1993

Judicial Panel: The Special Role of the Judiciary in Protecting First Amendment Freedoms

John D. Feerick
*Fordham University School of Law*

Kenneth Conboy
*Southern District of New York*

John F. Keenan
*Southern District of New York*

Edward M. Rappaport
*Second Judicial District*

Follow this and additional works at: [https://ir.lawnet.fordham.edu/iplj](https://ir.lawnet.fordham.edu/iplj)

Part of the *Entertainment, Arts, and Sports Law Commons*, and the *Intellectual Property Law Commons*

---

**Recommended Citation**


Available at: [https://ir.lawnet.fordham.edu/iplj/vol3/iss2/6](https://ir.lawnet.fordham.edu/iplj/vol3/iss2/6)

This Transcript is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.
DEAN FEERICK: My assignment is a very simple one, and that is to introduce three superlative jurists. Beyond being superlative jurists, they have been outstanding public servants throughout their careers at the bar.

* * *

I would like the judges to know how grateful we at Fordham are for your presence this afternoon. Judge Conboy.

JUDGE CONBOY: Ladies and gentlemen, I am very grateful to have the chance to speak with you today. The editors of the Forum asked the judges to give you some insights into how First Amendment cases appear and are resolved at the trial court level. I have selected three cases that I have had over the course of my career: one as a judge, one as a city official, and one as a prosecutor.

I cannot, in the limited amount of time available, go into any great detail as to the nuances with these cases. I will make some very general remarks about the First Amendment and the shaping

---

a. Dean and Professor of Law, Fordham University School of Law; President, Association of the Bar of the City of New York; Fordham University, B.S. 1958; LL.B. 1961.
c. United States District Judge, Southern District of New York; Manhattan College, B.B.A. 1951; Fordham University, LL.B. 1954.
forces that you ought to keep in mind as you come into court to try
to defend against or assert First Amendment claims.

The first case I want to mention is one that was before me as
a judge in the Southern District [of New York] two years ago,
Levin v. Harleston\textsuperscript{1}—which has now been resolved by an affir-
mance in the Court of Appeals without any further litigation—so,
I do feel comfortable in discussing it. This case involved Professor
Michael Levin, a tenured professor at City College [of New York].
The case by implication raised the question of hate-speech codes
on campuses and how such codes can withstand attack by advo-
cates of the First Amendment.\textsuperscript{2}

In this connection, I would just like to mention to you a very
famous observation by Woodrow Wilson, which was made when
he was president of Princeton. He said, “I have always been
among those who believed that the freedom of speech is the great-
est safety, because if people are fools, the best thing to do is to
encourage them to advertise that fact by speaking.”\textsuperscript{3} That is the
classic view of freedom of speech and academic freedom on cam-
puses . . . . Error will destruct by self-exposure. The problem of
hate-speech though is not quite responsive to this analysis and there
is a very discernible concern on the part of academics, commenta-
tors-at-large, and students that affirmative steps must be taken to
pursue and encourage standards of civility, openness, and inclusion
in our centers of learning.

There is no doubt that there is a rising tide of violence, oppres-
sion, and discrimination against ethnic and racial minorities in the
world. All you have to do is look at India, the Balkans, the Middle
East, and even Germany. There is no doubt that here in America
there has been an escalation in crude and incendiary expressions of
contempt for persons of racial, gender, and sexual preference

\textsuperscript{1} 770 F. Supp. 895 (S.D.N.Y. 1991), aff’d in part and vacated in part, 966 F.2d 85
(2d Cir. 1992).
\textsuperscript{2} Id.
\textsuperscript{3} See NEW REPUBLIC, May 24, 1919, at 99.
groups that can be extremely detrimental to the ongoing attempts of university faculty and students to maintain the kind of openness that is so essential to rational discourse.

Hate-speech, in such circumstances, is very different from conventional political speech and, hence, the Wilsonian confidence in untrammeled expression may not be entirely persuasive. In its most divisive and dangerous form, hate-speech destroys dialogue and shuts down discourse instantaneously. In that context, we note the aphorism of Justice Holmes, who said that the First Amendment is absolute, except for that person who would [falsely] shout fire in a crowded theater.\(^4\) The thinking—and it’s very embryonic at this point in First Amendment law—is that there is a real possibility that by the widespread tolerance of these kinds of hate remarks and hateful conduct that seek to isolate, ridicule, and hold in contempt certain ethnic groups, we have behavior that is analogous to an ongoing shouting of fire in the social or academic theater, to the extent that such ranting can indeed be destructive of the very essence and purposes of a university. That was the objection that City College officials had against Professor Levin’s writings on a claimed genetic inferiority of intelligence in blacks and why they asserted that their actions against him were justified.\(^5\)

This is the issue—the core issue—that is emerging in the jurisprudence under the First Amendment cases relating to campus life in the present, and certainly in the middle and even far term.

As Professor Burt Neuborne of N.Y.U. has brilliantly observed in a recent issue of Constitution, a censor, for the period in our country’s constitutional history from F.D.R. to Reagan, was typically a government bureaucrat who was seeking to defend the status quo by cutting off speech that might destabilize it. What we are now witnessing are college and university administrators—outside the government—who are seeking to change the status quo by stifling hate-speech that impedes development and ultimate ascendency of attitudes and values essential to democratic order and

---

progress, such as a nondiscriminatory university environment. Today, reformers are coming to champion censorship.

Professor Levin insisted that his published articles on the relative intelligence of blacks—as reflected in lower test scores than those achieved by whites—was not hate-speech nor was it strictly campus discourse because he never raised his theories in his campus philosophy courses. He made aggressive off-campus arguments on the question of whether affirmative action is effective to accomplish the goals that it is said to be in pursuit of. The problem for the University in the Levin case was that it was established as a matter of fact that he had made none of these statements in class or on-campus. Indeed, his statements had been limited to publications in The New York Times and in certain academic journals.

The University responded with certain measures, including the creation of so-called “shadow sections.” The Dean of Students sent a notice to all of Professor Levin’s students at the beginning of the semester which said, “If you don’t wish to take Professor Levin’s classes, we have a ‘shadow section’ across the hall and you can get the same course and the same credit from Professor X.” They did not ultimately touch his tenure, but they did have an inquiry in which his tenure qualifications were raised. This inquiry was secret; it refused to hear Professor Levin and it never specifically identified the “conduct” of the professor that it was investigating. It issued a report that—in Orwellian, elliptical language—found his articles to be destructive of the values of City College. But they did not formally sanction him in any way. The ultimate finding of the trial court—affirmed by the Court of Appeals—was that the creation of these “shadow sections” had undermined his tenure principally because—and the line in the opinion which is most often cited is—academic tenure must be more than the mere receipt of a paycheck.

