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## Impact of the Media on Fair Trial Rights: Panel on Media Access

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## Impact of the Media on Fair Trial Rights: Panel on Media Access

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# Impact of the Media on Fair Trial Rights: Panel on Media Access

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MR. GOODALE: We have a panel today on [press] access.

\* \* \*

Professor [Abramovsky], shall we begin?

PROFESSOR ABRAMOVSKY: On occasion, we experience the clash between First Amendment rights and the Sixth Amendment right to a fair trial. The reason I use the words "on occasion" is that most trials are not even deemed worthy of media attention

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no matter how serious the charge. For example, the killing of one inner city youth by another will hardly receive local media attention, let alone national recognition. The cases that draw media attention emanate from what I believe to be three primary sources: the prosecution, the defense, and the media itself.

The prosecutor, in announcing an indictment, leaking one, or even stating that an investigation is in process, can depict a defendant in such a way as to materially prejudice his rights to a fair trial. This, in turn, has often resulted in defense attorneys trying to combat fire with fire, which after awhile begins to create somewhat of a circus-like atmosphere.

Usually, however, it is the press, whether it be the printed media or the electronic media, that seizes on a particular case and catapults it into a national story. Some examples of these, and I am restricting them to New York, are of course the Central Park jogger case, the Amy Fisher case, and the Katie Beers case.

Saturated coverage, especially when inflammatory, almost precludes a case from being handled in an ordinary fashion. What do I mean by that? Most cases, as you know, are pled out. However, this is not so in cases that catch the media's eye—plea bargaining is out, maximum penalties are in.

Yet, in spite of all the abuses, I still believe that ours remains the fairest, most democratic of all the processes of the various nations [whose laws] I have had an occasion to study. (This speech is not meant in any way to either downgrade or otherwise deprecate any particular prosecutor or defense attorney.) I do mean, however, to take to task some of our latest media exhibitions such as the kindly and sensitive "A Current Affair" program, "Hard Copy," which often is anything but, and last, but certainly least, the ubiquitous "Geraldo."

Let's take a look at what has happened to us. Let's take a look at what I call media overkill. We have the Amy Fisher case. What was the Amy Fisher case? Basically nothing more than an attempted murder charge. What did it result in? An overwhelming amount of media attention which clearly prejudiced the accused. All the press coverage led to bail being set at an absolutely astro-

nomical amount unheard of in any other criminal case of its type. Even after the defendant pled guilty, the media and their quasi-movie counterparts didn't quit. The viewing public was subjected to no less than three movies concerning the case—each of the major [television] networks had to get in on it. If that wasn't sufficient, Joey Buttafuocco was tried on "Geraldo" in a mock trial—prominent counsel served both in the capacity of prosecutor and defense counsel.

Now, I ask you, what's going to be next? Will a mock appellate court on "Donahue" be called to decide this case? Are we to await a final decision from a mock Supreme Court of the United States's opinion which will be given on "Sally Jessy Raphael"? For the more intellectually oriented in the audience, however, you have no problems either. We have just tried James Earl Ray on PBS thirty years after the fact [of the Martin Luther King, Jr., assassination].

Moreover, it is ironic, I believe, that while a jury is repeatedly admonished in all cases to consider only the evidence and exhibits which emanate from the witness stand, they are subjected to a barrage of often inflammatory and irrelevant information prior to their impanelment. For example, we now have a group, which I call "trial mavens," who are not even vaguely familiar with the concepts of law or evidence. What do these folks do? They conduct round table discussions—patting each other on the back, complimenting each other—concerning totally erroneous conclusions which may [be], and often are, viewed by potential jurors.

Additionally, the advent of televised court cases in my opinion has both positive and negative aspects to it, and I believe that the negative outweigh the positive. While on the one hand, a lay audience is able to view what occurs in the courtroom, which is good, on the other hand, jurors are fed information that will taint their decision if they are not sequestered. Even in those cases where a jury is sequestered, I submit to you that the process still may be tainted.

Let me give you an example of what I mean. Traditionally, potential witnesses are excluded as a matter of course from the courtroom to ensure that their testimony does not conveniently

dovetail—that they do not collaborate prior to taking the stand. However, what is to prevent a witness from viewing the proceeding after its first or even second re-run during the evening on Court TV?

Now, I would like to take a brief look at the overall situation. Let's really look at what we are seeing. Should the Rodney King tape have been played at least 150 times prior to the trial? Was it absolutely necessary to have the videotaped confession of the youths in the Central Park jogger case played repeatedly on every conceivable newscast? Should the fact that Katie Beers's assailant, or alleged assailant, confessed to his attorney be aired repeatedly, and must the likes of this little girl be subject to an avalanche of television interviews whenever she is spotted? It's sort of like, "Which one of us reporters will win the hunt? Let's see which one of us can go and identify the sheriff or court officer with whom Katie is residing somewhere out in eastern Long Island."

While there is room for good television court dramas, I believe that they should remain fictional. One should always remember, in my opinion, that the truth-finding process, albeit imperfect, should be conducted within the contours of the courtroom, rather than on the courthouse steps, in the yards of neighbors, or with the friends of the victim or perpetrator.

MR. GOODALE: That certainly put some fat in the fire, as they say. Now, I think that Dave [Schulz] is going to embroider some of the general themes—do you want to respond to any of that, or are you going to wait?

MR. SCHULZ: Maybe I'll hold off on the response. There are a few things that I would like to say first, to put the discussion in context.

MR. GOODALE: And the few things you were going to say are?

MR. SCHULZ: The issue of where to draw the line between the press's First Amendment rights and a defendant's Sixth Amendment rights within the criminal justice system, is one that has been dealt with in many different contexts. It is one that the Supreme Court has not easily resolved over the years. So maybe

it's worth going back a little and looking at the history of courtroom access of the decisions in the Supreme Court. It's an interesting history in a lot of different ways.

For example, it's noteworthy, from a constitutional litigation standpoint, to examine both how the Court developed this access right and the standard the Court finally adopted. These have far-reaching implications, not only for access to criminal proceedings, but also for access rights in other contexts that we might want to talk about.

Some of you may be familiar with this history. The question of the press's right of access to criminal proceedings was presented to the Supreme Court back in 1979 in a case that arose out of New York state, *Gannett Co. v. DePasquale*.<sup>1</sup> This case arose in Seneca County, in upstate New York, where a reporter was barred from a pre-trial suppression hearing. The case went up to the Supreme Court as a Sixth Amendment case.<sup>2</sup> There is a historical reason for that. Back in the Forties there was precedent that said that the press did not have an enforceable First Amendment right—the press had no standing under the First Amendment to claim a right of access to judicial proceedings.<sup>3</sup> Given that limiting precedent, the *Gannett* papers tried to argue the case as a Sixth Amendment case. They claimed that the press has the right to be present at a [pre-trial] suppression hearing under the “public trial” provision of the Sixth Amendment, [which guarantees that “the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”<sup>4</sup>] In other words, if the proceeding is a “public trial,” the public has an enforceable right to be present.

This case went to the Supreme Court and ended with a 4-1-4 split. The majority essentially concluded that the Sixth Amendment right is one that is personal to a defendant and therefore the press had no right to stick its nose in and enforce the public trial

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

2. *Gannett Co. v. DePasquale*, 389 N.Y.S.2d 719 (App. Div. 4th Dep't 1976), *modified*, 372 N.E.2d 544 (N.Y. 1977), *aff'd*, 443 U.S. 368 (1979).

3. *Cf. In re Oliver*, 333 U.S. 257 (1948).

4. U.S. CONST. amend. VI.

right. The four dissenters thought to the contrary and actually crafted a very specific test that they would require a court to perform before excluding the press from its proceedings. Justice Powell was the middle man. He agreed that it was appropriate in the immediate circumstances to exclude the press, but he added, in an interesting opinion, that while there is no Sixth Amendment right, there might be a First Amendment right. However, to the extent there is a First Amendment right, he found it satisfied by the procedural safeguards that were followed. Thus, he let the closure order stand.

