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TRANSCRIPT

FREE PRESS AND FAIR TRIAL: IMPLICATIONS OF THE O.J. SIMPSON CASE*

*Nadine Strossen***

I am delighted to participate in this important forum. I still have fond memories of the last time I had the honor of speaking in this auditorium, when I gave the 1991 Cannon Lecture.

I want to express a special thanks to Professor Donald Lively for organizing this panel. I have had the pleasure of working closely with Don during the past year-and-a-half on a book that N.Y.U. Press has just published: *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties*.

The book that Don and I co-authored is generally related to the topic of this evening's discussion. Both concern tensions between the First Amendment and other constitutional rights. As such, both topics are part of an increasingly important, difficult constitutional debate: How do we simultaneously honor both the First Amendment's free expression guarantees and other fundamental rights?

In the next few months, the U.S. Supreme Court will be hearing three cases that present different variations on this same constitutional theme. Specifically, these cases ask the Court to reconcile freedom of expression with competing rights of equality and religious liberty.

This evening we are focusing on reconciling freedom of expression with the fair trial guarantees contained in the Sixth Amendment and the Due Process Clause. Specifically, the Sixth Amendment provides, "In all prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury"

As the O.J. Simpson trial has made dramatically clear, a defendant's fair trial rights may be in tension with the First Amendment rights of the press and the public—the rights to report and receive information about the trial. According to a recent survey, most lawyers believe that extensive media coverage of a criminal case inherently jeopardizes the defendant's right to a fair trial. Four out of five said that O.J. Simpson is less likely to get a fair trial because of the heavy publicity surrounding his case.

Beyond this general concern, the media coverage in the Simpson case has posed several specific threats to the defendant's fair trial rights. Accordingly, at

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several points in the proceedings, Judge Lance Ito has threatened to severely limit the media's coverage of the case, or even to prohibit such coverage altogether.

It is also important to note, though, that First and Sixth Amendment rights are not always antagonistic to each other. To the contrary, they may well be mutually reinforcing. The Simpson case illustrates this too. For example, recall the fall of 1994, when Judge Ito responded to false press reports about certain allegedly incriminating evidence by threatening to bar media coverage of the case. O.J. Simpson's lawyers, at first, supported such a move, but they later changed their position. They ultimately argued that allowing the press and the public to observe the proceedings would enhance their fairness, as well as the public's perception of their fairness, all to Mr. Simpson's benefit.

Indeed, the Sixth Amendment itself reflects the presumption that a trial that is open to public scrutiny is more likely to be fair. Thus, to prevent secretive, Star Chamber-type proceedings, the Sixth Amendment expressly guarantees "a public trial."

Accordingly, when criminal defendants themselves seek to have the proceedings open to the press and public, the defendants' Sixth Amendment rights overlap with the First Amendment rights of the press and public. In those situations, the proceedings should virtually always be open. The only exception would be if yet another constitutional right were implicated in a particular case, such as the privacy rights of a particular witness, as the Supreme Court has held.

There is an especially dramatic constitutional conflict when a defendant wants to exclude the press and public from the trial, arguing that open proceedings would be unfair. The Supreme Court has ruled that the defendant has no Sixth Amendment right to demand closed proceedings. But the Court has recognized that, in some circumstances, open proceedings may violate a defendant's fair trial rights, and therefore the public and press may be excluded.

For example, in the 1979 decision *Gannett Co. v. DePasquale*,¹ the Supreme Court upheld a trial court's order excluding the press and the public from a pretrial hearing on the admissibility of the defendant's confession.

Many criminal defense lawyers argue that the scales of justice are already heavily tilted against anyone accused of a crime and therefore, they maintain, the defendant should have every possible opportunity to correct that imbalance, including a veto power over whether the proceedings are open. Should the courts accept this argument? And what if the prosecution agrees with the defendant that particular proceedings should be closed? Should both parties, jointly, have a veto power to exclude the press and public?

Even where both the prosecution and defense agree that the press and public should have some access to the proceedings, sensitive constitutional issues still arise. I will now list some of the most important of these issues. While I do not have time to discuss how they should be resolved, I hope that our outstanding panelists, and you audience members, will do so. Some of these issues are:

1. 443 U.S. 368 (1979).

- What limits may a trial court impose on the press, both inside and outside the courtroom? For example, did Judge Ito act properly in allowing only a few reporters to sit in on the jury selection process in the Simpson case?
- May certain media—namely, television—be completely excluded, as they now are throughout the federal court system and in several state court systems?
- Should defendants have a veto power over television coverage, even if they have no veto power over the presence of print media?

When the ACLU National Board adopted a policy on media access to judicial proceedings about ten years ago, our most vigorous debate, and our deepest division, was on precisely this last question.

