LAW ENFORCEMENT AND THE MEDIA: COOPERATIVE CO-EXISTENCE

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I wish to thank the New York University School of Law and the *Annual Survey of American Law* for inviting me here today and giving me the opportunity to be outnumbered on this panel by the venerable *New York Times*. I am surrounded by the *Times*: metropolitan legal reporter Benjamin Weiser to the left of me, associate general counsel Adam Liptak to the right of me. As a result, I will preface my remarks by saying that this is all off the record, I am speaking strictly on deep background, and I do not wish to see any of my remarks in print.

Actually, the relationship between the law enforcement community and members of the media is considerably more trusting than that. I believe that this relationship can fairly be described as a generally cooperative co-existence. Each is an independent institution with independent goals and interests. Sometimes these goals coincide; other times, they clash. Fortunately, there are laws, rules, and policies that seek to promote the cooperative co-existence between these two institutions while maintaining the independence of each, and, in addition, to provide a check on the potential excesses of both.

The focus of my remarks today will be on the interaction between law enforcement and media in three situations: getting information from the media; giving information to the media; and working with the media.

I
GETTING INFORMATION FROM THE MEDIA

Prosecutors have powerful tools at their disposal for getting information from others. Through their subpoena power, the ability to confer immunity, and the general persuasive force of their office and position, prosecutors are uniquely positioned to compel individuals and entities to give them information of relevance to their

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investigations and prosecutions. The media, by contrast, is an enormous repository of information. It is, after all, the mission of the media to gather information and to report it to the public. The mixture of the two—the prosecutor's power to secure information and the media's possession of so much of it—gives rise to obvious temptations to turn to the media routinely for information of investigative interest to law enforcement, thereby turning the media into an unwitting instrument of law enforcement. This combination, in turn, presents a risk that the media will be perceived by its sources of information, as well as the public, as a "tool" of law enforcement, thereby compromising the independence (both actual and perceived) of the media in the eyes of both.

There are, however, both judicially-crafted and voluntarily-imposed rules that seek to minimize the risk that the media will be utilized in this fashion. For example, in New York, the federal courts have created a "qualified privilege" that circumscribes the instances in which the media can be compelled to produce non-confidential information to litigants in civil disputes. In *Gonzales v. NBC*,[1] the United States Court of Appeals for the Second Circuit explicitly recognized such a privilege. The plaintiffs, Albert and Mary Gonzales, sued a Louisiana Deputy Sheriff, Darrell Pierce, for allegedly pulling them over on a Louisiana interstate highway on the basis of their Hispanic ethnicity and without legal justification. They further alleged that this incident was part of a general practice by this particular deputy to stop Hispanic highway travelers without legal cause in order to extort property from them. This allegation was the subject of NBC's television program "Dateline," which included a segment depicting an NBC producer, posing as a highway traveler, being stopped by the same deputy sheriff even though the producer's car had violated no traffic laws and was driving at a steady, lawful speed. NBC broadcast selected portions of this tape on its "Dateline" program. Not surprisingly, the plaintiffs served a subpoena upon NBC, seeking production of the original and unedited tape of the producer's interaction with the deputy sheriff. About one month later, Pierce served his own subpoena on NBC, seeking similar information. NBC resisted production under both subpoenas, and the parties moved to compel compliance.

This litigation has a unique procedural history. First, the district court held that the two subpoenas were governed by the same strict journalists' privilege that governs attempts to gain confiden-

1. Gonzales v. National Broadcasting Co., 194 F.3d 29 (2d Cir. 1999).

tial information from the media.[2] The district court then found that disclosure of non-confidential materials—here, the unedited NBC videotape of Deputy Sheriff Pierce's car stop of the NBC producer—was available only "upon a clear and specific showing that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources."[3] The district court then found that both subpoenas satisfied this three-part standard and, thus, ordered NBC to produce the unedited videotape.[4] NBC refused, was held in contempt, and appealed.[5]