There was an immediate uproar over judges closing courtrooms and great concern about their ability to throw the press out of proceedings. The very next term, in 1980, another case reached the Court—the *Richmond Newspapers* case.<sup>5</sup> It was grounded in similar facts, except that it was not a pre-trial proceeding that was closed but an actual criminal trial. In fact, the case was on its third trial—there had been various problems with the earlier trials that had been heard on appeal. At this third trial, the judge finally said that he was going to be sure there are no mistakes this time—the press isn't going to be here. He then conducted a secret trial.

*Richmond Newspapers* was taken up [to the Supreme Court] as a First Amendment case, and we saw a different result. The Court found, for the very first time, that under the First Amendment, there is an enforceable right in the press to go to court to seek the protection of the First Amendment right to observe in the courtroom. Remember, the press isn't a party to the criminal trial. The press is only an observer. [However,] the Court said that when the press is thrown out, and certain procedural standards aren't met, then the press does have recourse. Reporters can enforce their right to observe, whether by writ of mandamus or on motion or on various procedural grounds that were worked out in later cases. *Richmond Newspapers* was truly a "watershed case."<sup>6</sup>

We spent the next decade trying to define the contours of that right and just how far it reaches. Is it limited to the trial? Does

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5. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

6. *Id.*



it extend to pre-trial proceedings? By what standard should the press's right to be in the courtroom be weighed?

There are two things worth noting. One, from a historical standpoint, by the time we get to a case called *Press Enterprise II*,<sup>7</sup> in 1986, the majority articulates a standard for the First Amendment right of access that essentially adopts the same Sixth Amendment standard articulated by the dissenters in *Gannett*. This standard [for closure] remains effective today.

Thus, the Court has come full circle and imposed the obligations that the dissent argued for in *Gannett* as a First Amendment standard. The standard basically requires that four elements be met before the press can be excluded. The Court articulates the standard in different ways in different contexts, and it may not always specifically address each element. But, I would submit that there are four things that are required [to override the qualified First Amendment right of access].

The first is a demonstration of a high degree of probability of injury to some right, that is equally as compelling as the First Amendment rights of the press. There must be some fundamental right at stake. In fact, in *Press Enterprise II*, the Court said there had to be a showing that there was a "substantial [probability]" that this other right was going to be prejudiced. In subsequent cases, the courts have focused [on] what this other right is—either the defendant's fair trial right, which is, of course, a constitutional right, or privacy rights, or some other right.<sup>8</sup>

But that's the threshold. Before you can deny access to information in the hands of the government, there has to be some showing that there is a right that's as important as the First Amendment right, and that there exists a "substantial [probability]" that right will be disturbed, absent a restriction of First Amendment rights.

If you meet that threshold, then the second test requires a showing that there is no way to protect that threatened right without

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7. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (*Press-Enterprise II*).

8. The interests of those other than the accused, such as victims of sex crimes, may be implicated. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607-10 (1982).

interfering with the First Amendment rights of the press. In other words, you first have to look to other solutions[—"reasonable alternatives to closure"—]that could avoid denying First Amendment rights. Obviously, in the context of a Sixth Amendment right to [a fair] trial, there are a lot of alternatives that don't interfere with the press's right to access. There is extensive voir dire of jurors to assure an impartial panel. There is sequestration of jurors. There is change of venue. There is delay of a trial. With so many possibilities available, the second test also imposes a rather high burden before a court can conduct proceedings secretly.

If the court decides that there is no alternative that will protect the Sixth Amendment right, then it still must meet two additional burdens in fashioning relief. One is that any restraint on the First Amendment has to be as narrow as possible—that means narrow in time and narrow in scope.<sup>9</sup> If the court is trying to protect, for example, privacy rights, it can redact documents. In trying to protect any right to the detriment of the First Amendment right, the above element must be addressed.

Finally, if the court has satisfied the first three elements, it still must show that its proposed restriction will be effective. That's important in various contexts. You may recall that this notion arises out of the *Nebraska Press* case,<sup>10</sup> where the trial court imposed a gag order on the press to try to protect the fair trial rights. You may recall that one of the arguments Justice Burger makes is that in the small community where the trial was to take place, the residents already knew the information that the judge was ordering the press not to publish. The theory is that we won't stand by and allow interference with First Amendment rights for some idle and unnecessary purpose. If you have met the first three steps, you also must show that the means you propose will be effective in protecting the other threatened right.

I lay the standard out because we may want to come back to this in a few minutes. The analysis can be applied to several areas

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9. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (*Press-Enterprise I*).

10. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

besides the criminal justice system. Indeed, it has been applied in civil access cases and in some others that we can talk about.

The second interesting aspect of this history is the reasoning process of the Court, not just the fact that it implicitly reversed itself and came full circle in the course of five or six years. In the five cases that were decided between 1979 and 1986, there was an ongoing dialogue between Chief Justice Burger and Justice Brennan about the source of this access right and its proper application.

Chief Justice Burger consistently argued that this right must be found in historical precedent. To decide if a First Amendment right of access exists, he believed the Court should look at the proceeding in question or the type of access at issue and determine if there was a historical presumption of openness. If there was a historical access right, the Court should recognize a First Amendment right.

Brennan disagreed with that view and took a more policy oriented approach. He said that the Court should look instead at the objectives of the First Amendment and determine what goals the Court is trying to accomplish by recognizing First Amendment rights. If those goals would be advanced by attaching a First Amendment right of access to a given situation, the Court should be prepared to do that.

In his concurring opinion in *Richmond Newspapers*,<sup>11</sup> Justice Brennan articulated at least five or six goals that the First Amendment was designed to advance. His analysis of these factors led him to conclude that the right of access should be broadly recognized. For example, he argued that allowing the public and the press into criminal prosecutions protects the accused from secret inquisitions. He also believed that public knowledge is important because it ensures that the accuser is getting justice. In other words, the public has a right to know that proceedings are conducted fairly and that both the accused and the accuser receive justice before the courts.

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11. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 584 (1980) (Brennan, J., concurring).

Justice Brennan further noted that the public could have little confidence in the fairness of criminal procedures if they were not allowed access through media coverage. He also pointed to the importance of retribution. The criminal justice system is an outlet that allows the public hostility to vent. If you close the proceedings, you deny the public that valuable outlet and you defeat the ability of the criminal justice system to perform its role.

Finally, Justice Brennan noted that access improves the performance of those who are participating in the process. It motivates the judges and the lawyers and everyone who is involved to be prepared and to perform as they should. [Press access] also inhibits perjury, because if witnesses know that what they say may be reported in the paper, they are less likely to bend the truth.

That's the context in which these rights have developed. I think we could have a long discussion about whether the press goes too far or not far enough.

There is one other issue I want to raise again both because its history is interesting and because it's a question that has not been resolved. It concerns the on-going conflict between the First Amendment and the Sixth Amendment.

This conflict has more to do with gag orders than with access, but it ties into the issues we have been discussing. I mentioned the *Nebraska Press*<sup>12</sup> case earlier. The Supreme Court never specifically decided whether the First Amendment right of access or the Sixth Amendment right to a fair trial is to be given priority. It has avoided deciding the issue, but it came very close in the *Nebraska Press* case.

Justice Brennan, in his concurring opinion in *Nebraska Press*,<sup>13</sup> was prepared to find, as a matter of constitutional law, that a claimed threat to the Sixth Amendment right of a fair trial could never be sufficient to justify a gag order. He said that this was so because the proof required to demonstrate an actual threat to a fair trial is too amorphous and difficult to establish. It necessarily

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12. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

13. *Id.* at 572 (Brennan, J., concurring).

relies heavily on conjecture as to what people in the community know and how that might affect their judgment.

