create scandal, as when teenage friends hop over a fence to steal a farmer’s pears³² or when a business organization’s ethical climate fosters immorality.³³ Scandals do not always arise from isolated acts of specific people; they can also arise from laws, institutions, fashion, and opinions.³⁴ And scandal can be given by people acting morally with good intent.³⁵ But whatever its origin, scandal creates occasions of sin³⁶ that lead us to act in ways we ourselves would condemn.

René Girard further refined the concept of scandal. Focusing on the sources of human desire as disclosed in literature and scripture, Girard emphasized the mimetic nature of desire.³⁷ That is, we value objects that we believe others value; we desire what others desire. In that sense, others provide the *model* for our desire but also stand as an *obstacle* to our possession of the object.³⁸ If we cannot successfully manage those conflicting orientations toward the model/obstacle, we can increasingly ignore the desired object and focus on the other, who then becomes a scandal to us. “Etymologically,” then, “the scandal is that which causes one to stumble. In its developed meaning, the stumbling block is the hindrance that one loves”³⁹ When the scandalization is reciprocal, the two adversaries become monstrous doubles of each other and the danger of violence, real or figurative, dramatically increases. Neither participant recognizes his own responsibility for the dynamic; both participants project onto the other the full responsibility for the crisis. Hence scandalization feeds on self-deception.

In daily life, there are countless ways to manage situations that

31. See, e.g., CATECHISM OF THE CATHOLIC CHURCH, para. 2284, available at <http://www.vatican.va/archive/catechism/p3s2c2a5.htm#I>; 7 ST. THOMAS AQUINAS, THE SUMMA THEOLOGICA IIa-IIae, Question 43.

32. 2 ST. AUGUSTINE CONFESSIONS 76-79 (William Watts trans., William Heinemann Ltd. 1950) (1631).

33. See Sarbanes-Oxley Act of 2002 § 404, 15 U.S.C. § 7262 (Supp. V 2005).

34. CATECHISM OF THE CATHOLIC CHURCH, para. 2286, available at <http://www.vatican.va/archive/catechism/p3s2c2a5.htm#I>.

35. See *id.* at para. 2284.

36. See *id.* at para. 2284-87.

37. ROBERT G. HAMERTON-KELLY, THE GOSPEL AND THE SACRED: POETICS OF VIOLENCE IN MARK 129-30 (1994); see also John Steele, *A Seal Pressed in the Hot Wax of Vengeance: A Girardian Understanding of Expressive Punishment*, 16 J. L. & RELIGION 35 (2001).

38. RENÉ GIRARD, VIOLENCE AND THE SACRED 143-49 (Patrick Gregory trans., Johns Hopkins Univ. Press 1977) (1972).

39. ROBERT G. HAMERTON-KELLY, SACRED VIOLENCE: PAUL’S HERMENEUTIC OF THE CROSS 21 (1992).

threaten such psychological entrapment. But for litigators, who can neither capitulate nor walk away, the task is harder. Because our legal system is adversarial, we require litigators to become something just short of scandals for each other. The lawyers stand in for the clients and then stand off against each other. They seek the same object—the unanimous approval of the jury. The opposing lawyer serves as model and obstacle.

We have codes of civil procedure, ethics rules, codes of professionalism, and social norms to constrain our worst impulses. And mimetic processes can inhibit scandal as well as exacerbate them. Positive role models serve that function as well.⁴⁰

When the mimetic process is successfully managed, we play out our rivalries on the merits and under the rules. When it is managed poorly, the constraints fail and the litigators turn into monstrous doubles of each other, believing the worst about each other and mimicking each other's worst behaviors. Nietzsche might have been speaking about litigators when he warned: "Whoever fights with monsters should see to it that he does not become one himself."⁴¹ I call this pathology a "small scandal." As we'll see below, when this small scandal occurs in criminal or civil litigation, the lawyers begin to "fight fire with fire," or focus on "taking out" the opposing lawyer.⁴²

Girard also defines and analyzes great scandals that lead to episodes of social scapegoating. Great scandals are fueled by small scandals—the "dissensions, rivalries, jealousies, and quarrels"⁴³ of everyday life which, like a sort of social friction, are constantly building up and discharging. Mostly, we find healthy ways to inhibit or discharge these negative desires. And we usually find collective ways to accomplish the same goals. But not always. Sometimes societies come under great stress. The economy falters. There are military defeats. Or a contagious disease races through the population. Under those conditions, social stresses build. Sometimes societies are plagued by systemic inequalities that generate friction. Sometimes we witness transgressive acts that shock our moral sensibilities. When the latent social frictions build toward a

40. Clive Stafford-Smith's presentation at the conference illustrated how an attorney can fight hard on the merits but use humor to avoid being scandalized. See Clive Stafford-Smith, Founder & Legal Dir. of Reprieve, Speech at the Hofstra Law School's 2007 Legal Ethics Conference: Lawyering at the Edge (Oct. 14, 2007) (video on file with the Hofstra Law Review).

41. FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL 69 (Rolf-Peter Horstmann & Judith Norman eds., Judith Norman trans., Cambridge Univ. Press 2002) (2001).

42. See David Luban, *Taking Out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 220-25 (2003) (focusing in particular on attacks on progressive lawyers).