The second holding came in the form of an initial opinion by the Court of Appeals, rejecting the district court's application of the three-part qualified privilege.[6] In fact, the Court of Appeals held that there was *no* privilege at all with respect to efforts to obtain non-confidential materials from the media.[7] Thus, albeit for different reasons, the Court of Appeals upheld the district court's order requiring NBC to comply with the subpoenas.[8]

NBC moved for rehearing, and the Court of Appeals, in a most unusual maneuver, granted the motion and, over eleven months later, issued another opinion renouncing its earlier decision and issuing what became the third judicial pronouncement on the privilege issue in this litigation.[9] This time, the Court of Appeals agreed with NBC that the media is protected by a qualified privilege from efforts to require it to produce non-confidential, as well as confidential, materials to parties in litigation.[10] However, the Court of Appeals concluded that this qualified privilege could be overcome by a "less demanding" showing than had been required by the district court's original decision.[11] Under the Court of Appeals' formulation, a subpoena calling for the production of non-confidential materials from the media is enforceable so long as the materials are: (1) of likely relevance to a significant issue in the case and (2) not reasonably obtainable from other available sources.[12] Unfortunately for NBC, however, the outcome of this decision was

2. *See* Gonzales v. Pierce, 175 F.R.D. 57, 59 (S.D.N.Y. 1997).
3. *Id.* at 59.
4. *See id.* at 59-61.
5. *See Gonzales*, 194 F.3d at 32.
6. *See* Gonzales v. National Broadcasting Co., 155 F.3d 618 (2d Cir. 1998).
7. *See id.* at 626.
8. *See id.* at 628.
9. *See* Gonzales v. National Broadcasting Co., 194 F.3d 29 (2d Cir. 1999).
10. *See id.* at 32.
11. *See id.* at 36.
12. *See id.*

the same as its two predecessors. The court held that the qualified privilege had been overcome and ordered NBC to comply with the plaintiffs' subpoena.[13]

Although the court's holding was limited to civil litigants,[14] its reasoning would appear to apply equally to parties in criminal cases as well. In fact, the court's decision relied upon criminal case precedents that, according to the court in *Gonzales*, recognized the dangers of uninhibited access to media materials and supported the application of a legal standard that limited compulsory production of media information to cases where it was clearly relevant and necessary.[15] While these cases involved subpoenas issued by the defense, rather than the government, the same concern that underlies the judicial scrutiny of defendants' subpoenas to the media seemingly would apply to government-initiated efforts to secure information from the media as well. As the court observed in *Gonzales*, if parties were free to subpoena the media "at will," it "would likely become standard operating procedure" in cases involving media attention.[16] This, in turn, would impose compliance burdens on the media, potentially deter sources from providing information to the media, and "would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties."[17] One can reasonably posit that these same concerns would apply if the government were to have unrestricted opportunities to compel the production of materials from the media.

In the course of definitively recognizing the qualified privilege for non-confidential media material, the Court of Appeals in *Gonzales* reaffirmed that, when dealing with confidential sources, an even more protective version of the journalists' privilege applies. Thus, efforts to compel the media to reveal confidential information will succeed only "upon a clear and specific showing that the informa-

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13. *See id.*

14. *See id.*

15. *See id.* at 31 (quoting United States v. Cutler, 6 F.3d 67, 71 (2d Cir. 1993) (upholding, in prosecution of defense attorney for contempt based on statements to media, defendant's subpoena for television station's outtakes of his statements in light of "clear relevance of the outtakes to [the attorney's] defense" and his need for the materials to defend against charge)); *see also* United States v. Cuthbertson, 630 F.2d 139, 147 (3d Cir. 1980) (rejecting argument that qualified privilege previously held to exist in civil cases does not apply to defense subpoena to media in criminal case; media's interest in the privilege "does not change because a case is civil or criminal").

