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The Gag Order in the O.J. Simpson Civil Action: Lessons to Be Learned

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I. INTRODUCTION

This Article is written as the civil suit in Rufo v. Simpson1 nears completion. It concerns one small but significant aspect of the O.J. Simpson proceedings: whether attorneys and other trial participants should have been subjected to a gag order that, as a practical matter, prevented them from participating in the public debate surrounding the case since August 13, 1996, when Judge Hiroshi Fujisaki entered the first gag order in the case.

The overall theme of this Article is that the gag order was issued for reasons that do not withstand First Amendment scrutiny and, given the unique nature of the Simpson case, should not be used as precedent for issuing such orders in future civil cases. This Article considers some of the issues surrounding the gag order in the Simpson civil proceedings. It is not intended as a comprehensive or scholarly analysis of these issues, but rather as the observations of one who has participated in the gag wars, examining some of the issues raised by this case.2

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2. The author has litigated many gag order issues, often with Doug Mirell, since 1984. See, e.g., Levine v. United States Dist. Court, 764 F.2d 590 (9th Cir. 1985). Many gag order decisions are unreported. For example, the Ninth Circuit did not publish its opinion overturning the portion of the gag order issued by Judge Davies in the federal Rodney King criminal trial that prohibited defense attorney Harland Braun from "impugning" the political motivation of the
As with many issues in the Simpson case, the gag order issues have been characterized by extremes. In the criminal proceedings, though Judge Lance Ito periodically threatened to silence lawyers and others, he ultimately declined to issue orders preventing the lawyers or parties from speaking publicly about the case. Many of the lawyers took advantage of this opportunity to speak publicly; however, it is unclear whether the public heard more of what the trial participants had to say from the televised criminal proceedings or from the extra-judicial comments.

In the Simpson civil proceedings, the parties and their attorneys continued the practice of making public statements to the media throughout the discovery phase of the trial. During noteworthy depositions, particularly that of Simpson, the public would receive media sound bites from the lawyers and parties, mostly the plaintiffs, about the significance of the testimony. These deposition transcripts were dissected in much detail in the Los Angeles Times. Though media coverage of the civil proceedings did not equal the intensity of the criminal trial, the civil case still received enormous media attention.

This judicial laissez-faire attitude ended suddenly on August 13, 1996 when Judge Fujisaki issued a draconian gag order directed against all lawyers, parties, and certain other trial participants, prohibiting them from speaking publicly about any aspect of the trial. Civil liberties advocates and the media were chagrined by this gag order. Public reaction was mixed, given its tumultuous relationship with the Simpson case. Although some cheered any step that would reduce the media coverage, one suspects that many in this camp would have watched the civil trial had it been televised.

The order was modified by Judge Fujisaki on August 23, 1996, in response to requests from the media, the ACLU, and attorneys representing Fred Goldman. On September 16, 1996, the California Court of Appeal for the Second Appellate District further modified the order, but affirmed the core prohibitions on trial participant speech imposed by Judge Fujisaki. Thus, the main participants in the civil trial were silenced but the lawyers from the criminal trial, legal pundits and the public were free to dissect the civil case from every angle during the proceedings.

During the civil trial, the public heard the views of many attorneys and legal commentators who participated in the criminal proceedings.

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3. Judge Alan Haber rejected arguments for a protective order early in the proceedings.
These commentators have expressed a wide variety of views on every aspect of the criminal trial, including the evidence and the credibility of witnesses. The jury had been exposed to the very information the trial court and court of appeal stated would prejudice a fair trial. Only the lawyers, parties, and certain witnesses participating in the civil trial were prohibited from speaking publicly.

The gag order was obviously an ineffective means of limiting public debate about the very information that was assumed by the court to be prejudicial. No gag order could accomplish that result in the circumstances of the Simpson civil case given the information about the case already in the public domain. The order can only be explained as a signal by Judge Fujisaki that he intended to maintain firm control over the proceedings and that public comments by the parties or their lawyers was inconsistent with that control. The issue for this Article is whether such purposes are consistent with the First Amendment.

II. THE GAG ORDER PROCEEDINGS BEFORE JUDGE FUJISAKI IN THE SIMPSON CIVIL CASE

The gag order issue in the Simpson civil proceedings arose from an unusual procedural posture. On August 13, 1996, without advance notice, Judge Fujisaki issued a sweeping gag order:

[This] Court makes an oral order that no counsel may discuss anything connected with this trial with the media or in public places. This order encompasses all parties, attorneys and witnesses under the control of counsel. Counsel may inform the media and the public of the order. All counsel stipulate to this order on the record.  