The ACLU has always strongly championed both First Amendment rights and the rights of accused criminals. Therefore, we sought to formulate a policy that would accommodate both sets of rights.

In general, this policy presumptively protects media access to all judicial proceedings, subject to exceptions only upon clear and convincing evidence of a specific danger to a competing fundamental right, including the fair trial guarantee—and even then only if no other alternative measure would protect that right.

The one exception to this fact-specific approach, though, was one that was fiercely advocated by many criminal defense lawyers on our Board—namely, that in a criminal case, the accused should have an absolute right to exclude all broadcast coverage of any proceedings. Not surprisingly, I have had some intense discussions about this aspect of our policy with Steve Brill, C.E.O. and Chairman of Court TV, and Floyd Abrams, his counsel. At some point, the ACLU will probably revisit this contentious and difficult issue.

Let me now return to laying out some of the other challenging issues concerning free press and fair trial, even when the defendant does not ask to keep the media out altogether.

- May the court impose a so-called “gag order” on what the press reports before or during a trial? For example, consider again Judge Ito’s anger during the fall of 1994 over false press accounts about incriminating evidence. Could he bar the press from reporting on any evidence until or unless it is actually admitted at trial? Or could he bar the press from reporting on incriminating evidence that is specifically excluded from the trial because the government violated the defendant’s rights in obtaining it? For example, a coerced confession or illegally seized physical evidence?

In 1976, in the case of *Nebraska Press Association v. Stuart*,² the Supreme Court held that a prior restraint on press coverage of a criminal trial would violate the First Amendment unless it was the only way to prevent prejudicial pretrial publicity from impairing a defendant’s fair trial right. Was that the correct constitutional standard? Or, as Justice Brennan and two other Justices maintained,

2. 427 U.S. 539 (1976).

does the First Amendment *absolutely* bar any prior restraint on press coverage as a means of protecting the defendant's fair trial right?

- And what about "gag orders" on lawyers, parties, witnesses, and other players in the criminal justice system? May states adopt codes of professional conduct that prohibit lawyers' out-of-court statements about pending cases? Are such general rules unconstitutional prior restraints on speech, as many lawyers and scholars maintain, or are they compatible with the First Amendment, as the Supreme Court recently held? Would it be more consistent with First Amendment values to rely instead on specific gag orders issued by trial court judges, framed in response to the peculiar exigencies of particular cases?
- Do rules restricting lawyers' out-of-court statements undermine defendants' fair trial rights, since such rules do not bind many prosecutorial agents, such as police, investigators, and public relations personnel? In other words, do defense counsel *need* to issue out-of-court statements to offset the adverse impact of public statements by government agents? Can defense counsel satisfy their professional responsibility to zealously represent their clients without issuing such statements?
- If general rules *are* permissible, what is the constitutionally correct standard for limiting out-of-court statements? Should the proponent of such a limitation have to show that the statements would create a substantial likelihood of materially prejudicing the case, as provided in the rule adopted by the American Bar Association in 1994?³ Or should the proponent of any such limitation have to satisfy a stricter, more speech-protective standard, enforced by some states—namely, that the out-of-court statements would create a clear and present danger of prejudice?
- Should there be an exemption for statements in response to prejudicial comments from the other side, as in the new ABA rules?⁴ Or would that exemption [on reverse] eviscerate the rule, as the U.S. Justice Department argued?⁵

3. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(a) (1995). The Rule states:

A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

Id.

4. *Id.* See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6(c) (1995). The Rule states:

Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

Id.

5. See *ABA Seeks Lawyer Input on Rules Drafting, Nixes Mandatory Court-Annexed*

- Should any rule restricting lawyers' out-of-court statements be limited only to criminal cases? Or should such a rule be limited only to jury trials? Should it apply only to lawyers directly involved in the pending case, or also to other lawyers and law professors?
- What other steps may courts take to protect defendants from potential prejudicial effects of publicity either before or during the trial? For example, should the jury be sequestered? On the one hand, sequestering the jury is less restrictive of First Amendment rights than limiting press coverage. On the other hand, though, it may make the jurors truncate their deliberations, to the defendant's disadvantage. Thus, at some stages of the Simpson case, the defendant's lawyers said that they would object to cameras in the courtroom if their presence would require the jury to be sequestered.
- How effective are other potential measures for assuring defendant's fair trial rights in the face of prejudicial pretrial publicity? For example, are measures such as postponing the trial, or changing its venue or location effective? What about using the voir dire—the jury selection process—to screen out jurors who cannot issue an impartial verdict because of their exposure to pretrial publicity? How helpful is it to instruct the jury on its responsibility to decide the case based only on the evidence presented in court?