43. GIRARD, *supra* note 38, at 8.

crisis point, they tend to coalesce around a suitable controversy.

As the social panic increases mimetically—through imitation of others’ panic—we may reach a crisis requiring decisive resolution. When scandal and crisis develop without restraint, a lynch mob can form and discharge its fury on a victim. (Indeed, as I’ll discuss below, I was once in a crowd that I felt was capable of mob justice.) After the fury is spent, the mob perceives a sense of unity and dissipated tension.⁴⁴ But this is self-deception. The mob erroneously attributes the crisis to the victim and interprets the resulting peace as being due to the victim’s great evil.⁴⁵ These two falsehoods are hallmark symptoms of moral panic.

Mob justice is rare. Typically, we mediate the crisis through our social institutions, such as legislatures, electorates, and juries. But those institutions are not immune from scandal. Quite the contrary. As Gustave LeBon noted, legislatures, electorates, and juries can be considered special purpose mobs.⁴⁶ They channel scandals, for better or worse. Legislatures can pass “moral panic” legislation.⁴⁷ Electorates can demand punitive laws.⁴⁸ Juries can convict in a moral panic, as happened in the infamous child abuse convictions in the 1980-90s⁴⁹ and as may be happening to some accused terrorists today.⁵⁰ In that sense, Kathleen Culhane was correct—a death qualified jury is a successor-in-function to a lynch mob.⁵¹

Our adversarial system invokes scandals in a controlled way. Civil litigations resemble small scandals because the parties are symmetrically situated. The preponderance standard is practically neutral. The parties are formally on an equal footing. We do not say, “it is better that ten

44. See, e.g., HARRY FARRELL, *SWIFT JUSTICE: MURDER AND VENGEANCE IN A CALIFORNIA TOWN* 228-42 (1992).

45. See RENÉ GIRARD, *THINGS HIDDEN SINCE THE FOUNDATION OF THE WORLD* 51-53 (Stephen Bann & Michael Metteer trans., Stanford Univ. Press 1987) (1978); HAMERTON-KELLY, *supra* note 39, at 25-26.

46. GUSTAVE LE BON, *THE CROWD: A STUDY OF THE POPULAR MIND* 166-207 (1960).

47. The term “moral panic” is often attributed to Stanley Cohen. See, e.g., STANLEY COHEN, *FOLK DEVILS AND MORAL PANICS: THE CREATION OF THE MODS AND ROCKERS* (1972). I first encountered the term in the writings of Professor Michael Tonry. In my view, Girard gives the most satisfying explanation of the phenomenon, although he uses different terminology.

48. See Susan A. Bandes, *The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty*, 42 *STUD. L., POL. & SOC’Y* 21 (2007).

49. See generally DOROTHY RABINOWITZ, *NO CRUELER TYRANNIES: ACCUSATION, FALSE WITNESS, AND OTHER TERRORS OF OUR TIMES* (2003) (describing her coverage of the rash of accusations of child abuse by preschool workers).

50. See *id.*; Dorothy Rabinowitz, *From the Mouths of Babes to a Jail Cell: Child Abuse and the Abuse of Justice*, *HARPER’S MAG.*, May 1990, at 52 (concerning the infamous accusation and prosecution of Kelly Michaels for alleged sexual assault).

51. Sahagun, *supra* note 4.

injured plaintiffs go uncompensated than a single defendant unfairly pay a judgment.”

In contrast, a criminal trial resembles a great scandal, a mimetic crisis, or a mob process. Typically, “the people,” embodied by the prosecutor, stage a verbal reenactment of the crime and then a unanimous citizenry (the jury) inflicts good violence (punishment) on the accused.

Our legal ethics rules reflect these two different approaches. The ethics rules don’t formally differentiate between civil litigators for plaintiffs and defendants; the lawyers are symmetrically situated. On the criminal side, however, we find differentiated ethics.⁵² The ethics rules governing the prosecutor, who stands with “the people,” aim to restrain the power of the accusatory mob. The ethics rules governing the defense lawyer, who stands with the accused in the middle of the mob, aim to amplify the power of the accused to defend himself.

These definitions of scandal are successful only if useful. So I will now turn to some examples of “small scandals” and “great scandals.”

IV. SMALL SCANDALS

So if opposing lawyers are required to play the role of scandal for each other, how should they function with each other? It seems that many lawyers just “get it.” Perhaps the oddest such pair is not Terry Stewart and Robert Tyler, but rather Andrew McCarthy, the prosecutor of Omar Abdel Rahman (the “Blind Sheikh”), and Lynne Stewart, who defended Rahman and was subsequently convicted for assisting Rahman to send forbidden messages from prison.⁵³ In an article titled *Lynne Stewart & Me*,⁵⁴ McCarthy tries to reconcile his genuine fondness for Lynne Stewart with their professional, political, and ideological differences. McCarthy found that, for the most part, Stewart was reasonable, practical, open-minded, and true to her word.⁵⁵

It doesn’t always work like that. Some lawyers skillfully “bait” their opposition into becoming scandalized, while themselves avoiding

52. See MODEL RULES OF PROF’L CONDUCT R. 3.1 (2007) (criminal defense lawyers given unique treatment); MODEL RULES OF PROF’L CONDUCT R. 3.8 (2007) (criminal prosecutor has special duties). Compare ABA STANDARDS FOR CRIMINAL JUSTICE Ch. 3 (“The Prosecution Function”), with Ch. 4 (“The Defense Function”) (Supp. 1986).