8. Levin, 966 F.2d at 88.
Now I want to share with you a brief extract from the trial record. This was a key point on which the entire case turned. Remember, just because it's a constitutional question does not mean that you don't concern yourself with the facts, that you don't prepare your witnesses, and that you don't shape the trial record to best assist you when you get to the Court of Appeals or the Supreme Court in the application of the abstract principles. The complaint here was that there were “shadow sections” that were created by the College as a device to undermine Professor Levin with his students. The chairperson of the committee that investigated Professor Levin was on the witness stand.

The Court: Did the committee give any thought to the question of whether or not the creation of shadow sections would create a peer pressure upon those who would not themselves be harmed, but might feel that the expectation of the university, or its officials and, indeed, the majority of students, would be to abandon Dr. Levin and go to the shadow section. Was any thought given as to that?

Witness: The question [of] shadow sections was raised and considered by the committee, its pros and cons. A person like myself would go to such a class given by Professor Levin because we aren’t in lockstep, and I’d like to hear what his views are. That doesn’t mean that somebody who is being denigrated by statements made by Professor Levin about his race wouldn’t go to a shadow section. They might want to hear what he had to say.

The Court: But you didn’t gather any data?
Witness: No.

The Court: You didn’t make any inquiry of the students in his class or in the shadow section?
Witness: No.

The Court: Have you ever heard of the term “politically correct thinking”?
Witness: Absolutely.

The Court: Do you think that if the shadow section was viewed as a haven for those who were politically correct in their thinking, irrespective of whether they felt they would
be harmed or whether they could objectively be harmed, do you think that the creation of shadow sections might, in fact, do damage on an overall basis to the educational process of the college?

Witness: I think that the creation of a shadow section for some students who would feel intimidated by the view that he has expressed, that is a good thing.

The Court: That is not the question. The question is, what about the possibility of shadow sections encouraging people who did not feel intimidated, and who were perfectly comfortable in Professor Levin's class, but who in the nature of the climate felt I had better get over into that shadow section because if I stay here I'll be deemed a racist.

Witness: I most certainly wouldn't interpret it that way.

The Court: I'm not saying you did. You said that the committee was concerned about the overall impact on the educational process of the impression of views of this type, correct?

Witness: Yes, Sir.

The Court: I asked you whether you considered shadow sections and you said, "Yes we did." And indeed, you endorsed them because a few minutes ago you told me that it was a perfectly appropriate method to protect people from Professor Levin's views who might be harmed, correct?

Witness: Yes.

The Court: I said, putting aside those who might be harmed, what about the effect of such a device, shadow sections, on the student population in general? And I gave you an example of where it is certainly conceivable that students who would not in any way feel they might be harmed, they might nonetheless feel peer pressure to make haste to go into the politically correct shadow section as opposed to staying with the professor. Isn't that something the Committee gave thought to?

Witness: Yes, it did.

The Court: What did the Committee conclude?

Witness: We had faith in the students, in other words,
that certain students might do that, but there would be many others that would not.

The Court: But that is just speculation?
Witness: Of course it is.

The Court: You didn’t do any analysis of the record, and you certainly didn’t question any of the students?
Witness: [No, we] didn’t question any of the students or any of the faculty.

Now, ladies and gentlemen, I recommend that you read the court opinions on this. This evidence was the key part in the Court of Appeals affirmance. In order to justify what the college officials had done, they had to establish that there was an essential need and justification to, in effect, chill and abridge the professor’s First Amendment rights. In point of fact, it came out in the trial that the Dean had sent a letter to the students enrolled in Professor Levin’s class inviting them to leave his class, in which he said that Levin was a fine philosophy professor and that the college had every confidence in his ability to conduct his classes objectively. The plain lesson of this is that—while you are reflecting upon the great constitutional cases and the ruminations of great constitutional scholars—when you get a case like this you first ought to consider what are the facts, what will the witnesses say, and how are they to be prepared when taking the witness stand.

I want briefly to mention two other cases. Prior to my becoming a judge, one of the positions I held was General Counsel to the New York Police Department. One of the matters I had in the course of my responsibilities was the case loosely called the “Russian Mission” case. This case dealt with the appropriateness of police demonstrations in front of the Soviet Mission. This case was also quite celebrated and went to the Court of Appeals. The case was conducted before Judge Pollack, and the City was sustained in its restrictions.

10. Levin, 966 F.2d at 88-89.
12. Concerned Jewish Youth, 621 F.2d 471.
The Russian Mission is at 136 East 67th Street, between Lexington and Third Avenues. The police determined—in the late 1970s—that any demonstrations had to be limited to twelve persons behind barricades in a bullpen area over 100 feet from the front of this Mission. A group called the Congress of Jewish Youth—a group that was founded out of Queens College—brought an action seeking a mandatory injunction from Judge Pollack requiring the police to let them be closer to the Mission site. These were very real obstacles to that demonstration group being heard. They were kept diagonally across from the Mission—118 feet away. They were not allowed to have any bullhorns. They were limited to twelve demonstrators and their argument was that these restrictions made a travesty of very basic free speech. Under the circumstances, they expected that they would have a very good chance of having the district court issue the injunction.

The proof that was put in was as follows: the police demonstrated that over the course of the previous six years there had been 30 demonstrations in front of the Mission; that in one case there were over 1,000 persons demonstrating; that in another case over 90 persons were arrested; and that in another incident, the Mission was completely immobilized for two days and no one could go in or out. The proof also established that there was a synagogue on the block, a school, Hunter College, a bus stop, and a police station. Further evidence of record indicated that the Mission had been the subject of a sniper attack by a person with a rifle on the roof of Hunter College. Furthermore, the precinct commander testified that 25% of his force was devoted to protecting the 45 diplomatic locations in his area. The commander of the Anti-Terrorist Task Force testified that in his opinion the Russians would use deadly force to eject any intruder and maintain control in the face of any attempt to rush the Mission and enter it.

The record that was created before Judge Pollack in this case was convincing on the appropriateness and the viability of reasonable time, place, and manner restraints that the police imposed on these demonstrators. It also established that the regulations were content-neutral and applied to everybody, whether they were the Irish picketing the British, the Moluccans picketing the Dutch, the
Croats picketing the Serbs, the Greeks picketing the Turks, or any one of the average 40 demonstrations occurring daily in the City. The main point made was that the United States had obligations that transcended the local obligations of the New York Police. We are a signatory to the Vienna Convention. We are a signatory to the U.N. Charter. Were our diplomats in distress overseas—as for example during the hostage crisis in Tehran around that same time—we would expect the local police to protect our diplomats from unruly and threatening demonstrations.