The questions I have laid out have not been definitively answered as a matter of federal constitutional law. The Supreme Court has issued a number of decisions that address these issues. However, the Court's rulings in this area tend to be tightly tied to the particular facts presented. Therefore, slight factual variations may warrant different outcomes. Also, several of the Court's key cases in this area have produced multiple opinions, yielding no clear majority ruling or rationale.

Additionally, each state has its own constitution, and each state's courts are free to interpret their own constitution independently. For example, California courts have interpreted their state free speech guarantee more protectively than the U.S. Supreme Court has interpreted the First Amendment. Therefore, some California lawyers argue that any rule limiting out-of-court statements by lawyers would violate their state free speech guarantee, even though the U.S. Supreme Court has held that such a rule would not necessarily violate the First Amendment.

Given this relatively unsettled state of the governing law, our discussion this evening should focus on what the law *should* be, drawing upon the expertise of our distinguished panelists, with their diverse experiences and perspectives. To provide further background for that discussion, I will now give a thumbnail sketch of a few key Supreme Court rulings. I will then outline a major current controversy about free press and fair trial rights. It presents a larger issue that we could usefully consider in light of the O.J. Simpson case: Whether our federal

Arbitration, 63 U.S.L.W. 2097 (Aug. 16, 1994) ("Michael H. Dettmer, president of the State Bar of Michigan, sought to delete the new 'right of reply' in Rule 3.6(c). Purporting to speak on behalf of the Department of Justice and U.S. Attorney General Janet Reno, Dettmer said paragraph (c) . . . will open the possibility of a trial in the press, a virtual 'rights of reply' free-for-all, he said.")

court system should continue to completely bar all broadcasting of any proceedings whatsoever.

In the watershed case of *Richmond Newspapers, Inc. v. Virginia*,⁶ in 1980, the Supreme Court recognized that the First Amendment guarantees press access to criminal trials. The Court held that such trials could be closed to the public and press only if absolutely necessary to preserve defendants' fair trial rights—in other words, if there were no other alternative means for assuring a fair trial.

Applying the principles underlying the *Richmond* case, the Supreme Court has also recognized a press and public right of access to other proceedings in criminal cases—specifically, preliminary hearings and voir dire, or jury selection.

In 1982, in *Globe Newspaper Co. v. Superior Court for Norfolk*,⁷ the Court held that the First Amendment right of access was violated by a statute that automatically excluded the press and public from certain portions of criminal trials (testimony by underage sex crime victims).

The Court recognized the important privacy and psychological concerns at stake. But it held that a *per se* closure was too blunt a tool for balancing these concerns against the also compelling free speech concerns. Accordingly, the Supreme Court ruled that trial courts must retain discretion to weigh these competing concerns in light of all the facts and circumstances in any particular case.

In 1981, in *Chandler v. Florida*,⁸ the Supreme Court held that when a state chooses to allow television cameras in the courtroom, defendants may not automatically exclude them. The Court concluded that televising criminal trials is not inherently at odds with defendants' fair trial rights. Therefore, it ruled that an accused may exclude the broadcast media only by showing specific prejudice to his fair trial rights in the particular situation. This was an important constitutional development.

In the 1965 case of *Estes v. Texas*,⁹ the Court had suggested that televised criminal trials were inherently prejudicial to defendants. However, in light of intervening technological developments, the Court recognized in the 1981 *Chandler* decision that television coverage in the courtroom need not be any more obtrusive or distracting than print coverage.

The Supreme Court thus held that there is no Sixth Amendment bar to televised proceedings. However, the Court has not yet held that there is any First Amendment right to televised proceedings. Therefore, policies concerning television access have been up to each state, with respect to its own courts, and up to the Judicial Conference of the United States, with respect to federal courts.

Currently, only three states absolutely bar all televising of judicial proceedings. The remaining forty-seven states allow a range of latitude for broadcasting. Of these states, twenty-three impose few, if any, general restrictions on broadcasting, leaving any limitations to the discretion of individual trial judges. California is

6. 448 U.S. 555 (1980).

7. 457 U.S. 596 (1982).

8. 449 U.S. 560 (1981).

9. 381 U.S. 532 (1965).

in this category. Therefore, while Judge Ito does have discretion to impose certain limits on television coverage, he probably would exceed his discretion by completely ousting the media, as he has threatened to do.

The few states that completely bar all televised judicial proceedings are joined by the entire federal court system. I will conclude by outlining this federal court situation, which dramatically poses the free press and fair trial issues we are examining.