There was no public awareness that such an order was even under consideration. All of the proceedings took place in an unreported chambers conference. The parties apparently stipulated to the gag order in the chambers conference, though the lawyers for Goldman later recanted


6. Judge Fujisaki exhibited his only display of emotion in the August 23, 1996 hearings on the gag order when Kelli Sager, the attorney for the media challenging the gag orders, questioned this procedure. Reporter's Transcript of Proceedings at 24–25, Rufo (No. SC031947). In the exchange Judge Fujisaki took the strange position that the in chambers conference in which he issued the gag order was "not a court proceeding" and thus it did not need to be transcribed. Id. at 24. The court of appeal later ordered that the transcript be prepared.
upon further reflection.⁷ No motion was made. No briefs were filed. No evidence was taken. No factual findings were made. Judge Fujisaki apparently decided on his own initiative that a blanket gag order was required. Under the August 13, 1996 order, the lawyers, their clients, and witnesses “under control of counsel” simply had to be silent about any aspect of “the trial” in public.⁸

News of the order spread quickly, and lawyers representing television, radio and print media,⁹ joined by the ACLU,¹⁰ challenged the order. The media and the ACLU challenged the need for any gag order in light of the enormous coverage of the Simpson proceedings, both criminal and civil, in the preceding twenty-six months. The ACLU amicus curiae brief, in particular, pressed the argument that the August 13th Order was a prior restraint and could not meet the stringent requirements governing such restraints.

The media and the ACLU urged Judge Fujisaki to narrow the scope of any gag order he issued and to address the uncertainty caused by applying the August 13th Order to witnesses “under the control of counsel.” The media suggested that the court amend the order to track the language in the new California Rule of Professional Responsibility 5-120.¹¹ The ACLU objected to this proposal.

Of the parties, only Goldman challenged the August 13th order, seeking to modify it so he could speak about victims’ rights and the reform of the criminal justice system and respond to the public statements of

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⁷ Id. at 30-31 (comments of Goldman attorney Daniel Petrocelli). Goldman’s counsel admitted that they had not consulted with their client before agreeing to the August 13th Order. Plaintiff Frederic Goldman’s Memorandum re Modification of Gag Order at 2, Rufo (No. SC031947).


¹⁰ The ACLU received permission from the Court to file an amicus curiae brief and to participate in the hearing scheduled for August 23, 1996, on the media request to modify the August 23, 1996 Order. The ACLU appeared in this capacity in the Simpson criminal proceedings as well.

¹¹ Rule 5-120 took into effect on October 1, 1995, and was inspired in large measure by the adverse reaction of legislators and the public to the Simpson criminal proceedings. See generally Doug Mirell, Gag Orders and Attorney Discipline Rules: Why Not Base The Former on the Latter?, 17 LOY. L.A. ENT. L.J. 353 (1997).
Simpson "surrogates." Goldman argued that he wished to respond to public comments by others, as permitted by Rule 5-120(c). Judge Fujisaki set a hearing for August 23, 1996, to consider these challenges to his August 13th Order.

At the August 23, 1996 hearing, Judge Fujisaki heard arguments from all interested parties and read his modified order almost immediately after counsel completed their arguments. The new gag order provided that:

No counsel, party or witnesses under the control of counsel may discuss or state any opinions concerning evaluation of evidence, including any witness whether called to testify or not, whether offered, received, excluded, purported to exist but not tendered or not available, the jury or any juror, the Court, including the trial proceedings, or whether the defendant did or did not commit the homicides, outside of the trial proceedings with the media or in public places within hearing of the general public. This order does not apply to private discussions by and among the attorneys in preparation of their case, with their clients, staff, investigators and witnesses. The order will remain in effect until the trial of this case is concluded.

III. THE APPELLATE DECISION

Not satisfied with this modification of the August 13th Order, the media, supported again by the ACLU, filed a writ petition seeking to overturn or further narrow Judge Fujisaki's order. The court of appeal issued an order requesting a response to the petition from the parties. Only

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13. Id. at 3. Rule 5-120(c) allows an attorney to make statements required to protect their client from the substantial undue prejudicial effect of recent publicity not initiated by the attorney or client.