16. Gonzales v. National Broadcasting Co., 194 F.3d 29, 35 (2d Cir. 1999).

17. *Id.*

tion is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources."[18] New York State's so-called "shield law" contains an even more rigorous variant of the federal standards: it applies the three-part test to non-confidential unpublished material and creates an absolute privilege with respect to confidential material.[19]

To its credit, the federal government recognized the sensitive nature of a subpoena to the media long before the Court of Appeal's decision in *Gonzales*. Since the 1970s, the Department of Justice has severely restricted the ability of federal prosecutors to compel the media to produce any materials, confidential or otherwise. This policy is embodied in a voluntarily-imposed federal regulation, 28 C.F.R. § 50.10. The regulation expressly recognizes that "the prosecutorial power of the government should not be used in such a way that it impairs a reporter's responsibility to cover as broadly as possible controversial public issues."[20]

The regulation goes on to impose five significant limitations on a federal prosecutor's ability to subpoena a member of the media, as well as the telephone toll records of a member of the media. First, there must be "reasonable grounds to believe" from sources other than the media that the information sought is "essential" to the success of the government's case.[21] In a criminal case, success means that the information must bear directly on establishing guilt or innocence.[22] In a civil case, it means that the information must be needed for the successful completion of a case of substantial importance.[23] In both criminal and civil cases, the government cannot use a subpoena to obtain "peripheral, nonessential, or speculative information."[24] Moreover, the information justifying the subpoena must originate from sources other than the media itself; prosecutors cannot simply "piggyback" on the media's newsgathering efforts to justify an attempt to compel the media to disclose information to the prosecutors.[25] By its own terms, then,

18. *Id.* at 31 (quoting McGraw-Hill, Inc. v. Arizona, 680 F.2d 5, 7 (2d Cir. 1982)).

19. *See* N.Y. CIV. RIGHTS LAW §§ 79-h(b), (c) (McKinney 1992).

20. 28 C.F.R. § 50.10 (1999).

21. *Id.* § 50.10(f)(1).

22. *See id.*

23. *See id.* § 50.10(f)(2).

24. *Id.* §§ 50.10(f)(1), (f)(2).

25. *Id.* §§ 50.10 (f)(1), (g)(1).

§ 50.10 imposes a higher burden on prosecutors than that imposed on litigants by the Second Circuit in *Gonzales*.

Second, prosecutors may only subpoena members of the media to verify published information and circumstances relating to the accuracy of such information, "except under exigent circumstances."[26] Thus, a subpoena for non-published outtakes of a broadcast television program would require a prosecutor to meet a double standard of the highest order: (1) that the material was "essential" to the case's success and (2) that "exigent circumstances" called for its production.

Third, the government must pursue "[a]ll reasonable attempts" to obtain the information from alternative sources.[27] This requirement again reflects the regulation's overarching principle that subpoenas to the media should be viewed by prosecutors as an investigative tool of last resort, to be pursued only when all other reasonable investigative avenues have failed.

Fourth, a prosecutor is required to negotiate with the media in an effort to secure the desired information without compulsion.[28] This process, in turn, may result in the government narrowing its request for information in order to satisfy particular concerns of the media, and it gives the media an opportunity to articulate any particular issues that may arise as a result of the government's desire to obtain information in a given case.

Fifth, a prosecutor may not subpoena a member of the media without the express authorization of the Attorney General of the United States.[29] This highly unusual procedural requirement is an obvious and powerful deterrent to any possible untoward use of the subpoena power against the media. Violation of this requirement, moreover, subjects the offender to possible disciplinary action.[30]

Even in those rare instances where a subpoena to the media meets these exacting standards and is authorized at the highest level of the Department of Justice, it must still be crafted so as to minimize its intrusion on the media. Thus, the subpoena should be "directed at material information regarding a limited subject matter, should cover a reasonably limited period of time, . . . should avoid requiring the production of a large volume of unpublished

26. *See* 28 C.F.R. § 50.10(f)(4).
27. 28 C.F.R. § 50.10(b).
28. *See* 28 C.F.R. § 50.10(c).
29. *See* 28 C.F.R. § 50.10(e).
30. *See* 28 C.F.R. § 50.10(n).