The federal courts absolutely banned all broadcasting of any proceedings whatsoever until 1991. Beginning that year, the U.S. Judicial Conference, the federal courts' administrative arm, adopted a very limited, three-year experiment with television. Under this experiment, federal courts, on a voluntary basis, could allow television coverage of civil trials and appeals only, and subject to exclusion orders in particular cases. Only eight federal courts (out of a total of 107) chose to participate in the experiment.

As the experimental period was drawing to a close, during the fall of 1994, a committee of the U.S. Judicial Conference recommended that the experiment should be made permanent, based on the positive experiences of those who had participated in it. In addition, another committee recommended that the federal courts should begin to experiment with televising criminal trials as well.

Despite these recommendations, and despite the positive experiences in the forty-seven states that allow cameras in their courts, in the fall of 1994, the U.S. Judicial Conference voted overwhelmingly to bar cameras from federal courts. By a two-to-one margin, the Conference voted to discontinue even the limited televising of civil trials and appeals, and further, to resume the pre-1991 total ban on any broadcasting in the federal courts.

I was shocked by this setback to fundamental rights. As I have already indicated, the rights at stake are not only the First Amendment rights of the press and the public, but also the Sixth Amendment rights of those criminal defendants who seek media coverage. Therefore, I immediately called the ACLU's Legal Director to explore a possible constitutional challenge to this total ban. After all, the federal courts have a special responsibility to uphold federal constitutional rights. It thus seems especially outrageous that these courts would ride roughshod over the important constitutional rights at stake here. The ACLU's Legal Director agreed with my assessment of the constitutional issues. However, he thought it highly unlikely that any federal judge would rule that the U.S. Judicial Conference had acted unconstitutionally. After all, the Judicial Conference is chaired by the Chief Justice of the U.S. Supreme Court, and also includes the Chief Judge of every federal Circuit Court of Appeals.

Our Legal Director's skepticism was borne out by the ruling of the one federal judge who has been asked to allow the televising of a particularly important case. In 1984, Judge Pierre Leval heard the Cable News Network's (CNN) request to televise the important libel trial that General William Westmoreland had brought against CBS Television, concerning a documentary about the Vietnam War. Judge Leval was very sympathetic to CNN's constitutional claims. However, in light of the U.S. Judicial Conference's complete ban on television, he reluctantly decided that his hands were tied. Judge Leval concluded that he could not admit

cameras to his courtroom unless or until the Supreme Court held the current federal court ban unconstitutional.¹⁰

Chief Justice Rehnquist does not appear favorably disposed to cameras in federal courts. Under his leadership, the Supreme Court has even barred the distribution of audiotapes of appellate arguments before it. In 1993, the Chief Justice threatened to punish University of California Professor Peter Irons for publishing some of these tapes for classroom use. This hostility to dissemination of even such federal court proceedings as Supreme Court arguments—which are open to the public, and involve neither witnesses nor jurors—does not bode well for the prospect of televised federal court proceedings.

For the foregoing reasons, I am not optimistic that the Court will open federal courts to broadcasting anytime soon. And I think that is a great loss for all of us. As stated by Harvard Law School Professor Laurence Tribe, who had successfully argued the *Richmond Newspapers* case before the Supreme Court:

[T]he right of the public and the press to attend and observe criminal trials, as recognized in *Richmond Newspapers*, cannot plausibly be limited to the few who are fortunate enough to fit physically into whatever courtroom space is made available. [Therefore,] wholesale exclusion of the larger public—both contemporary and historic—that is unable to witness the proceedings, without the aid of a TV camera, cannot stand in the absence of a compelling justification in the particular case.¹¹

Ultimately, all of us who are committed to the Bill of Rights have an important stake in television access to all judicial proceedings. For our freedoms can't survive without popular support. And they would not have popular support without public understanding. Televised judicial proceedings have made an enormous, invaluable contribution to that public understanding. The O.J. Simpson case exemplifies this. As columnist Nat Hentoff wrote:

The [televised] pretrial proceedings in the O.J. Simpson case have resulted in a particularly remarkable advance in many people's interest in [and understanding of] the justice system. I have heard friends and acquaintances—who had no previous concern with the Bill of Rights—argue heatedly [over such issues as] whether there was sufficient probable cause for the Los Angeles police to conduct a search of O.J. Simpson's home and grounds.¹²

In conclusion, then, media access to all judicial proceedings serves not only the free expression rights of those who report and receive information about particular cases, and not only the fair trial rights of participants in those cases. In the long run, such access promotes all rights of all people.

10. *Westmoreland v. CBS, Inc.*, 596 F. Supp. 1166 (S.D.N.Y. 1984), *aff'd*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

11. LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 964 (1988).

12. Nat Hentoff, *The Courts: Not for Judges Only*, WASH. POST, Oct. 15, 1994, at 15.