53. *United States v. Sattar*, 395 F. Supp. 2d 79, 84-88, 104 (S.D.N.Y. 2005) (affirming conviction of lawyer Lynne Stewart).

54. Andrew C. McCarthy, *Lynne Stewart & Me*, NAT’L REV. ONLINE, Feb. 15, 2005, <http://article.nationalreview.com/?q=OGfkNjA4YTJkY2ZhN2YyY2U5OGMwZTY1OGU2NTk4MTI=>.

55. *Id.*

any obvious improprieties. Every county courthouse has at least one lawyer who “everyone knows” is a lying jerk, yet who somehow never gets sanctioned or disciplined. Such lawyers love to be hated, and the strategy can sometimes throw the opposition lawyers off their game.

And sometimes lawyers just attack the other side. As L. Ali Khan notes: “Parties, including governments, often refuse to distinguish between their opponents and lawyers who represent them.”⁵⁶ So, for example, prosecutors and defense lawyers sometimes mirror each other’s real or imagined excesses in the game of tit-for-tat. Gerald Uelman described this phenomenon in his reflections on the ethics of Clarence Darrow. Focusing on the criminal trial of Darrow himself for bribing jurors and planting spies in the prosecutor’s office, Uelman captured this notion of “fighting fire with fire”:

This immediately identifies a serious problem with “fighting fire with fire.” Over an extended period of time, everyone forgets who set the first fire. The Los Angeles prosecutors probably justified their use of spies and informants in the defense camp because they were sure Darrow would deploy spies and informants against them. From this perspective, *they* were the ones fighting fire with fire. Thus, fighting fire with fire invites a constantly escalating conflagration with diminishing ability to sift through the ashes and determine who started it.⁵⁷

This small-scale scandalization is a perennial threat, but today is particularly acute. The federal government “took out” the opposing lawyers in the KPMG case and tried to take out the big law firms representing Guantanamo detainees.⁵⁸ The problem arises in private litigation as well: “If a lawyer is vigorously advocating his client’s cause, the lawyer is not only identified with the client but may be seen as an aider and abettor.”⁵⁹ Currently the law of lawyer liability is witnessing repeated attempts to expand lawyers’ liability for aiding and abetting their clients’ torts.⁶⁰ Similarly, we have seen frequent use of tactical disqualification motions. One might think that refusing to expand lawyer liability would only serve the economic self-interest of

56. L. Ali Khan, *Advocacy Under Islam and Common Law*, 45 SAN DIEGO L. REV. (forthcoming 2008), available at <http://ssrn.com/abstract=1016381>.

57. Gerald F. Uelman, *Fighting Fire with Fire: A Reflection on the Ethics of Clarence Darrow*, 71 FORDHAM L. REV. 1543, 1563 (2003).

58. Stephen Gillers, *The “Charles Stimson” Rule and Three Other Proposals to Protect Lawyers from Lawyers*, 36 HOFSTRA L. REV. 323 (2007).

59. Khan, *supra* note 56, at 22.

60. See generally Katerina P. Lewinbuk, *Let’s Sue All the Lawyers: The Rise of Claims Against Lawyers for Aiding and Abetting a Client’s Breach of Fiduciary Duty*, 40 ARIZ. ST. L.J. (forthcoming 2008), available at <http://ssrn.com/abstract=1017042> (examining this growing trend).

lawyers, but there is a larger issue at stake: To what extent will we indulge the logic of scandal and permit the legal process to turn on itself?

Here's another example of small scandals, but this time outside of litigation. One frequently sees a small scandal when a partner departs a firm. The original firm, realizing that one of its partners is "in play," might rush in and fight to retain the partner. The competing firms view each other as models in the Girardian sense, in that each firm's desire for the potential lateral stokes the other firm's desire.⁶¹ But the model is also an obstacle, because only one can possess the coveted object. As the two firms begin to match each other's offers, tensions rise, and they interpret the other's moves as bad faith and "over the line." A game of reciprocal "hard ball" ensues. The firms face each other in a symmetrical posture of distrust and aggression.

If the departing partner keeps the lateral move secret until it is announced, or if the new firm wins the bidding war, a different "small scandal" ensues, with both firms fighting over the clients. Of course, no firm owns its clientele. But the logic of scandal can be irresistible. In the scramble for clients, each firm interprets the other's conduct in the most negative way and then imitates it in a game of "tit for tat." The result is a race to the bottom, a co-dependent process, in which participants share responsibility for each other's conduct. I have seen participants remain indignant decades after a break-up. I have also seen emotional reconciliations in which participants forgive each other and wonder what had caused them to act as they did.

A few years back, one of those small scandals ballooned into a public spectacle. Frode Jensen, a partner at Pillsbury Winthrop, announced internally that he was moving to Latham & Watkins.⁶² According to news accounts and Jensen's subsequent allegations, tensions within Pillsbury were high because they had previously lost partners to Latham and other firms. Not surprisingly, Jensen sought a smooth exit. He negotiated with Pillsbury over the text of a press release by Latham and thought that agreement had been reached. But after Latham made its announcement, "Pillsbury stunned the legal community when Chair Mary Cranston and Managing Partner Marina Park issued a press release disparaging Jensen" as unproductive and worse.⁶³ Jensen

61. See GIRARD, *supra* note 38, at 144-48.

62. See Alexei Oreskovic, *Pillsbury Pounds Ex-Partner as He Moves to Latham*, THE RECORDER, Sept. 6, 2002, available at <http://www.law.com/jsp/article.jsp?id=1030821171414>; see also Anthony Lin, *Frode Jensen Finds a New Home at Holland & Knight*, N.Y. L.J., Sept. 14, 2004, at 1.