material," and "should give reasonable and timely notice" of its production demand.[31]

It should be obvious that this regulation significantly inhibits any temptation to force the media to turn over information about matters of prosecutorial concern on a routine basis. Rather, such a subpoena is properly viewed as a measure of last resort, to obtain vital and highly material information that is not available elsewhere and which the media will not provide voluntarily. For example, in my nearly ten years as a prosecutor, I have sought and obtained the Attorney General's approval for a subpoena to the media on only three occasions. And while the rules governing state prosecutors are less defined, it is my understanding from my state counterparts that they, too, subpoena members of the media only on the rarest of occasions.

II
GIVING INFORMATION TO THE MEDIA

The relationship between law enforcement and the media is, like many relationships, a two-way street. Oftentimes, the roles of these institutions are reversed from that described above, and the media is in the position of seeking information from members of law enforcement. Once again, each institution has motives to accommodate the others' interests in this situation. The law enforcement community is oftentimes amenable (if not eager) to publicize its exploits or otherwise draw attention to some investigative or prosecutorial effort it has undertaken. The media, for its part, is often eager to publish stories about such matters, especially those it considers particularly newsworthy or which otherwise touch upon matters of significant public concern.

Here, although different policy considerations come into play, there are similar restrictions on the furnishing of information between the two institutions. Most prominent among the concerns is the general aversion to "convicting" someone "in the media." Uninhibited dialogue between law enforcement and the media may well encourage this undesirable phenomenon and interfere with the ability of suspects to receive a fair trial. Moreover, uninhibited dialogue might actually serve to undermine investigative efforts that depend on confidentiality for their success.

Restrictions on the communication of information by law enforcement to the media take a number of forms. Courts may enact local rules that restrict what can and cannot be disclosed to the

31. 28 C.F.R. § 50.10(f)(6).

media by a party to a litigation. In my district, for example, the local rules prohibit the release of information to the media if there is a "substantial likelihood that it will interfere with a fair trial or otherwise prejudice the due administration of justice."[32] The rules provide further specific guidance on the subject. Thus, with respect to an investigation, the government's disclosure of information is limited to confirming its existence and general scope, gaining the public's assistance in catching a suspect, or warning the public of any dangers.[33] In a prosecution, the government may only disclose information that confirms the particulars surrounding the suspect's arrest, the identity of the investigative agency, the length of the investigation, the nature of any items seized, the nature of the charges, and the scheduling of the case in court.[34] Moreover, in accordance with Department of Justice policy, all press releases issued by my office announcing the arrest or indictment of any defendant contain the express caution that the charges are merely accusations and that the defendant is presumed innocent unless and until proven guilty.

As in the case of getting information from the media, a balancing of competing interests is at work here as well. The local rules reflect a reasonable balance between four separate interests: (1) the interest of law enforcement in disseminating information about people accused or convicted of crimes so as to deter others from engaging in like behavior; (2) the interest of the public in learning about such matters; (3) the interest of the media in reporting such matters; and (4) the interest of subjects of criminal investigations and prosecutions in having their day in court without having already been tried and convicted in the media through the premature and one-sided disclosure of evidence and other information.

Additionally, federal prosecutors are constrained by rules of criminal procedure. For example, Rule 6(e) of the Federal Rules of Criminal Procedure severely limits a prosecutor's authority to reveal any "matters occurring before the grand jury."[35] Indeed, disclosure of such matters is prohibited unless: (1) it is to government personnel participating in the investigation or to another federal grand jury, or (2) judicial approval is obtained for disclosure and

32. S.D.N.Y. & E.D.N.Y. LOCAL CRIM. R. 23.1(a).
33. *See id.* R. 23.1(b).
34. *See id.* R. 23.1(e).
35. FED. R. CRIM. P. 6(e)(2).

then only for specific and limited purposes.[36] Violations of the rule are punishable as a criminal contempt of court.[37]