The Court of Appeals sustained Judge Pollack’s refusal to issue the injunction. The interesting thing—this gets a little bit to the real politik that occasionally shapes the outcome of these cases—is that between the time that Judge Pollack refused to issue this injunction in May of 1979, and the time of the Court of Appeals decision in the early part of 1980, a bombing occurred at the Russian Mission in which four officers were badly hurt. Sadly, one was blinded and four employees of the Russian Mission were very seriously injured. I needn’t tell you that when the Court of Appeals decision came down it was a systematic affirmance of every single fact that Judge Pollack found. This case is an extraordinarily valuable benchmark for police commanders in cities all over America—particularly in difficult times like these, i.e., the bombing of the World Trade Center—because its trial record is a roadmap—a primer—as to how to balance responsibly the competing values of free expression and prudent security in periods of terror and violence. One of the claims made by the dissident protestors was that, “Gee, with only twelve people in the bullpen, we can’t attract any media attention.” Well, the Court of Appeals found that the First Amendment doesn’t guarantee the right to mass sufficiently large crowds close to the target mission to guarantee an enthusiastic press response for the ensuing “media event.”

I will briefly discuss a final case with you. When I was a prosecutor many, many years ago, I was involved in a prosecution of

14. Concerned Jewish Youth, 621 F.2d at 477-78.
15. Id.
16. Id. at 474.
Republican leaders of the New York State Legislature—principally the speaker, Perry Duryea. This case had to do with dirty tricks. The Republican Assembly leaders created a bogus campaign committee and falsely marked its literature as coming from the Liberal Party. The objective was to draw votes from the Democratic candidates to Liberal candidates in certain target districts, so as to cause the election of Republican candidates, thus ensuring the continued control of the Assembly by Republicans and enhancing Duryea’s political strength. The interesting thing was when the matter was litigated it was right around the time of Watergate. Though the indictment was not ultimately sustained, there was a finding that the kind of dirty tricks involved in this campaign device was not protected by the First Amendment.

In fact, the judge involved—who is a very famous judge and a colleague of ours, Burton B. Roberts—said in that case that the First Amendment is not a haven for political fraud, trickery, and deceit. I hardly think that would have been as viable a finding if it had not been made during 1972 where there had been the disclosure of campaign fraud upon Senator Edmund Muskie. In that case there was a Florida presidential primary in 1972 and Senators Jackson and Humphrey put out letters purportedly on the stationery of Senator Muskie. The text offended a vital voting block in the primary, and it severely eroded Senator Muskie’s vote total. There was a federal prosecution and the statute implicated in that case was sustained, even though it did affect campaign speech.

DEAN FEERICK: Thank you very much. Judge Keenan.

JUDGE KEENAN: I think it was Catherine Howard, who was Henry VIII’s fifth wife, who went to Henry and Henry said to her, “I shall not keep you long.” I shall follow Henry’s advice.

The First Amendment and the rights protected thereunder are unique to the United States. The idea of a written constitution guaranteeing freedom of religion, for example, was unheard of in

18. Id.
1791 when the Bill of Rights was adopted. The rights protected by the First Amendment are fundamental to American society. The fact is that it—the First Amendment—only exists here. It’s only here in the United States that religion, speech, the press, assembly, and the right to petition the government are recognized as entitlements of the people—only in the United States.

Our instructions as trial judges were to give examples of situations that we’ve personally encountered relative to First Amendment issues. I should say at the outset that it is relatively rare that a United States District Judge comes to pass upon governmental activity in the context of the First Amendment. In the Southern District of New York, each active judge is assigned a total of approximately 425 civil and criminal cases per year. It is not unusual to go for a whole year—or two, or three—without a case arising which has First Amendment implications. First Amendment matters generally are in a more rarified atmosphere and strata than the trial court level. However, four of the cases assigned to me since I joined the Court in 1983 come to mind as having interesting First Amendment issues. I would like to briefly touch upon those cases with you this evening.

Two of them were actual criminal cases and the other two were civil cases which arose from and out of basic criminal cases. First, let me take up with you some First Amendment issues which arose in the well-publicized case—back in 1988—of United States v. Myerson. You will recall that Ms. Myerson, who was a former Miss America, a television celebrity, and a public official, was indicted together with her lover—a man by the name of Andrew Capasso—and a New York Supreme Court Justice in connection with a job that Ms. Myerson had allegedly given to the judge’s daughter in a City agency. The purpose of giving the daughter the job—according to the theory of the prosecution—was in return for having the judge reduce the alimony payments which Mr. Capasso—Ms. Myerson’s lover—was required to make to his former wife. The whole thing was a sordid affair, which naturally attracted the prurient interest of the New York press and the media.

There were stories on television and radio and in the newspapers, tabloids, and magazines. The whole case assumed the proportions of a three-ring circus. The lawyers on both sides, some of the defendants, one of the witnesses, and others, were giving more interviews than Larry King conducts. The case was then assigned to me. I was the fourth judge to receive the case; three others had earlier recused themselves. They were wise. I was not that wise.

Upon learning that the case was assigned to me, I immediately called a conference. I brought the defendants and the lawyers on both sides in before me in open court and I issued a gag order to the lawyers and to the principals because I was extremely concerned that there would not be a fair trial if the extra-judicial statements continued.\(^{21}\) I was thinking of the ruling of the Supreme Court of the United States in the famous case out in Ohio in the 1950s, *Sheppard v. Maxwell*,\(^ {22}\) where a doctor was tried for murdering his wife and [due to the extensive media coverage] it became impossible for him to get a fair trial. The Supreme Court of the United States properly reversed the conviction and criticized the trial judge for not maintaining sufficient order in his courtroom.\(^ {23}\)

I was also reminded of the case of *Estes v. Texas*,\(^ {24}\) which was tried down in Texas. Those of you [who are] the age of the judges and Dean Feerick will recall Billy Sol Estes. He was a dear friend and buddy of the late President Lyndon Baines Johnson. Estes was indicted in a massive fraud. The courtroom was turned into a television studio. There were television cameras all over the place that were intrusive. There were cables running here, there, and everywhere. Once again, the trial became the media's delight and it prevented Estes from getting a fair trial.