63. Alexei Oreskovic, *Pillsbury Settles With Frode Jensen*, THE RECORDER, Apr. 2, 2003,

quickly sued for forty-five million dollars⁶⁴ and the case settled quietly.

In the legal community, the question of the day was, “What were they thinking?” When a firm believes that a departing partner had become unproductive, self-interest normally leads the firm to publicly state, “We wish the departing partner well,” and then privately celebrate that the firm’s profitability has risen. But the sway of scandal is strong and the sense of rivalry with Latham and other firms could have overwhelmed common sense, particularly if there was an anxious mood within the Pillsbury firm. So, when we view the process through the lens of the “small scandal,” we aren’t surprised by the reaction and the pertinent question becomes, “How did they succumb to the self-defeating logic of scandal?”

Given the destructive nature of scandal, law firms utilize prohibitions, norms, and ritual to prevent scandals from arising or escalating. Take, for example, the scandal of compensation, a topic that can rend firms apart. Many firms traditionally employed “closed compensation” systems, in which partners did not know what other partners made. The knowledge of what the other partners made was a scandal to be kept out of sight and out of mind. Or they used “lockstep” compensation, which eliminated incentives to play tit-for-tat. Today, many firms believe that the best way to prevent internal warfare from erupting is to utilize an open compensation system based on transparent formulas, precisely defined partnership levels, and point systems. But whatever system is used, the object is to prevent scandals from starting and to contain the scandals that do.

It’s harder for two firms to manage an incipient scandal between themselves. In that context, community norms and ethics rules can help. Let’s return to the example of the departing partner and the resulting scramble for clients. Ethics opinions have promulgated the helpful norm that the departing partner and the original firm should jointly sign a letter to the affected clients, explaining that the client chooses its lawyers and asking for a written statement of the client’s decision. Notice that even under the “double signature” scenario, the original firm and the new firm adopt a symmetrical posture—but this time they face the client (not each other) in a posture of restraint and obedience.

available at <http://www.law.com/jsp/article.jsp?id=1048518230488>.

64. Amended Complaint at 23, *Jensen v. Pillsbury Winthrop LLP*, No. CV-02-0191966-S (Conn. Super. Ct. Oct. 14, 2002), available at <http://www.americanlawyer.com/pdf/101402jensen-complaint.pdf>.

V. GREAT SCANDALS

When analyzing great scandals, we might ask where they come from, how to identify them, and what we should do once we are in one.

A. *Where They Come From*

Sometimes it's clear why the scandal generated. The prosecution of the Duke University lacrosse players was that way. Within various communities on and around campus, deep reservoirs of discontent had been generated by race issues, gender issues, class issues, antipathy between geeks and jocks (that is, professors and athletes), friction between "town and gown," and left-right culture wars. Then came accusations that privileged white college athletes gang-raped a poor African-American single mother after paying her to dance naked while they chugged beer. A "perfect storm" quickly swirled, regardless of the truth.⁶⁵

Some great scandals are more puzzling. For example, for several months in 2004, the public and popular media were obsessed with the Northern California trial of Scott Peterson for murdering his pregnant wife, Laci, on Christmas Eve, 2002.⁶⁶ Why the public fascination with that particular murder? It is hard to predict in advance which homicides will engage the public imagination, but that trial certainly had some classic elements: a fresh-faced, white, suburban, pregnant wife; a Christmas Eve crime; bizarre behavior by the attractive, white, suburban husband (at the time of his arrest in a golf course parking lot he had dyed his hair and assembled a get-away kit that included sleeping pills and Viagra).⁶⁷ That is a potent recipe. Still, there was a fickleness, an element of randomness, about why that particular murder drew so much attention. The Scott Peterson trial probably had no lasting effect on the public at large.

And sometimes great scandals are generated not by false accusations or random processes, but by issues that merit our greatest attention. In that category we must place the issue of morality and the rule of law in the Global War on Terrorism. Even though some of the

65. STUART TAYLOR, JR. & K.C. JOHNSON, *UNTIL PROVEN INNOCENT: POLITICAL CORRECTNESS AND THE SHAMEFUL INJUSTICES OF THE DUKE LACROSSE RAPE CASE 16-32* (2007).

66. Carolyn Marshall, *Jury Finds Scott Peterson Guilty of Wife's Murder*, N.Y. TIMES, Nov. 13, 2004, at A10.

67. *Laci Peterson Case: What the Jury Didn't Hear*, CNN.COM, Dec. 31, 2007, <http://www.cnn.com/2007/US/law/12/12/court.archive.peterson10> (originally published in 2004 from CourtTVNews.com); Transcript of Anderson Cooper 360 Degrees, CNN.COM, July 14, 2004, <http://transcripts.cnn.com/TRANSCRIPTS/0407/14/acd.00.html>; see also Marshall, *supra* note 66.

issues in that controversy are substitutes for other social frictions, the core of that dispute is real and will remain the pre-eminent event in American legal ethics for this generation and longer.