This rule seeks to achieve multiple objectives. Primary among them is the interest in preserving the confidentiality of an investigation and, by extension, its witnesses and evidence-gathering techniques. This confidentiality, of course, is very often in the prosecutor's interest, for it minimizes the risk that investigations will be obstructed or evidence tampered with or destroyed. However, this rule of secrecy also serves to protect the interests of targets of investigations from being publicly identified as suspects in criminal wrongdoing unless and until they are formally charged and have a full and fair opportunity to defend themselves against such accusations in court. It is a rule that surely frustrates members of the media, for many an interesting story can be lost behind the sealed doors of the grand jury room. Even an overzealous prosecutor may silently chafe at its restrictiveness. However, it is a sound rule, for all of the objectives it seeks to promote are worthy ones—even if one consequence is a limitation on the information that law enforcement is permitted to disclose to the media.

III
LAW ENFORCEMENT AND MEDIA WORKING TOGETHER

Despite their very different institutional roles and objectives, there are times when the interests of law enforcement and the media overlap and members of both organizations cooperate toward some common objective. This does not, however, necessarily mean that such cooperative efforts will be immune from scrutiny. As we will see, there are instances in which these efforts clash with the interests of third parties affected by the collaborative actions of law enforcement and the media. In those instances, the courts have served as a check on the potential excesses of these collaborations. Two recent examples illustrate this point well.

A. Limits on Collaboration

The first example is the so-called "perp walk" case, *Lauro v. City of New York*.[38] *Lauro* involved the efforts of law enforcement and the media to capture a suspect on television during his "perp walk"—the colloquial name for the procedure whereby the police

36. *See* FED. R. CRIM. P. 6(e)(3)(A), (C).
37. *See* FED. R. CRIM. P. 6(e)(2).
38. 39 F. Supp.2d 351 (S.D.N.Y. 1999).

physically escort a suspect either into or out of a police station in full view of the media and members of the public. In this particular case, John Lauro, a doorman at an Upper East Side apartment building, was suspected of burglarizing and stealing property out of the apartment of one of the building's tenants while the tenant was away on vacation. On September 18, 1995, the police brought Mr. Lauro to the local precinct, where he was questioned for several hours. At the conclusion of this interrogation, Mr. Lauro was arrested. At around that point, the local police were contacted by the Police Department's press liaison, who reported that the media had taken an interest in Mr. Lauro's case. The police liaison instructed the local police to take Mr. Lauro on a "perp walk." The local police dutifully complied: they handcuffed Mr. Lauro, walked him out the front door of the precinct, put him in a police car and drove him around the block; they then returned to the precinct, walked Mr. Lauro out of the car and back into the precinct, all in full view of television cameras from Fox 5 News. Footage from this "perp walk" appeared on Fox 5 News on two successive days. By year's end, Mr. Lauro sued the city and the police department for violating his constitutional rights by taking him on his "perp walk."

The district court held that the city was liable in damages for violating Mr. Lauro's Fourth Amendment right to be free from unreasonable seizures.[39] This case was an example of what lawyers like to call a "bad facts" case. The "staged" nature of this particular perp walk appeared to offend the district court the most. The court concluded, not unreasonably, that there was no good law enforcement justification for walking Mr. Lauro out of the police station just so he could be walked back in again, solely for the benefit of the media.[40] Indeed, the district court had unusually harsh words for the police department, calling the procedure "outrageous and unnecessarily humiliating" and devoid of "any legitimate law enforcement objective."[41] The court even went out of its way to suggest that had Fox 5 been sued, it may have been liable to Mr. Lauro as well.[42]

What remains to be seen in the aftermath of *Lauro* is whether the decision is limited to purely "staged" perp walks, such as the one that Mr. Lauro was forced to take. If so, law enforcement and the media will simply have to ensure that they coordinate their ac-

39. *See id.* at 365.

40. *See id.* at 364.

41. *Id.* at 365.