Being concerned about those rulings and the fundamental obligation that I had as a trial judge to ensure that a fair trial took place, I issued a gag order. Interestingly, after the gag order, there was really no more out-of-court publicity engendered. The lawyers

\(^{21}\) *Id.*

\(^{22}\) 384 U.S. 333 (1966).

\(^{23}\) *Id.*

\(^{24}\) 381 U.S. 532 (1965).
behaved themselves and there were enough fireworks in court to keep the media satisfied. Thus, nobody challenged the order in that case.

Another First Amendment case of interest, which is the subject of an extensive article in a recent issue of the *Fordham Entertainment, Media & Intellectual Property Law Forum*, was a case called *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*. The case revolved around the constitutionality of section 632-a of the Executive Law of the State of New York—the so-called "Son of Sam" law. The law was passed in 1977 and signed by Governor Carey to prevent criminals from profiting by selling their criminal memoirs in the form of books, movies or stories.

One Henry Hill, together with an author by the name of Nicholas Pileggi, wrote a book called *Wiseguy*—which later became the film called *Goodfellas*. The Crime Victims Board in 1981 found and declared that Hill had to pay to the Board all the profits that he had received based on the book and that—if Hill failed to pay those profits—Simon & Schuster would have to pay the Board all the money that it had already paid to Hill. The amount was some $95,000.

Simon & Schuster brought suit and they asked me to declare section 632-a of the Executive Law unconstitutional. I erroneously felt the statute was constitutional. The Second Circuit affirmed me two-to-one for somewhat different reasons, but you take affirmances if you get them. The Second Circuit held that the law passed constitutional muster. The Supreme Court reversed the

---

30. 916 F.2d 777 (2d Cir. 1990).
31. Id.
Second Circuit and me, 8-0. The Court held that the statute was a content-based regulation of expression and that it was thus impermissible.

Since then, New York has passed a new section 632-a which, hopefully, is constitutional. It is broader in its scope and it prohibits any type of contract which profits a criminal not just—and I quote from the earlier statute—"a movie, book, magazine article, etcetera" which related to writings or tales. It's now any type of contract. Hopefully, this new statute is constitutional.

In 1991, a fascinating case arose relating to the right of a former member of the Iran-Contra's prosecution staff to write a book about his experiences there. Judge Conboy and I had the great pleasure of working under Mr. District Attorney Frank S. Hogan for several years. I parenthetically preface my remarks about this particular case I'm about to mention, by saying that to me it is practically anathema and I think that prosecutors who write books about their cases are "kissing-and-telling," in a sense. I don't really think that it's professional to do it and I know a lot of very able prosecutors who don't think it appropriate either.

In any event, the name of the next case I will discuss is Penguin Books USA, Inc. v. Walsh. Mr. Toobin, who had been a member of Walsh's staff, wrote a book called Opening Arguments. The subject of the book was the Iran-Contra investigation, the North and Poindexter cases and the other aspects of that affair. Independent Counsel Walsh didn't want the book published. The plaintiffs—the publishing house and Toobin—sought an injunction against the government's interference, saying that they didn't want the government to interfere with the plaintiff's exercise of his First Amendment rights. In addition, they sought from me a declaratory judgement permitting the publication of the book.

34. Id.
36. JEFFREY R. TOOBN, OPENING ARGUMENTS: A YOUNG LAWYER'S FIRST CASE—UNITED STATES V. OLIVER NORTH (1991)
The defendant countered Walsh with his application for a declaratory judgement that publication was improper. Although the preliminary injunction was denied—because I didn’t think that one could enjoin the United States government—I did grant the plaintiffs a declaratory judgement indicating that the publishing of the book would not violate Rule 6E of the Federal Rules of Criminal Procedure relating to the leaking of grand jury information since Walsh had maintained that the book leaked secret information that was grand jury information. In addition, he also didn’t want the book published because he felt that it would hurt future prosecutions. You should be aware of the fact that the book had been cleared by the CIA and the CIA saw nothing in the book that violated any rules of confidentiality.

I found no 6E violation and I granted plaintiffs the declaratory judgement. Walsh immediately filed an expedited appeal. He did not seek a stay of my decision either from me or from the Second Circuit. Before the appeal could be heard, the book was published and was being sold in book stores across the country. It was reviewed in The New York Times Book Review and this infuriated, and I really mean infuriated, the late Chief Judge of the Second Circuit, Irving Kaufman—a distinguished graduate of our school. He excoriated the plaintiffs for not waiting for the appeal to be heard before publishing. The appeal was dismissed as moot and the plaintiffs were, as I say, strongly criticized. Interestingly enough, there was no mention of Independent Counsel Walsh’s failure to have sought a stay which would have given the Second Circuit an opportunity to rule.

The final case I would like to make mention of is United States v. Scopo. Scopo and his co-defendant, Dominick Montemorano, were high ranking members of the Columbo organized crime family of which one Carmine—alias “the Snake”—was the chieftain.

38. Id.
Many of his merry men had been tried and convicted of many RICO violations and related crimes before me in an eight-month trial—which took place in 1985 and 1986. Montemorano and Scopo had originally been indicted with the others in the main indictment. Each of them were eventually severed for very serious health reasons and they were tried together in the spring and summer of 1987. As part of the proof that Montemorano belonged to the Columbo family, the government introduced FBI surveillance photographs showing him outside a church before and after a funeral mingling with several organized crime leaders.

Montemarano—through counsel—objected to the introduction of the evidence on the grounds that it infringed his First Amendment right to freely exercise the practice of his religion. I rejected his argument—as did the Second Circuit—and was affirmed. Society had a compelling interest in the law enforcement activity of the FBI and the photos were taken outside the church. They did not depict a religious ceremony. Since they were taken covertly from a surveillance truck, they avoided any potentially menacing effect on those present at the religious ceremony and there was no chilling result. The religious ceremony, as I said, was a funeral. It was the funeral mass of a deceased mobster.

Those, then, are some of the First Amendment issues which I have had the pleasure of grappling with over the years.

DEAN FEERICK: Justice Rappaport.

JUSTICE RAPPAPORT: I'd like to approach this discussion this evening from a different aspect. In the state courts we now have legislation—which we had a few years back—dealing with television cameras being permitted into the courtroom. Now, going back to times prior to television entirely—which is something one must bear in mind when you discuss the right of the press as opposed to the right of fair trial—the press always had the right of access to courtrooms through the written press, as far back


as I can remember, which is perhaps not as long as some people. I remember when I started in 1958 that even then we didn’t permit electronic recording—such as tape recordings and things of that nature—in the courtroom for the most part. We did permit still cameras to come into the courtrooms and take pictures. As television communications grew, [the media] wanted access to the courtrooms in New York State to televise what they felt were the type of trials that the public would be interested in.