However, Justice Brennan found that such speculative evidence was too slender a reed on which a Court could ever allow a gag order to be imposed. In his opinion, which was joined by three Justices and supported in a concurrence by Justice White, he argued that the First Amendment should prevail over the Sixth Amendment, at least in the context of a gag order.

The reason all this ties together is that the question came up recently with the Noriega prosecution down in Florida. A gag order was issued in that case against CNN, which had gained access to some tapes of telephone conversations between Noriega and his lawyers.<sup>14</sup> The issue presented and decided by the [Court of Appeals for the] Eleventh Circuit in *Noriega* was whether the gag order had been properly entered.<sup>15</sup> The Eleventh Circuit basically said [that] the court's primary goal is to protect the integrity of the judicial system, and in a case such as this, the First Amendment right must necessarily fall to the Sixth Amendment right. They held, quite clearly, that the Sixth Amendment prevails over the First Amendment. This, to my reading, is exactly the opposite of what at least four justices said in the *Nebraska Press* case.

Somewhat surprisingly, the Supreme Court refused to take that case and denied certiorari.<sup>16</sup> I think that there is still an ongoing tension between the scope of the First Amendment right and its relation to the Sixth Amendment right. I think this is a tension that will not be quickly resolved.

As to whether the press has gone too far, I will note that while people may think that currently things are out of hand . . . I suspect this is something that's been with us [for] a long time and that people have always felt this way. There is a quote, which none of the press people up here will enjoy too much, that puts things in

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14. *United States v. Noriega*, 752 F. Supp. 1032 (S.D. Fla.), *aff'd*, 917 F.2d 1543 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990).

15. *United States v. Noriega*, 917 F.2d 1543 (11th Cir.), *cert. denied*, 498 U.S. 976 (1990).

16. *Cable News Network, Inc. v. Noriega*, 498 U.S. 976 (1990).

context. It's from *Spoon River Anthology* which was written back in 1915.<sup>17</sup> I think it was sort of the "Twin Peaks" of its day. It's a collection of poems of people speaking from the grave about their lives. Edgar Lee Masters had this to say about the newspaper publisher in Spoon River, describing what he did as "[t]o scratch dirt over scandal for money, and exhume it to the winds for revenge."

The press has never been held in too high regard. We may just have to live with that.

MR. GOODALE: I think what I am going to do is start with George [Freeman] and then come around the table in my direction, because I had a chance to warm up George while Dave was speaking.

George, isn't Professor Abramovsky absolutely correct and isn't the *Noriega* court absolutely correct in concluding that there are substantial dangers to a defendant's Sixth Amendment right to a fair trial when the press publishes the sort of material that the professor points out? Therefore, isn't Dave [Schulz], or at least the judges Dave points to, absolutely wrong in thinking that under practically no circumstances could you ever show that there is such a danger?

MR. FREEMAN: No, I think the Professor is probably absolutely incorrect. I think that much of what I see as the fallacy of the argument was included in one sentence that Professor [Abramovsky] made, which just floated through his speech. It didn't seem like a controversial issue, but it was kind of a presumption—and I wrote it down—that all the publicity surrounding the Amy Fisher case "clearly prejudiced the accused."

It seems to me that the basic fallacy of many of the people who argue against press access to trials is that somehow the access to pre-trial hearings and pre-trial publicity all necessarily impacts to the detriment of the criminal defendant—certainly not a good thing if it were true.

However, I had the feeling, seeing this dance played out in

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17. EDGAR LEE MASTERS, *SPOON RIVER ANTHOLOGY* (1915).

front of our reporters from time to time, that maybe prosecutors once had an easier time getting the ear of the press than defense lawyers. But now the situation is reversed, given the basic ebb and flow and the general standard in this whole dance. I think the fact is that the prosecutors generally feel somewhat more circumscribed by their office. But the defense bar is no slouch at getting its angle across as well. Indeed, in the Amy Fisher case which was mentioned, my own take on it, and maybe I am wrong, is that much of the pre-trial publicity in fact benefitted, and was for the benefit of, the defendant Amy Fisher. Indeed, many people in the early going thought that the prosecutors were attacking the wrong person [when] they really ought to be fingering Joey Buttafuocco. You know, I must say, it pains me that I even have to mention that name—this guy has gotten enough publicity and the notion that we are talking about him is rather irksome—but so be it.

I just don't see, number one, why more publicity about a case prior to trial means that it's prejudicial to the defendants. Secondly, I think publicity before a trial in the incipient stages of a case is important if for no other reason than [that] most cases never get to trial. So, if there is going to be public knowledge about the criminal process, that knowledge has to be imparted during the pre-trial process because there is no trial process in the vast majority of cases. Thirdly, even if everything I have said heretofore is wrong, the fact is that all that pre-trial publicity doesn't really make the slightest bit of difference when it comes to impaneling a jury. [This is] because unlike lawyers and reporters, who believe that the public rises and falls on every one of their words, most people don't read all this good stuff.

I argued in front of Judge Glasser in the Gotti case that all the publicity about the Gotti trial and John Gotti—and certainly there was more of that than most any other case in recent memory, except for Joey Buttafuocco—would not make it difficult to impanel a jury who didn't know what was on the hidden tapes that the government had been compiling. My argument dealt with the issue as to whether or not those [tapes] should be sealed. The fact is, certainly people are aware that John Gotti seems to be connected to the mob, that he gets a lot of headlines, that he is a "Dapper

Don," that he wears elegant suits. But I don't believe that is going to prejudge a juror's mind after sitting through two months of a trial, or really have a great effect on how they view the case at that point, having now sifted through all the evidence. I think basically jurors can discard that, and more importantly, most jurors really won't have read any of the articles. Whether or not this tape should be sealed or whether or not this suppression hearing should be closed is immaterial. Assuming it was open, what they learn or what they read in those articles will be immaterial to their ability to be fair jurors—if they read this stuff in the first place.

As I told Judge Glasser, "I am not one of the most unintelligent people in the Brooklyn [County] venue. Working for a newspaper, I probably tend to read newspapers more than many other people, and I haven't read these articles on John Gotti. I don't know why your assumption is that everyone in this county has." He kind of smiled and nodded his head, and then he ruled against me.

In any event, I do think that the pre-trial publicity threat to a fair trial is vastly overrated and I think it underestimates the public's ability to be good jurors, number one, and number two, it vastly overrates the knowledge that the public has about the details of these trials.

I would also point out in passing that as much as the media gets attacked, as well it should, as I do, for putting on three movies about Amy Fisher—and what a totally inane thing to do—the fact is, these three movies got the highest ratings in God knows how many years. Why is that so? I can't tell you. But I can say that it really poses, I think, a dilemma between the public basically believing that the press is intrusive, that they invade privacy, that isn't it terrible that we have all these interviews of Amy Fisher's mother, niece, and boyfriend—yet, at the same time, gobbling this stuff up. If they didn't gobble it up, it wouldn't be on the air.

That brings me to one other small point having to do with Katie Beers. I think that's another example of media craziness gone amuck. On the other hand, the fact of the matter is that the reason why cameras were taking pictures of Katie Beers going to school is because the local sheriff tipped the press off as to the temporary guardian of Katie Beers. He did that because he was in



some election campaign and wanted the publicity. Now, it's hard to make the media out to be the fall guy if that's what a public official is doing. Indeed, I am told that once the press got their mandatory first shots of her going to school they basically relented and let her be a regular human being again.

The final point I would make is to disagree violently with the notion that televised trials are a bad thing in this whole process. My view is, and I think it was shown clearly in the William Kennedy Smith case, that number one, the more on TV, the better—in terms of reporting—on what really goes on in a trial. [Televised trials] point out to the public the contrast between what they perceive to be a judicial proceeding in "L.A. Law" with all the drama and craziness that goes on there, and the boringness and the ploddingness of the real judicial system, which I think underscores its seriousness, and ultimately, its fairness.