42. *See id.* at 365 n.11 (stating that a claim against Fox 5 "would not be farfetched in this case given that Fox 5 News appears to have encouraged, and participated in, the perp walk conducted by" the police).

tivities better in the future so that the media captures the suspect while he is entering or exiting the police station for real, rather than for show. Certainly, the language of the decision—including its explicit reference to the perp walk as having been "staged"[43]—would counsel against jumping to the conclusion that perp walks in general have come under a constitutional cloud. In any event, one could hypothesize situations in which public dissemination of a suspect's visual image would have a legitimate law enforcement function—for example, where law enforcement seeks to encourage as-yet-unidentified eyewitnesses to a crime to come forward if they recognize the suspect. In such instances, both law enforcement and the media could persuasively point to the "legitimate law enforcement objective" found lacking in *Lauro*.

The Supreme Court's decision in *Wilson v. Layne*[44] is of similar importance. *Wilson* involved a constitutional challenge to a so-called "media ride-along," in which members of the media accompany members of law enforcement while the latter carry out some authorized police function. In this case, members of the United States Marshal's Service and the Montgomery County Police Department went to a private residence in Rockville, Maryland to arrest Dominic Wilson, a fugitive from justice. Pursuant to the "ride-along" policy of the United States Marshal's Service, they invited a reporter and photographer from the renowned *Washington Post* to join them for this early-morning raid. At about 6:45 in the morning, five members of the Marshal's Service and Montgomery County police department entered the home, weapons and media in tow.

Regrettably for law enforcement, this turned out to be, like *Lauro*, a "bad facts" case. The Marshals did not find Mr. Wilson at the house. The address in the police computer was actually that of Mr. Wilson's parents. Instead of finding Mr. Wilson, the search team was greeted by Mr. Wilson's father, Charles, dressed only in his underwear briefs. Needless to say, an angry confrontation ensued, which resulted in the officers leaving the house empty-handed. Thereafter, Mr. and Mrs. Wilson brought a lawsuit against the Marshals and the police.

The Supreme Court held that the media ride-along in this case violated the Wilsons' Fourth Amendment rights.[45] The Court, like the district court in *Lauro*, relied heavily on the fact that there was

43. *Id.* at 363, 365.
44. 119 S. Ct. 1692 (1999).
45. *See* Wilson v. Layne, 119 S. Ct. at 1699 (1999).

no legitimate purpose for the presence of the media to be in the Wilsons' home.[46] The Court rejected several proffered justifications, including arguments that the media's presence helped publicize law enforcement's efforts to combat crime, helped minimize the risk of police abuses during the execution of the arrest warrant, and helped protect the officers themselves.[47] Instead, the Court concluded that, because the media's presence did not "aid in the execution of the warrant"—but was, instead, purely for the media's own private benefit—it was a violation of the Wilsons' Fourth Amendment right to be free of unreasonable searches for the media to accompany law enforcement into the privacy of their home.[48]

In this particular case, the Wilsons' victory was pyrrhic. The Supreme Court held that, because the Fourth Amendment violation was not "clearly established" at the time of the search, the defendants could avail themselves of the qualified immunity defense and therefore were not liable in damages to the Wilsons.[49] Moreover, the media avoided liability because, for reasons undisclosed in the decision, the Wilsons did not sue them. However, the decision stands as a warning to both law enforcement and the media that their cooperative endeavors have limits. Of course, the Court's decision also appears to be limited. Had the search for Dominic Wilson not occurred in his parents' private home, or had the media's presence during the search actually aided law enforcement in some more identifiable way (for example, if the media knew what Mr. Wilson looked like but members of law enforcement did not), the Court may well have found no constitutional violation at all.

B. Cooperative Endeavors between Law Enforcement and the Media

Happily, law enforcement and the media sometimes work together successfully. One little-known example of this interaction was a case in which I participated: the criminal prosecution of Charles Price and Lemrick Nelson, Jr. for the death of Yankel Rosenbaum during the onset of the riots in Crown Heights, Brooklyn in August of 1991.[50] In that case, the media's newsgathering efforts were critical to the successful prosecution of both men.