What we are confronted with when we talk about constitutional safeguards is that there are two constitutional safeguards that are more or less colliding with each other. One deals with due process or the right to a fair trial—which we tell juries and we talk about all the time as judges—and I’m sure as law students all of you believe is essential to the proper administration of the criminal justice system. Every defendant, or anybody accused of wrongdoing, is entitled to a fair trial. On the other hand, the public has a right to know what is going on. There are segments of our public that feel that some of the things that take place in courtrooms are sort of an esoteric, secret-type of ritual, which they’re not part of and they don’t know what is happening. They feel that something happened when there then is a result in a particular case which they themselves do not particularly favor or is not something that is within their own particular interest. They don’t really know what happened because they—obviously not everybody can attend a trial—were not present. You can’t have all types of people assembling at a trial. You can’t have, for example, seven million people in a courtroom. They really don’t know what happens other than, perhaps, if reporters were there and reported it. But many feel that reporters also don’t essentially give the salient factors of a trial and don’t tell enough for the segment of that particular public interest to know.

Now, we put into effect for another two years the right of the television and electronic communication to come into a courtroom either to do live, simultaneous telecasts, or to record court proceedings for future telecasts. The New York State Legislature, with the
signature of the Governor, promulgated all types of safeguards.\footnote{See, e.g., \textit{id.} §§ 29.2, 29.4, 131.7, 131.8 & 131.13.} I would think that if one believes the court can bar television from entering a courtroom—and I don’t know of any case to the contrary—then one must also believe that the Legislature and the . . . Office of Court Administration can set forth a whole bunch of rules as to what is permissible and what is not permissible.

Now, there are many Judges that believe that the simplest thing—because of all the problems that both the legislation and the rules present—is just to keep the cameras out. At the same time—when one takes that rather unilateral approach on high profile cases—one must appreciate the fact that perhaps you’re going to have a large segment of the community that is going to feel that something is happening that it’s not part of.

With that in mind, when I was assigned as the judge of the famous Crown Heights case—the Yankel Rosenbaum case, or as the case actually is known, the People v. Lemrick Nelson—there was an application made by the coordinator for the news media to have television [cameras] in court. Now the law says you’re permitted one [still photographer and two electronic or motion picture cameras], so everything is pooled.\footnote{\textit{id.} § 131.7(a).} It’s very sophisticated the way it’s done. In a room by the courtroom they put in a whole keyboard panel where every television station could [broadcast] by coming in and plugging in [to the panel]. They could either make tapes for future use or they could actually plug in from a satellite truck that is outside the courthouse and they could do it live. The multiples of this are mind-boggling. They could have 50 or 60 television stations do this all at one time from this one camera that is in the courtroom. Usually the camera that comes into the courtroom is from the cable television network, Court TV.

They presented an application to me. I don’t think you’ll find any appellate cases other than challenges to the law itself. The law is that the trial judge really has a tremendous amount of discretion as to whether or not he’s going to permit television in the first
place, or one still cameraman, and so forth, into the courtroom.\footnote{46}{Id. § 131.1(d).} The law also goes on to say that certain restrictions could be made by the trial judge in addition to those that the law makes in the first place.\footnote{47}{Id. § 131.1(f).}

Now, for example, I—as the trial judge—may deny an application made before me after listening to the news media representative and letting the defendant in the case also argue why he was against it. Interestingly enough, in the Crown Heights case, Arthur Lewis, who represented the defendant, never argued against the cameras coming in; his only argument was that he didn’t want his client to be photographed. The D.A. took no position. So, it was really what I wanted to do as opposed to what the petitioner was asking to be done. There was no true opposition to the petition being made for the cameras to come in. The interesting thing is if I had denied the news media, or if I had granted access—over the objection of one of the parties, either the D.A. or defense attorneys—there is only one place that the law permits an appeal and that’s to the administrative judge of the particular judicial district; in our case, it’s the Second Judicial District. That is the only appeal. In other words, if the administrator agrees with the trial judge, or overrules the trial judge, or makes modification in the trial judge’s order, that’s the end of it. The law does not [provide for] any judicial appeal to an appellate court.\footnote{48}{Id. §§ 29.2(h) & 131.5.} That procedure has been held to be proper and meeting the guidelines of the laws of the State of New York and the State Constitution. So you could say that this is a rather limited type of review that also gives tremendous discretion to the trial judge.

Due to the very nature of the [Crown Heights] case, and the publicity that it got, and knowing that we were dealing with two communities that were vocal about their fears and concerns about the unwanted consequences of this notorious trial, I granted the application to permit television into the courtroom. I felt, weighing
the fair trial aspect as opposed to the public’s right to know, that it was as important. I also felt, based upon some of the rules as to this and some of the other cautions that were taken by me as the judge, that the defendant—in spite of the video camera being present—would still be afforded a fair trial.

As far as defense attorney Arthur Lewis’ objection to his client being photographed, he argued that the defendant was presumed to be innocent and that this—the photographing and televising—would give rise to a great deal of ridicule and so forth, and therefore he shouldn’t be photographed. The law that was passed—and also the Administrator Matthew Crosson’s rules that he promulgated from that law—dealt specifically with this issue. Namely, the law said that the defendant was a party that could not prevent his picture from being taken.49

The law expresses that the defendant’s picture can be televised and it lists who can object. Any witness who’s a non-professional witness has the right to object—a police officer or a technical witness or a medical examiner is excluded but an ordinary lay witness or a person who comes as an eyewitness is not. [The law seems to be subjective to the witness—and my order was more explicit on this—that] when the [non-expert/non-professional] witness comes into the courtroom, [he must be asked,] “Do you want to be televised?” If he then says no, the operator of the television camera is directed to keep the camera on another focal point.

Interestingly enough, not one witness in the entire Nelson trial—which went over quite a few weeks—objected to being televised. I thought that was rather interesting, considering that there were many lay witnesses and lay people called [to testify] and yet none of them objected to having themselves televised.

The jury cannot be televised; they’re never shown and they’re not permitted to be shown. They can’t span and zero in on the families of the victims or the family of the defendant that may be

49. Id. § 29.2(g). The statute reads:

(g) Consent Not Required. Electronic media or print photography coverage of appellate arguments shall not be limited by the objection of counsel or parties, except for good cause shown.
sitting in the audience. That’s specified by the legislation.