B. How We Can Spot Them

One might think, “I know a scandal when I see one.” That’s often true. But remember that great scandals involve some level of self-deception. Large numbers of people—including, perhaps, ourselves—use the scandal as a vehicle for resolving frustrations we formed elsewhere. To justify anger and violence, a crowd deceives itself into thinking that the accused threatens us with social chaos; we believe that the calm we feel after the violence is due to the great wickedness of the accused. I saw this very dynamic myself a few years ago.

My office in Redwood City, located about a block from the courthouse, had scheduled a fire drill at almost precisely the time the verdict was due in the Scott Peterson trial. Several of us walked down to see what would happen. Helicopters hovered far above the courthouse, filming the circus below. Reporters worked the crowd, hunting for quotes. The news media “A-teams” set up canvas tents. Some in the crowd brought hand-held radios to hear the verdict read over the air. The crowd was tightly packed and it seemed to me that their emotions were also tightly packed. A giddy, euphoric mood was weighted with anxiety and tension.

I asked several people why they had come. For the history of it all, replied some. This is the biggest thing ever to happen in Redwood City, I was told by a man carrying his child high on his shoulders. Others had more pointed agendas. One woman said that her brother-in-law had gotten away with beating her sister, and that Scott should not get away with it too. A man said that O.J. Simpson had gotten away with murder and we shouldn’t let Peterson get away with it too. Another man, visibly upset, said that society was “going to hell” and “it’s about time we did something” about it.

I asked them why their personal concerns were relevant to Peterson’s guilt. Each one immediately conceded the irrelevance of their comments to the issue of guilt, yet each quickly reiterated their personal concerns with undiminished passion. Then someone yelled that the jury was returning its verdict. “Quiet!” someone yelled. The huge crowd fell perfectly silent and still. A long pause. “Guilty!” someone yelled. The crowd erupted. People cheered, convulsed, and threw their hands in the air. Strangers hugged strangers. The crowd was “as one.” A few minutes later, the crowd hissed when someone from the defense team walked out

the front door. I felt that the crowd was capable of administering justice itself.

The indicia of a great scandal (or mimetic crisis), then, are large numbers of people venting on collateral issues; charged, hyperbolic accusations; allegations of potential social chaos and disintegration; and, of course, an accused standing literally or metaphorically in the middle of the accusers.

C. *How Lawyers Behave in Great Scandals*

First, sometimes lawyers start great scandals or fan the flames—a practice I will address below in my discussion of Michael Nifong.

Second, some lawyers seem drawn to scandals. If we find ourselves drawn to scandals, we might analyze our motivations. Some lawyers seem to be present so often when scandals appear—Alan Dershowitz, Gloria Allred, and Mark Geragos come to mind—that one might wonder why that is so. If being in the spotlight ever took precedence over serving the client, there's a clear conflict of interest.

Third, lawyers are sometimes overwhelmed by the scandal and lose sight of their role in the process. We repeatedly see decent people get disoriented in a scandal. In my view, that is the best way to characterize, for example, Judge Lance Ito, who while presiding over the O.J. Simpson trial entertained celebrities in his chambers and generally presided over a circus atmosphere.⁶⁸ Likewise, William H. Ginsburg, a respected medical malpractice lawyer better known as Monica Lewinsky's first criminal defense lawyer, was "unaccustomed to the burdens of great celebrity" and ran from media outlet to media outlet making confusing pronouncements until Lewinsky replaced Ginsburg with two respected members of the criminal defense bar.⁶⁹ (Appearing on all five major Sunday political talk shows is sometimes called a "Full Ginsburg."⁷⁰) Former prosecutor Michael Cardoza was a television news analyst for the coverage of the Scott Peterson trial, yet for some reason decided to moonlight as a consultant for the Peterson defense team—resulting in his ouster from the media analyst role.⁷¹

68. Howard Chua-Eoan & Elizabeth Gleick, *Making the Case*, TIME, Oct. 16, 1995, at 48, 55; see also Frank Rich, Op-Ed., *Judge Ito's All-Star Vaudeville*, N.Y. TIMES, Oct. 2, 1994, at 17.

69. Lloyd Grove, *Bye Bye, Bill: The Lawyer Exits the Limelight*, WASH. POST, June 3, 1998, at D1, available at <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/ginsburg060398.htm>; see also *Ginsburg Departs as Lewinsky's Attorney*, CNN.COM, June 2, 1998, <http://www.cnn.com/ALLPOLITICS/1998/06/02/ginsburg.out/>.

70. See Hendrik Hertzberg, *Brouhahaha*, NEW YORKER, Oct. 15, 2007, at 33.

71. Stacy Finz & Diana Walsh, *Peterson Practices Being Cross-Examined*, SFGATE.COM, Oct. 18, 2004, <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/archive/2004/10/18/>

In contrast to the lawyer who struggles and then loses her way in a great scandal, we might consider Paul Biegler, the criminal defense lawyer portrayed by Jimmy Stewart in *Anatomy of a Murder*.⁷² It's about a murder case in which truth is elusive to the very end, lawyers for both sides try to mold testimony to suit their needs, witnesses have their own agendas, and the judge and jurors operate under prejudicial sexual stereotypes. Biegler walks up the ethical line and perhaps on occasion steps over it, but for the most part maintains his footing by sticking to the traditional roles and wiles of the trial lawyer. By the end of the film, Biegler has avoided calamity but appears no closer to the truth than when he started. Biegler struggled and stumbled, but suffered no greater disaster than having his client walk out on the fee.