Even those who criticize TV coverage of court rooms—because in the end all you get is a twenty-second snippet on the local news on at 11:00 p.m.—basically underestimate the fact that on the twenty-second snippet, even that generally is undramatic. In the course of a regular trial day, nothing dramatic happens. It's a slow, boring process. I think that comes through on TV, and so I think it does give a perception of judicial administration that's positive to the public. In the William Kennedy Smith case, and with all the criticism of everything that went on in that case, the one thing that didn't happen at the end of the day was that people blamed the verdict on the Kennedys' money. Basically, people had seen the trial, had seen that it was a fair and serious process, and I think were therefore willing to accept the result. I think that would have been quite a different perception had that not been on TV.

MR. GOODALE: Mr. Brook, here we [have George Freeman] the representative employed by *The New York Times*, stating his views on the subject. Nowhere in any of those views did I hear any hint of any restraint whatsoever—although, I will give Mr. Freeman a chance to defend himself later. I mean, he sounded to me pretty much like an absolutist—not conceding anything. If your police people were on trial in the Rodney King situation,

query whether you would be absolutely convinced he was right and that there would be no prejudice to the jury. But on the other hand, as a prosecutor, it helps I suppose in a perverse, cynical way to get that sort of information out, although it certainly doesn't necessarily redound to your benefit if your trial is moved for a change of venue or if you are trying a case to a sequestered jury.

So, he has gone too far, hasn't he?

MR. BROOK: Actually, this has been a much more gentle opening than I anticipated as the prosecutor here. I will get to Mr. Freeman and your question in a moment, but I want to address what [Professor Abramovsky] said. He began—as these discussions so often do—by accusing prosecutors of leaking information in pre-indictment and grand jury stages.

Now, I would not sit here and be so naive as to tell you that no prosecutors ever leak information to the press, but I want to point out to all of you that frequently in the investigation stage—when you read about what a prosecutor is doing—that leak does not come from the prosecutor's office, but comes [rather] from the targets of the investigation. I am thinking most commonly in terms of corruption or political investigations where the targets may be public officers and politicians. It is much to their advantage to have these stories break into the press as quickly as possible because that curtails an investigation rather than furthers it. The last thing in the world that a prosecutor wants to see is this type of information in the press.

Be that as it may, I would add a fourth source to Professor Abramovsky's "media circus" statements—complaining witnesses who have become media darlings. I think this started with the Howard Beach case and the Tawana Brawley case where the victims, and those who were concerned as witnesses, became media personalities and were the source of a great deal of information.

I think the press, while it has a First Amendment right to publish these stories, works a Sixth Amendment injustice. Now, to get to the Sixth Amendment, I want you to understand that the prosecutor is caught in a very, very difficult bind here. It's very easy for reporters and these very learned First Amendment attorneys to

take an absolutist position in support of the First Amendment. As an American citizen, and someone who is concerned and in the public debate, I certainly support wide access to news and information [about] government behavior. It is easy for defense counsel to stand up and say that a defendant's Sixth Amendment right to a fair trial has been violated whenever there is pre-trial publicity or . . . information about a defendant in the newspaper.

The prosecutor, however, is caught in between these two extremes and has a difficult balancing act to perform. As a public official—and certainly as someone who is in the political arena—it is necessary and correct for a prosecutor to take an open First Amendment position. But unlike other political figures, a prosecutor has a Sixth Amendment obligation to ensure that justice is done and to make sure that the trials he completes and the prosecutions he is engaged in meet constitutional standards. [A prosecutor must ensure] that defendants' Sixth Amendment rights are also protected. That simply is not a defense counsel's obligation.

So, [a prosecutor] always tries to balance the openness that Mr. Freeman wants with the protections due a defendant, which I am sure Professor Abramovsky would so ardently defend. That is a very difficult balancing act, and it is made more so every day by the types of stories that the professor referred to.

Now, for those of you who thought when they saw that the Howard Beach special prosecutor was going to be here today that Joe Hynes would be here, I am sorry to disappoint you, but I was the last Howard Beach special prosecutor and was caught in exactly that bind. Defense counsel—who have no obligation other than to their clients—actively court the press, releasing all kinds of stories which are favorable to their position during trial and during investigations. I am not saying they don't have a perfect right to do so, but then a prosecutor is placed in the position of either answering or not. That is a very, very difficult position.

I took the position that I would not talk to the press at all during the [Howard Beach] trial and instructed the other lawyers with me not to give interviews so that [the only matters that were] reported would be what reporters garnered from courtroom testimony. Quite frankly, I was pilloried in at least one story in one of New

York's most prominent newspapers.

I thought this personal attack was [the result of my refusal to talk] to the reporter and tell him what was going on in bench conferences and off the record.

You have to just suffer along with these kind of attacks because the press is not only concerned with getting ideas across to the public, it's also concerned with writing interesting stories that are going to be read. The two should never be confused.

MR. GOODALE: You are not going to pick on George [Freeman]?

MR. BROOK: I was pleased by what George said and in fact, I applauded him if you remember.

MR. GOODALE: Carolyn [Schurr], what's your take on all this?

MS. SCHURR: Well, I think that Mr. Brook just raised an incorrect perception that a defendant's Sixth Amendment rights are violated because of publicity. I think that the basic and more important thing about the Sixth Amendment rights to a fair trial are that they are not inconsistent with the right of access.

One of the most important means of assuring a fair trial is to open the process to the press and to the public. The Supreme Court has recognized in all of the access cases—the *Press Enterprise I & II* cases—that by opening up trials to the press and to the public, the defendant is ensured of fairness and the appearance of fairness to the public. As a matter of fact, the Supreme Court, in the *Press Enterprise I* case, said that there is a community therapeutic value in keeping trials open so that the public knows that the criminal justice process works. To say that it's injustice to talk to witnesses is incorrect; on the contrary, that ensures the fairness of the process.

I have to make a comment about the Amy Fisher case, because our paper *Newsday* was the hometown paper during this case that has been described as a "media circus." We reported on the case because it was of interest to the community where *Newsday* is located. Obviously, other people picked up on the case for the same reason. But just to make a vague allegation that the pre-trial

publicity prejudiced, or would have prejudiced, the trial if Amy Fisher had gone to trial is not enough. The courts have recognized [that] that's not enough. Vague allegations are not enough. Empirical evidence supports that an impartial jury can be impaneled [despite any pre-trial publicity] and that there are reasonable alternatives, such as, if there was a trial, moving it to an alternative venue or extensive voir dire.

So, I don't think that the Amy Fisher "circus"—a vague allegation that she wouldn't have gotten a fair trial—is enough to have stopped the media reporting on an important case.

MR. GOODALE: Well, the defendant's not getting much support from this group, except implicitly from the speaker's point of view, and the speaker—along with the present speaker—has some association with Fordham. The additional speaker also has some association with Fordham. Maybe the Fordham trio—I could include Dave [Schulz], but I won't—can stand up for the defendant. Can we, Professor Cohen?

PROFESSOR COHEN: Well, I know that being on the same side of the case as Professor Abramovsky is going to come home to haunt me at some point, but let's try it.

First of all, I think that the issue isn't as narrow as has been described. It is not simply a question of a fair trial, [but] it's a question of permitting a defendant, and I am going to speak about society's interest in a second, to be in a situation where he or she can get whatever it is this justice system has to offer.

In Amy Fisher's case, if the case had not been so titillating, which is undoubtedly one of the reasons that *Newsday* did cover it, she might not have been in the position of receiving a sentence of five to fifteen years. Had that case come about at a time when the press was preoccupied with other matters, I can foresee a disposition of the matter which might be very, very different.