What are the three major areas that the allowance of the television cameras into the courtroom have a tremendous impact on? I just want to briefly discuss them with you for your thought. It’s something that probably we have to do some refinement on. The first is, what impact—forgetting whether the jury now is going to go home and watch what’s on television, which doesn’t really disturb me that much, but it’s an area you must be concerned with—and what chilling effect do cameras have in the courtroom? Obviously when you have the cameras in the courtroom, it creates more of a—though I don’t like to use the word—circus atmosphere or carnival atmosphere; but, it certainly is different than the sedateness of a courtroom that does not have television cameras.

So what chilling effect, if any, do the cameras have? Do they affect the jurors as they sit? This is something that we discuss with the jurors in voir dire. We tell the jurors that there would be cameras in the courtroom. We ask them if that would have an effect upon them, after outlining to them what they would be doing, what their role would be as the judges of the facts, and so forth. None of them, not one juror—even those that were excused and those that weren’t—in the Nelson case said that it would have an effect. Now, of course people—particularly jurors in voir dire—tell you many things that they perceive the lawyers and the judge want to hear, as opposed to what they’re really thinking. So that may be a problem. It may really have a chilling effect on some individual jurors, but they may not realize its effect on them so as to articulate it, or—if they did realize it—they felt that it’s not the answer you were looking for so they give the other answer. So that’s a problem. After the trial, when I spoke to some of the jurors and some who were spoken to by the news media after the verdict, all said that the television had no effect upon anything that they were doing.

A second—I think much more crucial—consideration is something which I think we need to do, which I may have the opportunity to do shortly. I’m trying a series of cases dealing with the Brighton Beach incident that seems to attract a lot of news media attention as well. The cases deal with two Russians where the
husband went to the aid of his wife who was about to have her pocketbook stolen and he ended up being shot. That seemed to have gotten a lot of media attention at one point.

We have a rule of sequestration. We don’t let witnesses into the courtroom to hear the testimony of other witnesses. This is so that they won’t be in there preparing their own answers by listening to what other people said. We avoid the possibility that they will couch their answers to deal with something that may have been brought out either through direct or cross examination of a prior witness.

Now we have Court TV in the courtroom, that in some instances, does a simultaneous broadcast of what is happening in the court. I’m not concerned with the jury seeing that because they’ve seen it anyway; and we don’t let them do sidebars which are completely eliminated from the television or any type of media attention. But here’s a witness that is not allowed in the courtroom and then goes home at night to his cable TV and puts on Court TV; he watches everything that happened that day. It’s very dangerous. We kept him out of the courtroom but now he’s seeing everything.

Obviously, I guess we could issue orders, which didn’t occur to me, but it does now. I don’t think it really created a problem in the Nelson case in any event. I think a lot of the witnesses that ended up testifying at that trial don’t even watch television, so in that case it was not really a big problem. But, it could be a big problem. We might need some legislation or we may need judicial intervention here to either order witnesses not to in any way watch Court TV, news or anything else, similar to what we do with jurors and then hope that they listen to our instructions.

But a non-witness spectator could be in a courtroom who is a relative or friend of a witness, and go out and iterate to the witness everything that took place during the day. These are the problems that we have. It’s something that the television in the courtroom does affect.

The last effect of television in the courtroom is on the participants themselves—the judge and the lawyers. I gave an interview with a Canadian television [network] who seemed to be more inter-
ested in my reaction to what took place during the case than Amer-
ican television, I guess American television does not really care
what our reaction is so long as they can be in the courtroom. In
Canada, they don't permit the television in yet, but there's legis-
lation in the hopper to do it. They want to mimic what we're do-
ing; so they're concerned about it. I gave one interview in English
that they somehow translated into French for the Quebec Province.
I'm not quite sure how that turned out. I would like to hear how
they handled my "Brooklyness" in French. In any event [my reac-
tion was] that I think it had a good effect, for the most part, on the
participants—the district attorneys, and to some extent the defense
attorney—and it certainly had an effect on me. I learned certain
things by watching myself. I realized that what I do very frequent-
ly—like suck a hard candy—is not good to do when there's televi-
sion because it looks like I'm a cow chewing my cud. So I
stopped doing that. Some of the other movements—we all have
our idiosyncrasies and do certain things—when you start to watch
it, you decide that you better not do things like that because there's
a camera on you.

But other than that, I don't think television has had any great
effect upon me and my judicial rulings. I think the lawyers did
well. It's an area which obviously is developing more and more
and it's not easy to say, "Well, we'll just keep them out and we'll
solve all our problems." Because when you do that, then people
say, "Well, how come this verdict took place? What happened?
What did they pull on us?" I think that's something we have to
cconcern ourselves with.

DEAN FEERICK: Thank you very much for those three excel-
lent presentations. Do any of the panelists wish to respond to any
of the previous panelists? If not, why don't we open it to ques-
tions from the audience? You could direct questions to a particular
panelist or the entire panel, as you wish.

AUDIENCE MEMBER: I have a question for Judge
Rappaport. Judge Rappaport, you said something similar to what
an earlier panelist speaking on the same topic said—that it's not a
real problem for jurors to go home and watch Court TV because
they've already seen the trial.
JUSTICE RAPPAPORT: We told them, by the way, not to.

AUDIENCE MEMBER: Right. What that isn’t taking into account is that there’s actually commentary on Court TV. Lawyers come on and they talk about evidence that wasn’t admissible at the trial. And I just wonder—

JUSTICE RAPPAPORT: That commentary is something that is very disturbing. Some is irresponsible commentary, because I have watched the commentary as well. As to the question of whether I permit it, theoretically, I don’t know if they would bother doing it if I didn’t permit the cameras in or I denied their application entirely. That does not eliminate commentary on what takes place at a trial.

For example, if you have a trial in which the press perceives it has an interest—such as the [William Kennedy] Smith trial in Palm Beach—and you exclude television completely—which they did not do in the Smith case, my trial and some of the other trials that Judge Keenan and Judge Conboy spoke about—that won’t stop the commentary. In other words, they’ll just do it. You’ll always find the commenting. We had columnists that came when we didn’t have Court TV and wrote columns, Jimmy Breslin, for example, and others. That is very difficult to stop. We can gag the lawyers and we can gag participants, but I don’t know if we can successfully gag the news media from making these commentaries. That’s the problem.

DEAN FEERICK: Judge Keenan?