Fourth, we see that some lawyers have the skill and the temperament to stand by the accused in the middle of that circle. It's one of the most traditionally honored aspects of the profession. For centuries now, the lawyer's oath has called upon us to represent the friendless and oppressed.⁷³ I'll return to this point below when I discuss particular cases handled by Michael Tigar, J. Tony Serra, and Daniel Mori. Each of them served as defense counsel but has adopted different orientations toward the great scandal they faced.

VI. POSSIBLE ORIENTATIONS TOWARDS SCANDAL: A COMPARISON OF PARTICULAR MATTERS HANDLED BY MICHAEL NIFONG, DANIEL MORI, MICHAEL TIGAR, AND TONY SERRA

A. *Michael Nifong: The Prosecutor Magnifies the Scandal*

In theory, the prosecutor will stand in for the people and move a pre-existing social dispute into the courtroom where it will be resolved under the rules of the game. The scandal is not eliminated; it is constrained, harnessed, and tempered. The scandal is played out in a theater of violence—the courthouse—rather than played out on the streets.⁷⁴

PETERSON18.TMP.

72. ANATOMY OF A MURDER (Columbia Pictures 1959).

73. See, e.g., CAL. BUS. & PROF. CODE § 6068(h) (West 2003); ABA CANON OF ETHICS, OATH OF ADMISSION § III (1908).

74. AESCHYLUS, ORESTEIA 103-04 (Christopher Collard trans., Oxford Univ. Press 2002).

The prosecutor always threatens to subvert that function through false accusations or fanning the flames⁷⁵ of the scandal. Hence the ethics rules single out the prosecutor for special constraints.

During the 1980-90s, we witnessed an enormous mimetic crisis as it surged through the American justice system.⁷⁶ Dozens of people were convicted of child molestation for which there was no credible evidence. Rather than being a brake on the crisis, prosecutors abetted it. Prosecutors filed absurd charges alleging obviously impossible acts, and then the cases “prosecute[d] themselves.”⁷⁷

More recently, we witnessed the criminal prosecution of the Duke lacrosse players. I mean “criminal prosecution” in two senses—the normal one and also the sense that the prosecution was itself a criminal act. Michael Nifong was held in criminal contempt for lying to the judge about evidence.⁷⁸ If the testimony of the DNA expert is to be believed (and I do believe it),⁷⁹ Nifong also engaged in criminal obstruction of justice when he reached out to alter the expert’s exculpatory report.

The North Carolina State Bar’s initial discipline charges against Nifong dealt with his numerous out-of-court statements demonizing the defendants and witnesses.⁸⁰ It has been plausibly argued that Nifong, who at the time was losing the electoral race to keep his job as District Attorney, was motivated to further incite an already-upset electorate against the defendants.⁸¹ As it turned out, Nifong’s dogged pursuit of the defendants was the issue that won Nifong the election.⁸² But, as a “minister of justice”⁸³ who is forbidden from “heightening public condemnation of the accused,”⁸⁴ Nifong was perverting his role.

B. Michael Tigar: The Defense Lawyer Seeks to Defuse the Scandal

The defense lawyer’s response to the great scandal can vary. One classic orientation is to defuse the scandal by defending, excusing, mitigating, and contextualizing the defendant. The defense lawyer tries

75. Crowds are often metaphorically described as naturally occurring, positive-feedback events such as fires, storms, turbulent seas, overflowing rivers, and the like. *See, e.g.*, ELIAS CANETTI, *CROWDS AND POWER* 75-90 (Carol Stewart trans., Seabury Press 1978) (1960).

76. *See* RABINOWITZ, *supra* note 49, at 24-26.

77. MARK BAKER, D.A.: PROSECUTORS IN THEIR OWN WORDS 28 (1999).

78. *Nifong Pleads Not Guilty to Contempt Charge in Lacrosse Case*, FOXNEWS.COM, Aug. 30, 2007, <http://www.foxnews.com/story/0,2933,295209,00.html>.

79. TAYLOR & JOHNSON, *supra* note 65, at 311.

80. *Id.* at 321.

81. This theme runs throughout *Until Proven Innocent*. *See generally id.*

82. *See id.* at 295-98.

83. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. 1 (2007).

84. MODEL RULES OF PROF’L CONDUCT R. 3.8 (2007).

to break down the mob psychology by humanizing the defendant. The lawyer asks the jury members to step out of the mob and react as individuals.