14. The August 23, 1996 hearing also concerned other media access issues, especially the issue of whether the Simpson civil proceedings would be televised in some manner. Reporter's Transcript of Proceedings at 1-21, Rufo (No. SC031947). Judge Fujisaki refused to allow any television or radio coverage of the trial.

plaintiff Goldman responded by requesting the same modifications of the order he sought in the trial court. On September 16, 1996, the court of appeal issued an “alternative Writ of Mandate and Temporary Stay,” accompanied by a sixteen page memorandum and order, signed by all three justices, explaining its reasoning. The court of appeal ordered Judge Fujisaki to vacate the portions of his order that referred to witnesses “under control of counsel,” and the restriction on the expression of opinions about “the court, including trial proceedings.”

The court of appeal declined the invitation to treat Judge Fujisaki’s order as a prior restraint because the order did not command the media “to do or refrain from doing anything.” Thus, the court of appeal aligned itself with courts applying a more lenient standard to media challenges to gag orders on trial participants. The court of appeal, as did the trial court, ignored the fact that plaintiff Goldman’s challenge to the gag order should have stood on a different legal footing than the media challenge, as the order was a classic prior restraint as to him.

Having escaped from prior restraint analysis, the court of appeal drew from Sheppard v. Maxwell and Gentile v. State Bar the general principle that greater restraints on the First Amendment rights of “trial participants” are appropriate. The court held that this principle applied with equal force in civil proceedings, even though most gag order cases arise in the context of criminal proceedings. The court of appeal did not appear to have reached a final decision about the standard it applied, finding only that the standard for evaluating the constitutionality of gag orders directed at “trial participants” was “less demanding.”

16. Frederic Goldman’s Response to Petition for Alternative and Peremptory Writs of Mandamus, Prohibition and Review, and for Writ of Supersedeas or Other Appropriate Stay, Rufo (No. SC031947).
22. Memorandum and Order at 9-11 Cable News Network (No. B104967). Although beyond the scope of this essay, in my view it should be a rare civil case in which any gag order is appropriate. At a minimum, the principles embodied in cases addressing gag order issues in criminal cases should not be assumed to apply in the same manner in civil cases.
23. Id. at 10.
The court of appeal acknowledged that the trial court did not make detailed findings, but found the trial court’s comments in the context of the case adequate so long as the order was “clear and confined.”\textsuperscript{24} In essence, the court of appeal determined that Judge Fujisaki’s conclusion, that the pervasive nature of the publicity in this case could impinge on the parties' fair trial rights, was based on “common human experience.”\textsuperscript{25} This obscure “finding” became the substitute for any serious analysis of the nature of the publicity or the role trial participant speech was likely to play in it.

The court of appeal then conducted a cursory review of alternatives to a gag order and pronounced that “[n]o reasonable alternatives were presented to the trial court, and none are presented here.”\textsuperscript{26} Interestingly, the court of appeal did not consider the possibility that the new, more stringent California Rule of Professional Responsibility 5-120, relating to extra-judicial comments, might suffice as a constraint on comments by attorneys. Indeed, the court rejected Goldman’s suggestion that Rule 5-120 be the basis for any gag order because it, like ABA Model Rule of Professional Conduct 3.6, had been “subject to recent criticism on the basis of vagueness.”\textsuperscript{27}

The court of appeal found that three aspects of the order posed “grave constitutional doubt as to their validity.”\textsuperscript{28} First, the court of appeal construed the term “employees and agents or representatives, whether paid or unpaid, of the attorneys” as being limited to people acting as such in this litigation.\textsuperscript{29} Presumably, this addressed the issue of whether Christopher Darden or Alan Derschowitz were covered by the order, and made it clear that most of the lawyers from the criminal proceedings would be free to make any comment they wished about the case. Second, the court of appeal agreed with the argument that “witnesses under the control of counsel” was too vague and struck it from the order. However, the court suggested that an expert retained by a party may well be a proper subject to the order.\textsuperscript{30} Third, the court found that restrictions on the expression of opinions about “the court, including the trial proceedings” was “obviously overbroad.”\textsuperscript{31} The court of appeal doubted that Judge

\textsuperscript{24.} Id. at 11.
\textsuperscript{25.} Id. at 11.
\textsuperscript{26.} Id. at 12.
\textsuperscript{27.} Id. at 13-14.
\textsuperscript{28.} Memorandum and Order at 14, Cable News Network, Inc. (No. B104967).
\textsuperscript{29.} Id. at 14.
\textsuperscript{30.} Id. at 14-15.
\textsuperscript{31.} Id. at 15.
Fujisaki meant to proscribe every expression that included a statement of opinion that bears on the court or its processes.\textsuperscript{32}

Actually, Judge Fujisaki’s original order and his August 23 response to the challenges to that order suggest that he did seek a blanket prohibition on trial participant comments and that he wanted no comments about the court or its processes to be made. Judge Fujisaki’s apparent goal was to maintain complete control over the civil proceedings so that they would not appear as unruly as the criminal proceedings appeared to many. Even though the court of appeal eliminated some of the worst features of Judge Fujisaki’s gag order, its analysis suffered from some of the same infirmities as the original gag order, which was issued without adequate consideration of the First Amendment issues at stake. These issues will be expanded upon in the remainder of this Article.