JUDGE KEENAN: The whole process of a trial with a jury requires a certain amount of trust and faith in the jurors. Now there are those who cynically say, “You tell the jury don’t read about this, and all you’re doing is blowing smoke into the air on a night like this.” I’m not one of those people. There are things that you can do. I most respectfully disagree with Judge Rappaport about the televising of criminal cases. I think that invariably jurors will watch the snippets of the high points of the cross-examination—the point where the witness said, “I saw the defendant plunge the blade into the victim’s eye socket and remove it with the gore on the blade.” I think that the argument that the print news will
cover the trial and that the jury will read it anyhow can be blunted by the trial judge.

I mentioned the Scopo case today. During that trial, I arranged [a system to control the jurors' access to certain print media] with the United States Marshals and the jurors ahead of time. We anticipated that Chief Judge Kaufman's Crime Commission report was going to come out during the trial. Unfortunately, during that trial, [Paul] Castellano was murdered and he was on a few of our tapes, although he wasn't a defendant in my case. He was being tried upstairs, by Judge Duffy, when he was murdered. I had the government buy the four New York dailies every day and had the Marshals clip them. The papers were in the jury room, and the jurors read them there. The only difference was there were no stories about the Scopo case or anything else there. We saved those stories and marked them as part of the Court's record. Now, did the jurors read those stories when they went home at night? I don't know, but they said they didn't and I wasn't going to run a separate investigation of that. The difficulty with televising is that you invariably get some expert—who probably never tried a case in his life—who tells you this was the most telling part of cross examination and mistakenly explains why a certain piece of evidence was kept out. It's difficult enough, I think, for defendants. Although the Constitution doesn't really guarantee it, I happen to be one of those people that think that, implicit in the Sixth Amendment is the right that the prosecution gets a fair trial too. I'm afraid of this need for television; let's keep it to civil cases.

DEAN FEBRICK: Judge Conboy.

JUDGE CONBOY: I just want to make an observation that I do think that there is a larger question about the integrity of the jury system beyond whether or not individual jurors will tell a judge after it's over, "Gee, it didn't affect me." I have seen too many jurors drawn in as celebrities on programs like Nightline and McNeil-Lehrer Report, where they have been subjected to the hammerhead pressure of very facile interlocutors like Ted Koppel and others. Jurors in the Mike Tyson case appeared on one of those afternoon tabloid shows and were ridiculed by the audience.

I say to myself, what must the public at large think about our
jury system? What must they think about a verdict as important, for example, as the Rodney King case, or a verdict as important as the Smith case down in Florida, or a verdict as important as the Mike Tyson case or—the case that John mentioned—the Myerson case? What must they think? Because after all, what we are coming to is a jury of the whole. What is really important is not whether individual juror number nine says, “It didn’t bother me that there was a camera in the courtroom.” What really is important is, whether the verdict—which is supposed to be representative of the community and has integrity as a reflection of the moral stature of the community and its conscientiousness and fairmindedness and objectivity—is undermined by this massively intrusive and intense magnification by television lenses? It’s very different from having a reporter with a notepad in the audience.

It’s a different era. It’s of a whole different scope and to the extent that these jurors become more and more convinced that they are in the center of attention, either after the verdict or in the voir dire beforehand, it is, I think, something to be concerned about. Now, do I think we can reverse it? Of course not. In 25 years, we will probably have a very different concept of trials in this country. Hopefully, we will be able to get away from the fragmentary approach where you have one local television reporter discussing one shard of evidence because all they have is 22 seconds.

I’ve heard the Court TV people say, well, we’re providing a public service. We’re *The New York Times*. We have everything on Court TV. Unfortunately, Court TV isn’t at the center of the communication of this sensational tabloid-like coverage where you have cameras in the courtroom and in the lobby and on the steps and everything else.

So I am a bit more concerned about the cameras than my colleague, Justice Rappaport.

JUSTICE RAPPAPORT: Well, I’m very concerned about the cameras in the courtroom. I think that you bring up some interesting points. You talk about after the trial. There is no law that we have that we can control what happens after the trial is all over. You talk about people, jurors, going on Ted Koppel after a trial is over. We have absolutely no control over that at all.
JUDGE CONBOY: They never went on before. You never saw them going before the cameras in the courtroom until very recently. We’ve always had sensational trials—Ruth Snyder, all the way back. This is a new phenomenon and it’s because of the hype. It’s the drama. It’s the anticipation. They’re laying in wait for these people. They stake out their homes. They’ve got cameras there. It’s expected. It’s part of the media drill.

JUSTICE RAPPAPORT: Well, but I don’t even know if they were successful. Someone in your case—the Myerson case—tried to get to the jurors and everyone. You had no cameras in the courtroom.

JUDGE CONBOY: We didn’t have any jurors on television after the Myerson case. They may have talked to a few of them, but they didn’t have them on television.

JUSTICE RAPPAPORT: First of all, you know, there wasn’t even Court TV in the courtroom. I don’t even know if Steve Brill had his program—so that’s new also. New York One is also new. It’s just things are growing and we’re going to have to get regulations. Sure, I’m concerned about it. I don’t know if I would let them in again.

JUDGE KEENAN: Well, I’ll tell you one thing. I’ve written several times on the Hauptmann case—the Lindbergh kidnapping. I’ve been published about that.50 I’ve always thought that there was no question that Hauptmann was involved in the kidnapping and that he was guilty. I think that it was outrageous that the conviction wasn’t reversed because of the circus atmosphere that the case was tried in; that was the most colossal Barnum & Bailey atmosphere that ever existed. There was a camera hidden in the courtroom in that case.

It’s the responsibility of the trial judge to guarantee that the trial is fair to the degree that cameras and screaming Dorothy Kilgallens don’t prevent Sheppards from getting a fair trial. Again, most of you are too young to remember Dorothy Kilgallen. She

used to be on *What's My Line*. She was the lady without the chin. She ridiculed the authorities in Cleveland for not having indicted Sheppard. They then hounded the D.A. until finally he got an indictment. There was always, in that case, an awfully significant question as to whether Sheppard was guilty, factually.\(^{51}\)

AUDIENCE MEMBER: I was very happy to see Judge Conboy address the issue of the integrity of the jury. Unfortunately, we don’t hear enough discussion about this. Yet, I think it’s going to be the crucial issue. I would like to ask Judge Rappaport—in the case that you discussed regarding Crown Heights—did you ever consider that if the verdict had gone the other way, whether you would be troubled regarding the aftermath? How the jurors would be treated and what you might do or perhaps your powerlessness to do anything about it?