It seems to me that we talk too narrowly if we simply talk about a fair trial. What happens in the court room is largely governed by the rules of evidence and by the Constitution and the way that they have been interpreted by the courts.

So, I don't want to speak so narrowly about the effect of media

on criminal defendants. I think it is probably broader and more accurate to talk about the effect on both sides of the case. I am also not convinced at all that the remedies which are always talked about as being solutions for publicity, whether [publicity] be excessive, fair or otherwise, are adequate to the task. The fact of the matter is that in New York State it is extremely difficult to get a change of venue from one of the larger metropolitan counties such as in the New York area, or even a change of venue from one of the more rural counties.

I was involved in a case in Suffolk county, a case that *Newsday* covered for eleven years, the Pius murder case.<sup>18</sup> Although one defendant was granted a change of venue by the Appellate Division, Second Department—for reasons that still remain a complete mystery to me—the other defendant was not. And that's a case which points to a different kind of publicity, I suppose. At least I hope we won't be hearing about Amy Fisher for the next eleven years. In that case, the community did hear about that murder and the people who were supposedly involved. There is no doubt in my mind that it had a deep and lasting effect on the members of that community.

The other issue is that we talk about fairness to the defendant. We need also to talk about fairness to society. It's one thing to talk about a risk that adverse or prejudicial publicity may adversely affect a defendant's right to a fair trial. Televising trials and the kind of extensive publicity that now occurs, at least seemingly with more and more frequency, may affect the right of the public to get a fair result in any given case. You might have complainants being less willing to come forward, less willing to press charges. You may find a whole lot of those kinds of effects because there is a perception, true in at least some cases, that they will be subjected to the kind of media circus that occurred in some of the examples Professor Abramovsky has talked about.

Let me return just for a minute—you will be sorry that you have turned me loose on this—to the remedies. You talk about a

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18. *People v. Brensic*, 460 N.Y.S.2d 979 (Sup. Ct. Suffolk County 1983), *aff'd*, 506 N.Y.S.2d 570 (App. Div. 2d Dep't 1986), *rev'd*, 509 N.E.2d 1226 (N.Y. 1987).

change of venue and you talk about doing detailed voir dire. You talk about instructing jurors not to pay any attention to the media. Well, the *National Law Journal*, in one of its recent editions, published a survey of people who had served on civil and criminal juries. It concluded that a large number—more than 50% as I recall the article—of jurors admitted [to]: 1) reading media reports or hearing media reports about the case (despite the fact that they were instructed not to) and 2) routinely not following the court's instructions to disregard evidence. Those of us who actually try cases have a strong feeling that in fact jurors routinely don't follow this kind of instruction. So, it seems to me that the remedies for excessive and often unfair publicity either for the defendant or for the public are not very satisfactory and it's just not clear to me that we have focused on the possible negative effect of excessive publicity in a way that makes much sense.

One thing that we haven't talked about, although Mr. Freeman alluded to it, is responsible journalism, despite the possibility that in the end the journalist let Katie Beers go to school. It can't be good or responsible journalism to chase this poor little girl around. Consider shows like "Hard Copy" or "A Current Affair" and other examples like that. Are we talking really about journalism here or are we talking about business? That's a consideration that courts ought to begin to focus on more and more. It's one thing to say the press ought to have access, there ought not to be gag orders, [and] there ought not to be prior restraint. When we think of the First Amendment it's a sort of lofty historical principle. On the other hand, if we [may] think of it more as a business and think more about the possibility that *Newsday* and other media organizations were motivated and continued to publish stories about Amy Fisher, not so much because it is newsworthy, but because there is a perception that titillating articles of that type—and we could sort of tick off the titillating facts, but we won't—are of interest to the reader. You know, better they should go and get *The [National] Enquirer* from the supermarket newsstand.

MR. GOODALE: Well, Professor [Abramovsky], you have a chance to clean up all your attackers, but I certainly want to keep in mind the point just made with respect to responsible journalism.

It seems to me that [this] was one of your themes, and I would like to talk about it, if not now, later. It certainly was the theme I was trying to develop in my colloquy with George Freeman on my right, and maybe Dave [Schulz] can address it, too.

But anyway, what are your views on what you have heard so far?

PROFESSOR ABRAMOVSKY: I don't know where to start. I am getting bombed from all borders here, but let's start with the various remedial suggestions. Mr. Schulz feels that the way that you get rid of prejudicial pre-trial publicity is by one, extensive voir dire, two, sequestration, and three, change of venue.

Now, as Professor Cohen has pointed out, you are most unlikely to get a change of venue in a criminal case. [Furthermore], sometimes the change of venue that you get will depress you more than where it is that you [would] have [had] the trial, because as you know, a judge is not bound by your suggestion as to where it is that you are going to try the case. I won't give the name of the city or particular case, but I had a case when we had a change of venue to a place way upstate. It got to the point that it was Friday in the afternoon—the planes had left, even the Greyhound had left. Nothing, however, would keep us in that town. It cost us a \$200 cab ride to get back into the city. So, there are all kinds of considerations.

Secondly, a sequestered jury is a completely different jury than you would get in an ordinary case. A sequestered jury is a jury that you have to pick, who is willing to sit in a closed environment for two to three weeks or even months at a time. That's not your average, ordinary jury.

Third, insofar as the extensive voir dire, the notion here is, and the cases have so concluded, that the mere fact that the person has read the article is not enough to disqualify him. It is only if he has been substantially impressed by it that he will be excused. I don't believe that once a person has read about the "Dapper Don," as Mr. Freeman was stating—the head of the Mafia today, the boss of all bosses—that he hasn't formed any sort of opinion about the defendant.



With Mr. Freeman I got a little more. The thing here is that I am not so sure if I understand exactly what he is saying. First he says—well, I'll tell you—insofar as impaneling the jury, if the press gets involved, so what? People don't read anyway. Well, if they don't read anyway, what do we need the press for, and you to defend them? So, that's number one.

Number two, it seems to me that if the highest rated movies concerned the Amy Fisher case, the good folks of America must have read about this case or heard about this case somewhere. I don't think that they just happened to have clicked [on] the three different stations on three different weeks at random. Right? In addition, let's go a little bit further. Was she prejudiced? "No, not at all," said Mr. Freeman. "What's the problem calling her 'little Lolita,' or this is the 'young Fatal Attraction case'—that's not prejudicial whatsoever!"

The bottom line is, and this is perhaps because we practice different types of law, that when we pick a jury, Mr. Freeman, we try to get the most prejudicial jury we can get. My distinguished colleague to the left, [Mr. Brook], wants a "law and order" prosecution. I want folks who like to be in the hills of "The Sound of Music."

What happens here—and I don't think that I am overstating it, but maybe I am—[is] that an individual who is living in this day and age in the New York City metropolitan area and who is a potential juror, would be asked the following questions:

"Did you ever hear of Mr. Gotti?" "No, never did."

"Did you ever read about him?" "No, never did."

"Did you ever discuss it with anybody?" "Never did."

Now, it seems to me that this is not an impartial juror. This is a yam or a squash, or some other inert thing.

MR. FREEMAN: I am not sure I understand what the lesson to be drawn from that is, other than that I agree with you that we ought not to have lambs, or yams. Actually, I agree with your first point, and I think when we argue that you can sequester the jury or you can move to Oswego county, as far as I am concerned, we have lost the argument, because no judge is going to do that, nor

should he.

So, I agree with you there. But I disagree with the notion that unless a juror can answer "no" to all those questions—it matters. The fact is, a juror could have read some of the articles about John Gotti, and undoubtedly 99% of the panel was aware of who he was. But two things, it seems to me, spring from that.