A good recent example is Michael Tigar's defense of Lynne Stewart. For a variety of reasons, the defense wasn't able to attack the Special Administrative Measures ("SAMs") that Stewart had violated when she smuggled letters into and out of prison on behalf of her client Omar Abdel Rahman.⁸⁵ So, Tigar needed to create a context for jurors to view Stewart sympathetically. He developed the rhetorical concept of a "bubble" to create doubt as to whether Stewart had acted with the requisite criminal intent. Tigar argued that because lawyers are required to zealously serve their clients, when Stewart was faced with SAMs that might have impinged on her lawyering, Stewart interpreted the SAMs narrowly, in good faith, to create a "bubble" in which she could carry out her lawyerly duties.⁸⁶ Tigar himself suggested that Stewart's interpretation was "mistaken,"⁸⁷ but in good faith. Thus he himself modeled the stance he hoped jurors would imitate—understanding Stewart in a way that did not permit a criminal conviction.

The role of standing by an accused who is surrounded by the mob is a constitutional imperative but is also a moral imperative within the Judeo-Christian ethos. Talmudic interpretation of the law served to prevent mob action and to find something worth saving in the accused.⁸⁸ The New Testament went so far as to call the Holy Spirit the "paraclete"—the Greek term for defense counsel.⁸⁹ In the Pericope of the Adulteress, Jesus used subtle psychological techniques to induce members of the mob to step out of that role, however briefly, and react as individual human beings.⁹⁰ Inducing that reaction is still a matter of life and death in American court rooms, as was recently explained by a capital defense lawyer:

[T]here is built into a [death] penalty phase a basic dynamic of empathy. That is, if the defense is doing it right. Let me be clearer. For

85. *United States v. Sattar*, 395 F. Supp. 2d 79, 86 (S.D.N.Y. 2005).

86. Transcript of Record at 11967-76, *United States v. Sattar*, 395 F. Supp. 2d 79 (S.D.N.Y. 2005) (No. S1 02 Cr. 395), available at <http://www.lynnestewart.org/transcripts.011005.txt>.

87. *Id.* at 11976.

88. See ALAN M. DERSHOWITZ, *SHOUTING FIRE: CIVIL LIBERTIES IN A TURBULENT AGE* 329 (2002) (describing the high standards set by Jewish religious courts for imposing the death penalty); RENE GIRARD, *I SEE SATAN FALL LIKE LIGHTNING* 118 (James G. Williams trans., Orbis Books 2001) (1999); Rabbi Dan Polish, *Capital Punishment on Trial: Does Judaism Condone Capital Punishment?*, REFORM JUDAISM, Summer 2002, available at <http://www.reformjudaismmag.net/02summer/focus.shtml>.

89. GIRARD, *supra* note 88, at 189-90.

90. *John* 7:53-8:11.

a defense attorney to succeed in a penalty phase, for a defense attorney to convince a jury that this person doesn't have to be executed but they can simply be put away for the rest of their life without parole, typically to bring about that result means that just for a nanosecond that the jury looks at the person and says "there but for the grace of God go I," that there's something in them that [the jurors] can identify with.⁹¹

C. *J. Tony Serra: The Defense Lawyer Creates Counter-Scandal Inside the Courtroom*

Another defense strategy is to create a scandal and crisis in the courtroom, but turn it back against the prosecution. That is the strategy that criminal defense lawyer J. Tony Serra told me he uses in every defense.⁹² Serra says that a criminal trial deals with the "pre-cognitive soft tissue" of the human brain, and therefore the defense attorney must elicit emotions, must tie those emotions to moral issues, must be outraged, must be self-righteous, and must use all the poetics at his or her disposal to stake out a moral high ground.⁹³

Take, for example, Serra's defense in the retrial of Patrick "Hooty" Croy, a Native American who had been sentenced to death for killing a police officer in 1978.⁹⁴ Serra says that in the first trial, efforts to defend and contextualize Croy had reinforced the pernicious stereotype of the "drunk Indian." On retrial, Serra went on the offensive, raising the "cultural defense" that police had violated a truce—had violated a sacred trust.⁹⁵ It was the police who stood accused; Croy was acquitted. Serra's approach can be highly controversial. Even defense lawyers sometimes attack him.⁹⁶ But my point here is not to argue the effectiveness of his strategy, but rather to distinguish different orientations defense lawyers can take toward the mob.

There is nothing novel about creating counter-scandal when the police have overstepped their role. In those cases, defense counsel "turn the tables" on the police and government, and such "turnabout is fair

91. Kevin M. Doyle & Charles J. Hynes, *Catholics and the Death Penalty Panel Discussion*, 44 J. CATH. LEGAL STUD. 297, 317-18 (2005).

92. Telephone Interview with J. Tony Serra (June 29, 2007).

93. *Id.*

94. *Id.*; see also Wayne Wilson, *Miscues on Probation Lead to Life Sentence for Croy*, SACRAMENTO BEE, Oct. 28, 1997, at B1.

95. Telephone Interview with J. Tony Serra (June 29, 2007); see also Ann W. O'Neill, *Olson's Latest Lawyer No Stranger to Fame*, L.A. TIMES, May 11, 2000 (describing Serra's defense of Croy).