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46. *See id.* at 1700.

47. *See id.* at 1698-99.

48. *Id.* at 1698.

49. *See id.* at 1699-1701.

50. For several reported decisions dealing with the issue of prosecuting Nelson as an adult rather than a juvenile, see *United States v. Nelson*, 68 F.3d 583 (2d Cir. 1995).

Price was the man who incited the Crown Heights riots and, more particularly, the attack of Yankel Rosenbaum. The riots were precipitated by the fact that, during the evening of August 19, 1991, an orthodox Jewish man had gotten into a car accident in a busy intersection of Crown Heights, a Brooklyn neighborhood populated primarily by Caribbean-Americans and Hasidic Jews. The car accidentally struck two black children, Gavin Cato and his cousin Angela, who had been playing on the sidewalk. When the police arrived several minutes later, they found that the two seriously injured children were being extricated from underneath the car and members of the crowd that had formed were assaulting the Jewish driver of the car. When a Jewish volunteer ambulance arrived on the scene, the police instructed them to take the driver away from the scene. Immediately thereafter, two city ambulances arrived and tended to the children. Quickly, rumors spread through the neighborhood that the Jewish driver of the car had been treated preferentially by the police. The crowd at the accident scene grew to several hundred people, many of whom loudly complained that the police's actions were symptomatic of the long-standing preferential treatment that had allegedly been afforded to orthodox Jews of the Crown Heights neighborhood by the police.

Loudest among the crowd was a bald black man who passionately urged the crowd to attack Jewish people in retaliation for the manner in which the Jewish driver was treated by the police in the aftermath of his accidental striking of the Cato children. The crowd immediately responded to the man's inflamatory rhetoric, and within fifteen minutes, a group of about ten blacks attacked Yankel Rosenbaum, an orthodox Jew who was crossing the street five blocks from the accident scene. Rosenbaum was punched, kicked, and stabbed four times in the mid-section. Lemrick Nelson was caught one block away, trying to hide behind a bush, with a blood-stained knife in his pocket and blood stains on his jeans. Nelson was arrested for the assault, but it unexpectedly became a homicide when, due to inadequate medical treatment, Rosenbaum died from his wounds early the next morning. Three more days of rioting ensued. After Nelson was acquitted in his state court murder trial, federal authorities initiated their own civil rights investigation of Mr. Rosenbaum's death.

For many years, the bald black man who had incited the Crown Heights riots remained unidentified. However, a combination of videographers—one, the superintendent of the building against which the Jewish driver's car collided, and the other, an NBC cameraman who responded to the scene of the accident—had captured

this man on tape, and with the help of other witnesses, he was eventually identified as Charles Price, a neighborhood resident.

While NBC had broadcast some footage from the first night of the riots, the footage of Mr. Price was contained on non-broadcast videotape that was subpoenaed by the federal government (after complying with 28 C.F.R. § 50.10 procedures). This footage contained a brief segment depicting a clear image of Mr. Price as he paced back and forth and incited the crowd that had gathered at the accident scene. The tape also captured Lemrick Nelson within this crowd, as he and the others listened to Mr. Price exhort them to go and attack Jews. The videotape also depicted Mr. Price walking away from the accident scene and heading in the direction where Mr. Rosenbaum was attacked moments later. Finally, the videotape contained a time indicator which reflected the precise times (to the second) at which Price began to incite the crowd and then headed with the crowd in the direction of Mr. Rosenbaum's stabbing, thus definitively establishing that it was Mr. Price who caused the crowd to leave the accident scene in immediate response to his exhortations and to stab Yankel Rosenbaum a mere fifteen minutes later. The cameraman, Thomas Baer, agreed to appear at the trial in response to a subpoena, and he was the very first witness to testify at the trial. Baer's videotape was instrumental in securing the convictions of both defendants.