One, that doesn't disqualify the person [and] doesn't disqualify the vast majority of people living in the county from being qualified as jurors and being fair and impartial. Dave Schulz will help me, but one can go through trial after trial with vast pre-trial publicity where defendants were acquitted. John DeLorean's tapes, showing him dealing with cocaine, were aired on every TV station, and he was acquitted. Labor Secretary Donovan was tried in New York with vast pre-trial publicity that he complained about forever, and he was acquitted. Gotti was acquitted a number of times. In every brief we do, we have around five other examples—they fail me for the time being—but they are [of] people equally notorious, where publicity was great. So, the notion that because there is publicity, therefore you can't get a fair trial is disproved empirically.

Secondly, I am not sure what you would have us do. If the answer to those questions are "no," "no," and "no," and therefore, the juror admittedly is a yam, what is the newspaper to do? Not report about John Gotti at all? Pretend this thing doesn't exist because we want those answers to be "no," "no," "no"?

It seems to me that the court system does not—cannot—operate in a vacuum. Unless there is reporting on it, and fairly detailed and substantive reporting on it, then it, in fact, is going to be subject to a much greater jeopardy than we are talking about here. [A court proceeding] that is being carried out in secret without the public being aware of what's going on is I think, in the end, a much greater threat to the sanctity and the fairness of the system than writing about it, as long as that writing is relatively truthful and accurate.

PROFESSOR ABRAMOVSKY: Well, just to answer you on the last one—on the Gotti example—it is believed that he had a

little bit of help in getting acquitted in other cases, basically, because the jury was bribed.

MR. FREEMAN: At least that wasn't the press's fault.

PROFESSOR ABRAMOVSKY: So, I think that part of the example sort of needs a little something—I don't want to give you the impression that I don't want any cases covered. The thing that I do want to tell you, and I think that you will agree with me, is that the media chooses certain particular cases. The reason that they choose these cases is not because of the tremendous meaning to society, but because of the sordid details—"Here's a guy that eats up his victims. Wow, let's write all about it. First the neck, and then the knees, and then in the freezer"—you know what I mean? This is the thing that I object to. I don't want Star Chamber proceedings any more than anybody else, but, you know, there are limits.

MR. GOODALE: Dave, do you want to get in on this?

MR. SCHULZ: Well, I was going to make a few brief points. The first is that I was heartened, I guess, that no one seems to be disagreeing about the [closure] standard, and no one seems to be intimating that the press doesn't have a First Amendment right here. It seems to me that's been settled.

What we are fighting over is when and how that right gets applied. I think that's what I heard, although I was a little startled to hear George [Freeman] say that there shouldn't be a change of venue, because I would argue that of course there should be. In appropriate cases, if that will help protect a Sixth Amendment right, not only is it something that should be done, it's something that the First Amendment requires to be done before you choose the option of excluding the press from coverage.

The second point is that a lot of what we are arguing about is different emphases on what the impact of this is, and different views over what the impact might be. As George [Freeman] mentioned, there are lots of cases that could be cited where highly publicized trials resulted in acquittal. In the ABSCAM case some years ago—the prosecution of Senator Harrison Williams from

New Jersey<sup>19</sup>—there was a video-tape in one of the earlier prosecutions of the senator being handed a briefcase full of money. It was entered into evidence, turned over to the media, and shown on all the news programs—that was a highly publicized case. Later, an argument was made that a subsequent defendant in the case couldn't get a fair trial. They actually did some testing—this was in Brooklyn—to try to determine how many people really knew about the case. They found in that prosecution that only 5% of the people who were first called in to be on the jury panel knew anything at all about it. This, at the time, was one of the most highly publicized proceedings in the area. So I think it's easy to overstate the impact of some of these prosecutions.

To go back to the [closure] standard for a moment—and maybe this is something people don't want to get into—I do think that what's significant about the test that the Supreme Court adopted in [*Press-Enterprise II*]<sup>20</sup> is that it does have broader application. I think it's something we could explore. For example, if you look to the policies that apply, especially those in Brennan's arguments about when a First Amendment right attached, I think you could make a very cogent and persuasive argument that there is a constitutional right to bring cameras into the courtroom. I am not saying it's one that would be accepted, but I think the implication is there.

Another example: the Clinton White House announced in January that they would allow television coverage of their daily news briefings. After about three weeks they changed their mind and kicked the cameras out. I think there are arguments that could be made about the press's right to be there and to have cameras there that flow from the arguments that have been developed in the criminal context.

MR. GOODALE: Let me tie in the [closure] test that you talked about and what everyone else is talking about. You have a four-part test, but the principle part of the test is that there has to be some showing of probability that there would be a damage to a

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19. *United States v. Williams*, 529 F. Supp. 1085 (E.D.N.Y. 1981), *aff'd*, 705 F.2d 603 (2d Cir.), *cert. denied*, 464 U.S. 1007 (1983).

20. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

Sixth Amendment right if you don't get your way—and your way is to get access. The test is not an absolute test because if you have an absolute right to [access] then you wouldn't need the test. So, the test denies you—the press—the absolute right to be there all the time. Accordingly, there are some situations where you shouldn't be there.

Now, we have three press attorneys here and I—as the moderator at the moment—exclude myself from that group. What I haven't heard from any of you is the situation that you could hypothesize in which a defendant is prejudiced. Is it your point of view that no defendant is ever prejudiced by pre-trial publicity?

MR. FREEMAN: I can try to answer that, Jim, in a way that I occasionally do, I suppose in court, and that is, a lot of the discussion here has really not been about the facts of the way these things come out in a given case—that all this publicity, "Hard Copy," all this other stuff, is bad. It's bad for society somehow because it gives too much publicity to these cases, the standards are going down, it's going to be prejudicial to someone—we don't really know who.

All that might be true. I don't disagree necessarily with any of that, and none of that particularly relates to my newspaper. But the fact is that's really not a legal argument. It's kind of a complaint with the Geraldo Riveras, and I think that's fine. But there is not much any of us can do about that unless we change the First Amendment entirely.

The question as to pre-trial publicity in terms of the Sixth Amendment right and a First Amendment free press right generally gets played out as a practical matter in a pre-trial suppression hearing. Once you get to trial, it doesn't matter how the trial is covered, because by then the jurors have been picked and they are there watching the trial every day. I don't believe that if they go home and see the re-run on Court TV, that's going to prejudice them anyhow because they have seen the thing in the first place. They have seen it live. I can't imagine why they would go and watch it a second time. Sitting through the whole day is bad enough. That's not a concern. That's happened once so far in history. I am not sure that's a valid concern.

The question is about the specific bits of evidence—not that so-and-so is a bad guy—because we can test that in the course of two weeks. The jurors are smart enough to figure out—not that he is a bad guy or a good guy—but whether, given the specific evidence that's been introduced, he has violated the law.

The question though is: Is some of that evidence that [the jurors] are weighing in their heads actual evidence that the judge has excluded from the court case—from the trial? If so, then that's the problem. So, the question really comes up in the pre-trial suppression hearing when the judge rules that the "bloody handkerchief" or the confession, "I did it" should be suppressed because of police impropriety. In that case, if there is discussion and press coverage of that hearing, will the *New York Post* first-page headline "The Bloody Handkerchief," be remembered so clearly by the jury that they will not be able to render a fair decision six months later when they are impaneled and when they go through a trial? If the answer to that is possibly "yes," if indeed the first-page headline will be of "The Bloody Handkerchief" that will never be forgotten or the quote "'I Did It,' Says Defendant," then you can conceivably have a problem, in answer to Jim's question.

However, it seems to me, that then yields a result which no one has really mentioned, which is the way some of these cases—the worst of these cases—should come out, in my opinion. [That] is that you can still have a pre-trial hearing in open court with the press and the public in attendance, but what you can do is basically eliminate the specificity of the confession or of the "[bloody] handkerchief."