IV. PRIOR RESTRAINT OR NOT?

Gag orders issued against trial participants act as classic prior restraints on those trial participants. The court of appeal was confronted with two issues. The first was whether prior restraint analysis applied when the media, or \textit{amicus}, challenged a gag order. The second was whether Goldman’s challenge to the gag order was subject to the same standard. The court of appeal rejected prior restraint analysis in response to the first question and avoided the second question entirely.

Prior restraints are “the most serious and least tolerable infringement on First Amendment rights” because they pose unique harms to free speech interests.\textsuperscript{33} Where subsequent punishment schemes “defer[] the impact of judgment until all avenues of appellate review have been exhausted, “a prior restraint “has an immediate and irreversible sanction.”\textsuperscript{34} While the “threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.”\textsuperscript{35} The gag order in the Simpson case worked exactly in this manner to freeze the speech of trial participants.\textsuperscript{36}

\textsuperscript{32. Id. at 15.}
\textsuperscript{33. Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976).}
\textsuperscript{34. Id.}
\textsuperscript{35. Id.}
\textsuperscript{36. The chilling effect of this gag order is exacerbated by the fact that it is targeted at a particular individual, while the threat of an objectively-worded statute is “mute” and “impersonal.” LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 12-32 (2d ed. 1988). “Under a system of subsequent punishment, the [government] must show in each case that the particular expression which the [government] seeks to punish did in fact pose an immediate threat to an interest which the [government] has a right to protect.” In Re Halkin, 598 F.2d 176,}
Under traditional prior restraint analysis, such an order "may be upheld only if the government establishes that ... the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest." The order must also be narrowly tailored so that only speech that clearly endangers, or imminently and seriously threatens that interest is restricted. Moreover, there must be no other means of protecting that interest without infringing First Amendment rights. Finally, the order must actually function effectively "to prevent the threatened danger." The symbolic importance of calling an order a "prior restraint" in American legal culture, especially following the twenty-fifth anniversary of the Pentagon Papers case, is significant. By refusing to analyze the gag order as a prior restraint, the trial court and court of appeal could ignore uncomfortable facts in and outside the record, fashioning what appeared to them to be a sensible balance of the competing interests. Unfortunately, in this fuzzy and relaxed analysis, First Amendment rights were devalued and government interests were rendered so malleable that they could be used to justify almost any restraint on trial participant speech.

184 n.15 (D.D.C. 1979), 598 F.2d at 184 n.15 (citing Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978)). In contrast, under a prior restraint scheme, "[t]o escape the sanctions associated with violating the order, the speaker is inevitably led to clear his expression with the judge in advance, and the speaker bears the burden of proving that the expression is inoffensive." Id. (citing Near v. Minnesota, 283 U.S. 697, 712-13 (1931)). Moreover, because the collateral bar rule precludes a speaker who has violated a judicial order from raising the order's unconstitutionality as a defense, the speaker may be forced to choose between obeying the prior restraint and thereby giving up her First Amendment rights while she seeks judicial review, or insisting on her First Amendment rights, violating the order, and virtually guaranteeing conviction for contempt. Id.

For all these reasons—the immediate sanction, the especially chilling effect of a targeted threat, the shifting of the burden of proof and the Hobson's choice between forfeiting First Amendment rights to challenge the restraint or risking certain conviction to protect First Amendment rights—"[a]ny prior restraint on expression" carries "a heavy presumption" against its constitutional validity." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) (quoting Carroll v. President and Comm'rs of Princess Anne, 393 U.S. 175, 181 (1968)). The gag orders in the Simpson case worked exactly in this manner to freeze the speech of trial participants.

37. Levine v. United States Dist. Court, 764 F.2d 590, 595 (9th Cir. 1985) (emphasis added). The protected interest in this case was only the ability to empanel and maintain an impartial jury "who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court." CBS, Inc. v. United States Dist. Court., 729 F.2d 1174, 1178 (9th Cir.1983) (quoting Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 569 (1976)).