JUSTICE RAPPAPORT: We’re talking about a definition of—this has nothing to do with whether there was or was not television. We’re talking about—

AUDIENCE MEMBER: No, I’m talking about the press—

JUSTICE RAPPAPORT: Well, the press, let me tell you one thing. Assuming that I had denied their application to come in and that was sustained by the Administrative Judge, there would have been no television. You still would have had an enormous press interest. The reason the television wanted to come in to do the trial was because there was public interest, the press would perceive that and want to do the trial. Even without the television you still would have had tremendous press coverage. I can’t—

AUDIENCE MEMBER: Judge, I’m sorry—

JUSTICE RAPPAPORT: No, I understand your question. You’re asking how I would feel about the impact on the jurors—on their personal lives and so forth—if there had been a conviction. Now, before the trial started—from the way I knew the facts during the discovery—I perceived that there would have been a conviction in the Nelson case. It wasn’t until the trial started to unfold that one started to see certain things falling apart.

Listen to what the People claim they had: they had a confession; they had a bloody knife; they had an eye-witness; and they had a spontaneous declaration by the deceased that "That's the one that stabbed me." It seemed like a rather good prosecution's case. So we were very much mindful that if there was a conviction—particularly with what happened in California—that there could be a sudden community reaction.

We tell the jury that they should not concern themselves with what the reaction to their verdict would be by the community—whether it'll be a popular one or an unpopular one. Now, obviously—if the verdict came in—if anybody's well-being was going to be threatened, we were prepared to take whatever [steps] were necessary to protect them against violence, which we did.

As a matter of fact, I had worked out with the New York City Police Department and the Mayor that we would delay the reporting of the verdict to the press. I learned that there was a verdict at three o'clock in the afternoon. I didn't take that verdict until 5:20 p.m. so that the Police Department could prepare for the "tranquility" of certain neighborhoods before the verdict was announced on an unsuspecting police force.

So yes, that is always a concern. But I don't think that the television impacts upon it.

AUDIENCE MEMBER: Could I just follow up? The role of the judge is to guarantee a fair trial.

JUSTICE RAPPAPORT: Absolutely.

AUDIENCE MEMBER: Now in view of what's happening with regard to what Judge Conboy referred to as the integrity of the jury system and what I consider to be a present danger to it, how do we guarantee the fairness of future trials.

JUSTICE RAPPAPORT: You mean as a result of what happened in California?

AUDIENCE MEMBER: Yes, where prospective jurors have witnessed what's gone on in the aftermath of various verdicts today?

JUSTICE RAPPAPORT: I don't know how many you can
name like that. You have King. To some extent I guess Nelson. But how many others can you really speak about?

AUDIENCE MEMBER: It’s just starting, Judge.

JUSTICE RAPPAPORT: Well, if it’s just starting then we’re going to have to adjust ourselves.

AUDIENCE MEMBER: Well, what are the options? I mean, Judge Keenan, are there other options?

JUDGE KEENAN: You can have an anonymous jury.

JUSTICE RAPPAPORT: Well, we do that; it’s done in the federal court. You don’t see it that much in a state court.

AUDIENCE MEMBER: What if the press—with all this aggressive investigative reporting—finds out the names of the jurors? Might legislation help?

JUDGE KEENAN: I think that it might well run afoul of the First Amendment. There are certain safeguards that you can take. In some of the big racket trials in the Eighties—and I know I did it—I got limousines to take my jury from the courthouse either to central places or—in some instances—to their homes so that they couldn’t be followed by press or media, and they would not be identified. Now, is the press aggressive? Of course the press is aggressive. What was it, the North or Poindexter trial or one of the Iran-Contra cases, they actually called the jurors during the case. Do you remember that?

JUSTICE RAPPAPORT: One answer to it [is that] you could sequester the jury, but that becomes a tremendous problem.

JUDGE CONBOY: Look, what you have to do is, you have to be honest about it. We have here a very broad concession. Our legislatures have agreed that there should be—in most jury trials—electronic media presence. It’s going to affect the jury system. We will ultimately have a different kind of jury system. There’s no question about it. We ought to know about that. Now do I think that the media—the range of media power with respect to covering these things—can in any way be inhibited? I doubt it. It’s largely because the legislatures that pass these statutes are not willing. If a media company wants to get into a courtroom, why
[can’t the legislature] make as a condition for taking advantage of this access that [the media] will not tamper with juries?

A private person can’t go to a juror’s home in the middle of a criminal case. Why should a reporter? Why should someone be allowed just because he has a press card? Of course the ultimate thing is they just want controversy. They will—whether it’s during the trial or after the trial—seek to impeach the juror because that is what generates the sale of newspapers and the viewership of TV programs.

JUSTICE RAPPAPORT: As a follow-up on what you’re saying [about] the effect on the juror, let’s assume you have a juror who wants to vote guilty but is thinking that if he does so—after what happened in King—he’s going to contribute to the streets burning in Brooklyn. That’s a concern. But the first concern I had with that is that you question them in voir dire. I mean, if I were to turn to a juror and say, “Sir, do you think that you could announce your verdict—whatever it may be—without concern as to what may happen outside this courtroom if you found the defendant guilty?” That’s suggestive. “You can create a riot condition.” How can you ask a question like that? If it didn’t occur to the juror that his verdict might do that, you’re now suggesting that you’re concerned about it. So, he’ll start thinking about it. You have to be a lot more subtle when asking a question like that.

We tried [to be] subtle. The first problem we had was that out of a panel of 150 jurors, there were two people who had never heard of Crown Heights.

We spoke to every juror individually; we had individual voir dire. I broke them up into groups of twenty. The 150, for some administrative reason, ended up being 131. I don’t know where nineteen people disappeared to over two days, but they disappeared before we even got to divide them up. We then ended up dividing them into six panels of twenty, and whatever was left over—which I think was eleven. We then did one panel one at a time.

The first problem was that they all had some type of knowledge of the case. For the two people who knew nothing about it, I questioned either their integrity or what they did in their spare time.
They were completely insulated [from] this incident, which resulted in a five day riot. Some of them had things confused between Washington Heights and Crown Heights. Other than that, every juror was questioned by the lawyers, and that’s where we really got into it.

Instead of talking about our case, we talked about how they felt about what happened after the verdict in the King case and whether they thought *that* would have any effect upon things [in Brooklyn]—without saying that any verdict in this case might have an effect here.

It was subtly done, as much as one can be subtle. These are problems, without a doubt. But what do you do? Do we eliminate jury trials? No, but these are problems and your are right that they’re just starting. They are things that we have to be concerned about.

DEAN FEERICK: I would like to express our gratitude to the panelists for a most interesting discussion. Thank you very much.