In other words, the public should be able to see if the police mishandled the case, overstepped their constitutional bounds. On the other hand, you could conduct that hearing without the "bloody handkerchief" being discussed. The lawyers can agree to call it the piece of evidence and then the headline can't be "The Bloody Handkerchief" because the *Post* doesn't know what the evidence was. But on the other hand, discussion about it can still be had in open court. The case can be covered and life will go on.

So, I do think that in the worst case that Jim tries to postulate—and I don't think there are many of them, because don't for-

get these pre-trial hearings happen half-a-year before the actual trial and the jury has well forgotten about it [and] because so many other Joey Buttafuocco's have arisen in the meantime to blur it all in the juror's mind—there is a potential solution that kind of comes between both—is a compromise for both sides.

MR. GOODALE: So you [favor a] substantially absolute test?

MR. FREEMAN: I was much more reasonable this morning [on the panel on fair trial rights]. I am not sure why.

MR. GOODALE: Except for the “bloody handkerchief,” the press could do what it wants. Do you have any views on this subject?

MR. BROOK: Well, yes. I agree with Mr. Freeman that the greatest danger of prejudice and violation of the Sixth Amendment [arises] with the pre-trial publication of evidence that is not admissible but is submitted to the public for its consideration.

We shouldn't lose sight of the fact that there can be substantial prejudice of a jury even while a trial is going on, and *that* I think is the “media circus” that Professor [Abramovsky] was talking about—and the one which prosecutors face. [The risk is substantial] because you never know whether a jury is deciding the question of guilt or innocence based upon the evidence given to them in court and the jury charge, or [whether they are deciding based on] the comments that attorneys make to the press that are reported on television, or the interviews the attorneys give on the courthouse steps. [These comments] may be significantly different from the testimony that was actually heard in court and certainly will have a slant and an inference which is favorable to one particular side.

That's why prosecutors are caught in such a bind when they have to keep silent and not discuss the evidence while a trial is going on. [Prosecutors must go out of their way] to protect a defendant who is then exercising his rights. I don't deny for a moment that defendants have a right to do that, but [prosecutors must be concerned by defendants'] attempts to garner favor and possibly to assuage jurors with extra-courtroom discussions of evidence. It's a very, very difficult problem.

MR. GOODALE: I want to put something to the press and

perhaps we will get you back in on this question. But, before I do that, do you have any further responses?

MS. SCHURR: Well, I think the legislatures have recognized the potential for prejudice in all camera-in-the-courtroom statutes, the Southern District of New York guidelines, and the New York State Judiciary Law. The legislatures have given judges the discretion to remove the cameras even in the middle of a trial if there is this possibility of prejudice. But they do recognize up front that there should be this right of access unless the prejudice exists.

PROFESSOR COHEN: It's very hard for me to understand how the "bloody handkerchief" isn't going to be revealed. I understand how you can set up procedures, but I don't understand how that's really going to be kept a secret.

MR. FREEMAN: If it's not kept a secret, it's presumably because the prosecution will have leaked [it].

PROFESSOR COHEN: No, either the prosecution or the defense.

MR. FREEMAN: The question is, if it is.

PROFESSOR COHEN: Or the reporter, through good investigative work, has discovered that what we are really talking about here is a "bloody handkerchief" or what we are really talking about is "I did it."

MR. FREEMAN: Let me go back a step, and Jim [Goodale] will be happy because this involves the case that he was involved in, which is the "Pentagon Papers" case. The fact is that the system works when the press is trying to get information. That's its job—to get information from the prosecution, to make them talk maybe beyond the rules of ethics, [and to get information from] the defendant's lawyers—good journalistic work, as Professor Cohen said. That's his job.

The judicial system's job is the opposite. It is to keep stuff within itself until it comes out in a public trial. The press shouldn't be held responsible if a prosecutor wants to leak information to it. The press's job is to publish the information that gets leaked.



So, the notion that we should blame the press or somehow restrict the press because the lawyers, in jockeying for position, are giving the press information is, I think, ill-founded logic. The fact is, then, we ought to have stricter ethical rules or remedies and punish lawyers who talk when they are not suppose to talk. It's very easy, but I don't think that's a press problem. That's not a First Amendment problem. That's a judicial administration problem.

That's really why the "bloody handkerchief" will come out—because someone is going to leak it to us or else we are good enough that we will find [out]. Well, that's our job. There is a lot of discussion about the press, but it really is a problem of the judicial system not working the way it should.

MR. GOODALE: That's exactly the question I wanted to get to, which is, does the press have any responsibility? Your answer in part was—I don't want to put words in your mouth—but it seemed to me "no." The press's job is to get it out.

MR. FREEMAN: The press ought not decide for itself, "Well, I can report this, because this isn't really prejudicial, but I won't report that, which I know, because it may be a little more prejudicial." That would be a hell of a role for us to be in.

MR. GOODALE: But George, we are sitting here after two weeks of probably the worst time the press has had with it's role—with respect to responsibility—that I can remember. We have the NBC situation, where the press faked—totally faked—an example of negligence on the part of General Motors, although NBC, by the way, did a very good job standing up and saying that it did it, I thought. We have had a situation where *USA Today* yesterday said that it faked a photograph, and NBC had another situation where it had to say its photograph wasn't correct.

So, what bothers me from what I hear around the table—at least on the press side—is [that] I don't see what role the press has with respect to responsibility. Secondly, I don't see or hear what role lawyers for the press have with respect to that concept. That's what bothers me. Also there is—I don't want to take too much time on this—but there is a part of the *Nebraska Press* case that

talks about this. Dave [Schulz], if you want to say something before I get into that, go ahead.

MR. SCHULZ: I think the examples that you have given are examples that show that the press is accountable—that if NBC fakes something it could be liable. It could be liable for substantial money damages.

No one would argue that the press can misrepresent, that the press can distort, [that] the press can fake, or [that] the press can deceive the public. But, I don't think that it is appropriate to put a burden on the press, as George [Freeman] was suggesting, to sort through what's important versus what's not, at least in the context of a criminal trial. The press shouldn't have to decide what impact their reporting will have on the trial, or be held accountable for the outcome of the trial process. That role is for the participants in the process.

I want to respond to a point that was made earlier about how you do this—how you keep the “bloody handkerchief” out. It's something that's done all the time. In the Mario Biaggi prosecution, the whole dispute in the pre-trial suppression hearing had to do with certain wiretap information. Judge Weinstein held extensive oral argument without any of the information on the wiretap being disclosed because he gave the lawyers certain guidelines as to what they could say and what they couldn't. I think that's an example of what George [Freeman] was talking about—that there are ways to accommodate the legitimate interests of the public in knowing that the system works, and the legitimate interests of the accused in having a fair trial.

PROFESSOR COHEN: Yes, I am not suggesting that there will never be a case in which you could redact, if you will, the reference to the evidence that's being discussed. I am only suggesting that it is not something that will always work and that someone will either leak it or that the press on its own will discover the information. Wiretap information is relatively easy because it's secret—unless someone from law enforcement wants to leak it or unless, once the defense gets a hold of it, they want to leak it. The “bloody handkerchief” is going to be much more widely known in a police department, or the fact that the defendant

confessed will be much more widely know.

Jim really raises an interesting question. Why doesn't the press have any responsibility? The press makes decisions every day about what to publish, what to reveal and why. When you do that, it seems to me you consider all sorts of factors. Is the reader going to be interested in this? Is it newsworthy? Will we be sued? Would we win the suit? Is it worth paying for the suit? A whole variety of other considerations. Why is it inappropriate to suggest—or why is it at least inappropriate to put it on the table—that one of those considerations ought to be: If we talk about the “bloody handkerchief” will we be eliminating the possibility that this defendant will have a fair trial?