96. See, e.g., William Finnegan, *Defending the Unabomber*, NEW YORKER, Mar. 16, 1998, at 52.

play.” We might further distinguish a category of cases where the counter-scandal is consciously manufactured. In *Defending Mohammad*, Robert Precht, a criminal defense lawyer, relates the story of the criminal trial following the 1993 World Trade Center bombing.⁹⁷ Precht tells an anecdote about the famed criminal defense lawyer William Kunstler, who was preparing to defend a related criminal matter and who wanted Precht to subpoena and cross-examine a government witness who posed a threat to Kunstler’s client. Kunstler would, in effect, get free discovery on the witness who was implicating his client in the other matter. So, Kunstler urged Precht to “create an incredible sideshow.”⁹⁸ Precht declined. Kunstler pressed on: “Crimes are committed in the name of justice by prosecutors and judges all the time. You should argue that the FBI was behind the bombing and that it was a plot to discredit enemies of U.S. policy in the Middle East.”⁹⁹ Precht once again declined the suggestion. Kunstler then let the matter drop and casually showed Precht framed photographs of Kunstler with celebrities.¹⁰⁰

We might further distinguish the cases in which the defense lawyer creates counter-scandal by pointing the finger not at the government but at an innocent person. Although the purpose of this Article is primarily descriptive, that strategy seems to stand on a different normative footing than the “blame the government” cases.¹⁰¹

D. Major Daniel Mori: The Defense Lawyer Creates Counter-Scandal Outside the Courtroom

A third defense strategy is the one adopted by Major Michael “Dan” Mori in his representation of David Hicks, an Australian detained by the United States military in Guantanamo Bay, Cuba.¹⁰² Mori’s strategy was “to arouse political indignation” outside the courtroom.¹⁰³

97. ROBERT E. PRECHT, *DEFENDING MOHAMMAD: JUSTICE ON TRIAL* (2003).

98. *Id.* at 111-13.

99. *Id.* at 113.

100. *Id.* at 113-14.

101. See generally Ellen Yankiver Suni, *Who Stole the Cookie from the Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases*, 68 *FORDHAM L. REV.* 1643 (2000) (analyzing the ethics and morality of blame-shifting by criminal defense lawyers).

102. Posting of David Luban, *The Vindication of Major Mori*, to Balkinization, <http://balkin.blogspot.com/2007/04/vindication-of-major-mori.html> (Apr. 1, 2007, 12:02PM).

103. *Id.* News reports suggest that Mori’s strategy has been followed by other military lawyers in defense of other detainees. See Kirk Makin, *Canadian Bar Association Moves to Support Rights of Khadr*, *GLOBEANDMAIL.COM*, Aug. 11, 2007, <http://www.theglobeandmail.com/servlet/story/RTGAM.20070811.wmakin20811/BNStory/National/home>; see also Pascal Zamprelli, *Guantanamo Bay: Justice Denied*, *MCGILL REPORTER*, Oct. 25, 2007, <http://www.mcgill.ca/reporter/40/05/kuebler/>. (Disclaimer: This author provided an expert opinion and legal advice to the Lieutenant Commander William Kuebler.)

That strategy subverts the classical notion that we remove the social dispute from the public square and cabin it within the tribunal.¹⁰⁴ To prevent the dispute from spilling back out into society at large, the ethics rules and judicial gag orders forbid lawyers from trying their cases in the press and from discrediting the tribunal itself.¹⁰⁵ It's not surprising, then, that Mori's opponents accused him of unethical conduct.¹⁰⁶

Those accusations were ultimately meritless. First, Mori had technical defenses under the ethics rules. Second, Guantanamo is not like other courts. Guantanamo is a new tribunal, which has already had three different charters in its short life.¹⁰⁷ Its very existence and legitimacy are hotly contested both domestically and abroad. Therefore, Mori's decision to question the legitimacy of the court should not be seen as breaching the cultural norm that criminal litigation is to take place within the established courtroom. But, again, my purpose here is to illustrate the different orientations defense counsel can take toward the mob.

VII. CONCLUSION

Scandals are commonly compared to dangerous natural events, such as fires, storms and winds, that are fueled by short-term, positive-feedback mechanisms. In giving advice about being trapped in a scandal—about being scandalized—I will repeat here the warnings that my mother gave me about the dangers of swimming in the ocean when riptides are common. People standing safely on shore easily see a riptide. But when you are in the surf, you can rarely see it; you can only *feel* it. Even though you feel it, you probably cannot fight it. You must swim sideways to escape it, and then you are back in control.

Advocates can't swim sideways. We are duty bound to stand by the client and ride out the tides, storms, and fires. So, I end this Article where I began it—hoping that the lawyer at the edge maintains her moral footing, but also realizing that “scandal must come.”¹⁰⁸ And when scandal comes, lawyers will need knowledge of how scandals work, the

104. See AESCHYLUS, *supra* note 74, at 103-04.

105. MODEL RULES OF PROF'L CONDUCT R. 3.8(f) (2007); see also Lonnie T. Brown, Jr., “May It Please the Camera, . . . I Mean the Court”—An Intrajudicial Solution to an Extrajudicial Problem, 39 GA. L. REV. 83, 136-38 (2004) (suggesting that gag orders could enhance ethics rules).

106. See Posting of David Luban, *supra* note 102.

107. See, e.g., Erwin Chemerinsky, *Detainees*, 68 ALB. L. REV. 1119, 1122-24 (2005) (describing the various Supreme Court decisions affecting the legal status of Guantanamo Bay detainees). In 2006, the Supreme Court held that military commissions used to try detainees violate the Geneva Conventions. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2759 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

108. See *Matthew* 18:7.

ability to recognize our orientation toward the scandal, the self-awareness to diagnose our own motivations, the help of friends outside the scandal to guide us, and the courage to stand our ground.