The print media was equally important to the successful prosecution of Nelson. When Nelson was caught near the scene of the attack, he was brought back and shown to Mr. Rosenbaum while Mr. Rosenbaum lay bleeding on the hood of a car. Mr. Rosenbaum positively identified Nelson as the stabber. However, at Nelson's state court murder trial, there was evidently much confusion about whether Nelson was handcuffed at the time he was shown to Mr. Rosenbaum and whether the bloody knife that the police had found in his possession was visible to Mr. Rosenbaum when Nelson was shown to him—suggestive circumstances which, if true, would have cast serious doubt on the fairness of the procedures under which Mr. Rosenbaum identified Nelson. These suggestions, argued by the defense at Nelson's state court murder trial, reportedly contributed to Nelson's acquittal.[51]

It so happened that Jon Paraskevas, a photographer from *Newsday*, one of New York City's major daily newspapers, was in the

51. *See* 2 RICHARD H. GIRGENTI, A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS: A REVIEW OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF YANKEL ROSENBAUM AND THE RESULTING PROSECUTION 97 (1993).

neighborhood that evening. When he saw the police racing over to the scene of the stabbing, he followed them and arrived there just as the police began to bring suspects over to show to Mr. Rosenbaum. Sure enough, he took pictures of what he saw and some of his handiwork—a picture of Mr. Rosenbaum lying on the hood of the car, and a picture of Nelson (from the neck up)—was published by his newspaper.

The paper did not publish pictures of the actual "show-up" procedure when Nelson was presented to Mr. Rosenbaum for identification. However, the federal government suspected, based on the published photographs that had appeared in the newspaper, that there were additional photographs that *Newsday* had not published that might reveal more of what happened during this critical sequence. A subpoena (again, duly authorized by the Attorney General) revealed the answer: the photographer took pictures of the entire sequence of events surrounding Mr. Rosenbaum's identification of Nelson. These photographs established definitively that Nelson was not handcuffed when he was identified by Mr. Rosenbaum. They also proved that the bloody knife was nowhere to be seen during this time. Consequently, Mr. Rosenbaum's identification of Nelson was shorn of its earlier questions of suggestivity and became compelling evidence of Nelson's participation in the attack of Mr. Rosenbaum.

The photographs had an additional, though unplanned, function during Nelson's trial. As part of his defense, Nelson tried on the very baggy, blood-stained blue jeans that the police had recovered from him on the night of his arrest. Not surprisingly, the baggy jeans slid down from Nelson's waist right before the jury, in aid of his argument that the jeans did not fit him and that the police had planted the evidence in an effort to incriminate him—a defense strategy that had considerable success in the celebrated murder prosecution of O.J. Simpson two years earlier. Mr. Paraskevas' photographs, however, provided a powerful rebuttal to Nelson's defense tactics. One photograph clearly depicted Nelson's blue jeans—complete with stitching, stains, rivets, and discoloration marks that were identical to the jeans that Nelson had tried on in court. With the aid of Mr. Paraskevas' photographs and testimony, the prosecution was able to show that, regardless of their fit (or lack thereof), the jeans that the government had introduced in court as Nelson's were in fact the same jeans that the photographs depicted Nelson wearing the night of the stabbing.

The cooperation that was achieved between law enforcement and the media is significant. Critical evidence was secured from

both news organizations, and their representatives proved to be cooperative witnesses during the course of the trial. In the case of *Newsday*, the parties were able to negotiate with each other—precisely as § 50.10 contemplates—and to reach a reasonable accommodation that both found acceptable. The government agreed to accept a small sample of Mr. Paraskevas' photographs and respected the newspaper's request that Mr. Paraskevas not be interviewed before testifying at the trial so as to avoid any appearance that he or his employer was cooperating unduly with the prosecution. *Newsday* agreed to comply with our subpoena and to produce Mr. Paraskevas, as well as his editor, to testify as witnesses at the trial. All of this occurred without any suggestion from any corner that the media had acted as a tool of the prosecution or otherwise compromised its newsgathering independence. Perhaps most importantly, the cooperation between law enforcement and the media in this prosecution contributed to what was, in my mind, an eminently just result.