MR. FREEMAN: I think there are a lot of answers to that. One is that the decision on what should be published depends really on one factor—is it newsworthy? Not on other factors—certainly not on whether or not we'll be sued. I suppose my role takes place before that decision is made. Therefore, the answer is we won't be sued or we don't care if we'll be sued because if we are sued we will win. So that's not really a factor.

I think, certainly, if there are any other factors than “what is newsworthy,” they are factors which are within the control, or at least within the body of knowledge, of the editorial staff. Whether something is prejudicial to the legal system or to a defendant is not such a thing, and I think it would put an enormous and improper burden on the newspaper or on TV to have to make that decision—that's not a decision for [the press] to make. I also think it would be aggregating more power than it has now, and it's certainly criticized for the power it has now, if somehow the system places that burden on its hands, because then it's going to be deciding in its discretion whether to help this defendant or that defendant or not help this defendant or that defendant in every given case. That's hardly a decision on a case-by-case basis that newspaper editors should make.

Thirdly, to get back to the basics, I think the whole problem is overstated, because 99 times out of 100 a fair jury can still be picked that is somewhat more intelligent than yams [and] that hasn't read in great detail the specifics that are in the article. If the

problem is that the jurors know that Gotti is kind of tied up with the mob, I don't think there is any defense to that. There is no way we can keep jurors from knowing that unless you want us to shut down entirely.

So, I guess I don't see that in the end it's that great a problem. Indeed, the record supports that—trials have been given huge publicity and defendants have gotten off.

PROFESSOR COHEN: Except you are suggesting that therefore the publicity didn't impact negatively. I guess the point I wanted to make earlier is that maybe it did, and the negative [effect] is that the defendant got off. Maybe society wasn't benefited by the publicity.

MR. FREEMAN: It's hard to argue that where you see a tape of someone either accepting money or delivering cocaine and then that person gets off, one can argue that those tapes somehow ended up aiding the defendant. They have to aid the prosecution—the defendant got off notwithstanding that.

MR. GOODALE: Well, let me be particular about the question of responsibility of the press in this narrow area of fair trial/free press. In the *Nebraska Press* case, to which you alluded in your discussion, four of the Justices effectively concluded that the test probably was an absolute test, but the Court was not willing to adopt it at that time with respect to what the press publishes about a pre-trial proceeding. Justice Brennan said that even though this is so, the press ought to continue its efforts with bar associations and other interested parties with respect to articulating fair trial/free press guidelines.

What I was trying to push this discussion toward is why—in the view of that distinguished jurist (and also because it is a fact that all the papers represented on this panel are members of the New York State Fair Trial/Free Press Conference)—aren't the guidelines followed? After all, the guidelines only do what I have suggested the press should do in the free press/fair trial context—i.e. be responsible.

Any other comments? Questions?

AUDIENCE MEMBER: As one who tries cases, I thought it

might be helpful to the audience to know something about which very little, if anything, has been said here, and that is the aftermath of a trial and how the view of the jury system exists in the mind of the American public now.

Those of us who try cases, as everyone who tries cases knows, often discuss with jurors at the end of the case what led them to the verdict that they arrived at—this is a matter of helping our own craftsmanship, knowing what makes certain people tick and what we did wrong, [and] what we did right and helps us pick the next jury. We now have a phenomenon where journalists are questioning jurors, and in some cases, the questioning is very aggressive. They go to jurors' homes. They phone them. Does anyone on the panel have any strong feelings about the appropriateness of this, and also whether it's a salutary thing in terms of how the jury system is supposed to operate in this country?

MR. FREEMAN: Well, yes. I think it's a salutary thing. I think that we are helping you. We are assisting. I think the fact is that it imparts more education to all lawyers.

There was an incredible article written in the *American Lawyer*—in fact the first such article they described about the jury—regarding a *Washington Post* libel case which concluded that—I shouldn't say that in this audience—the jury in that case was led by a law student who had misguided other jurors. I am not sure what that taught us, but it certainly was an interesting discussion of what goes on behind the jury room doors.

I don't see any problem with that. I do see a problem, frankly, in the Rodney King case with newspapers publishing the addresses of jurors. I think that was dumb and I doubt any newspaper will do that in the future.

But as to the post-jury discussion, I think: a) it is interesting and newsworthy, and b) it informs the public and maybe makes them feel a little better about the jury system, because invariably the jurors have much more sophisticated explanations of their decision than what the first day's story would indicate, [and] that despite such and such evidence the jury concluded "X." Everyone is reading, gee, that's a weird jury. It was racial or it was this or it

was that. The second day, when you interview the jurors generally, confidence is built that they decided [the verdict] on the merits and fairly. So, I think it's a good thing.

MR. BROOK: I would totally disagree with what Mr. Freeman said. While again, I will concede that the press has an absolute right to question these jurors and interview them and print their views, the question was whether it has a salutary effect. It certainly does not and it's very harmful to the criminal justice system. I certainly would draw a line as to whether it's beneficial to society as a whole. One, it skews jury voir dire because in these high-profile cases you are liable to get performers—rather than fair-minded jurors—people who are looking forward to these post-trial interviews. In fact, if you remember, in one case we had a problem where the jury foreman, through her boyfriend, was negotiating to sell the story of the jury's deliberations—an issue which had to be argued extensively on appeal.

I think that the difference here is not with whether or not the press has a right to do anything. I think we have all conceded throughout the panel that the press has extensive rights. But just because you have a right to do something doesn't mean it's right to do it. [Furthermore,] just because you can constitutionally publish a story doesn't mean it's wise to do so. I think what we really need to discuss is the degeneration of the media into programs like "Hard Copy"—an example of the press vociferously arguing and always doing what it has a right to do without exercising the restraint which courtesy and wisdom should really mandate.

MR. FREEMAN: Let me just answer that for one second, because I too decry "Hard Copy" and I think that the media should be wise and courteous. But with the specific question, which I think is a good question and which we seem to take significant issue on, is a serious [journalist may] interview jurors after a trial.

The theme that I get from a lot of the practicing lawyers who were involved in these cases is that [such an interviewing process] is a bad thing because it reveals too much about what really went on at trial. [This] will either make it more difficult [for the lawyer] next time or show some of the weakness in his performance or in the way he picks a jury, and [this will make] make his life as

a practicing criminal lawyer tougher. That may be true and that may be a bad thing.

On the other hand, while it makes the administration of justice in a given case more difficult (though I don't understand that because this article comes out after the case is over), it gives legitimacy because of the reasoning of the jury being explained in a rational way, which almost always is the outcome.

But, in most cases, the jury explains its decision quite rationally in these interviews. It seems to me that anything that gives the public confidence that the system worked is far more important than any of this internal stuff about making voir dire harder and all this other stuff which has to do with the implementation on a case-by-case basis of a trial.

It seems to me that if the press is used as a means of building public confidence in the judicial system, we have done a good job and that's what I see happening in those articles.

PROFESSOR ABRAMOVSKY: Let me just ask you one thing. I think Mr. Goodale was trying to pin you on something and you sort of got away. Let's see if we could pin you on this one.

Let's assume that it was up to you as to whether jury deliberations—never mind interviews afterwards—could be televised [live]. Let's say it was possible—with a camera you could do it. Would you do this?

MR. FREEMAN: I don't see why not. It may not prejudice the verdict because the folks are in the jury room discussing their verdict as they speak. So, the fact that it's televised publicly, I am not sure it matters—though maybe it would affect the deliberations and thus be a problem.

PROFESSOR ABRAMOVSKY: You think the fact that ten or fourteen or sixteen million people are watching this jury deliberation will have no effect whatsoever on this?

MR. FREEMAN: I would think that the result is going to be made public in any event. I don't know. I never really thought of that.

MR. GOODALE: Well, guess what, folks. Time is up. I guess the issue that was posed here, as we got through it and down to the end, was what limitation, if any, can be put on press freedom. You have heard a variety of comments on that issue.