38. Levine, 764 F.2d at 595.


The issue of whether prior restraint analysis applied to this gag order was squarely presented by the media and amici. The media parties candidly informed the court that the standard to be applied when the media challenges a gag order on trial participants is unclear. In *Radio & Television News Ass'n v. United States District Court*, the Ninth Circuit found that an attorney gag order did not constitute a prior restraint against the media. Thus, if challenged by the media, such a gag order need only be shown to have a "reasonable basis." The media parties in Simpson argued that the Sixth Circuit's decision in *CBS, Inc. v. Young* was more pertinent than the *Radio & Television News Ass'n* decision, as both the Young and Simpson cases arose in civil settings. In Young, the Sixth Circuit applied a test much closer to a prior restraint analysis. The Supreme Court has yet to resolve this conflict.

The ACLU urged Judge Fujisaki to apply a prior restraint analysis. In essence, the ACLU was seeking to argue the rights of the parties subject to the order, in the California tradition of allowing third parties to challenge unconstitutional actions of government actors, including the courts.

Goldman's submission to the court did not assert a view on whether the gag order was a prior restraint. Perhaps not wishing to antagonize the trial judge on the eve of a high-stakes trial, Goldman did not insist that the court satisfy the rigors of a prior restraint analysis, though he did not concede that a lower level of scrutiny was appropriate. Once Goldman challenged the gag order, supported by the ACLU *amicus curiae* brief, it seemed clear that Judge Fujisaki was required to apply prior restraint analysis, at least regarding its effect on Goldman. It is equally clear that he did not. Instead of addressing this crucial issue, Judge Fujisaki simply stated that he considered the First Amendment issues of all of the parties in rendering his decision.

The court of appeal identified this issue and explicitly adopted the more lenient standard of *Radio & Television News Ass'n*, and treated the

42. 781 F.2d 1443 (9th Cir. 1986).
43. Id.; see also In Re Dow Jones & Co., 842 F.2d 603 (2d Cir. 1988).
44. 781 F.2d at 1448.
45. 522 F.2d 234 (6th Cir. 1975).
46. See CAL. CIV. PROC. CODE. § 526(a) (West 1996).
petition as exclusively raising the third party rights of the media.\textsuperscript{47} The court of appeal distinguished \textit{Young} on the grounds that the \textit{Gentile} case superseded it.\textsuperscript{48} In using \textit{Gentile} for this purpose, the court of appeal ignored the difference between the professional disciplinary rules at issue, and a gag order issued by a court against specific trial participants.\textsuperscript{49} Thus, \textit{Gentile} clearly does not resolve this issue. Moreover, the court of appeal’s reading of \textit{Gentile} as applying a “substantial likelihood of material prejudice” standard to restrictions directly on public or media commentary, to the extent the court meant an order directed at the public or the media, is clearly erroneous.\textsuperscript{50} \textit{Gentile} was concerned with the First Amendment standard to be applied to attorney discipline rules.

The cases applying a more relaxed standard to media challenges of gag orders against trial participants evidence a misunderstanding of the predicament of trial participants. Lawyers and parties may not wish to antagonize a trial judge or be viewed by that judge as attempting to try their case before the media, as was clearly the case here. Simpson’s civil attorney, Robert Baker, staunchly advocated the gag order, but perhaps this was based on the calculation that a gag order was in his client’s best interests, in light of his acquittal in the criminal proceedings.\textsuperscript{51} Applying the same prior restraint analysis when the media challenges gag orders could eliminate such tactical factors. Such analysis results in the treatment of gag orders against trial participants as the prior restraints they truly are. The First Amendment rights of trial participants confronted by a gag order are the same whether they are in a position, financially or tactically, to challenge the order. Moreover, applying a relaxed standard in media-based challenges to gag orders simply builds up a body of decisions in which First Amendment standards are systematically devalued, as was the case here.

Allowing the media to assert the rights of those subject to the order, under a prior restraint analysis, was especially appropriate and significant here because an unknown category of witnesses under the “control” of the parties was subject to the order. Judge Fujisaki declined to reveal exactly

\begin{itemize}
\item \textsuperscript{47} The court of appeal specifically rejected the ACLU’s arguments that prior restraint analysis should apply. Cable News Network, Inc. v. Superior Court, No. B104967 (Cal. Super. Ct. filed Sept. 16, 1996) (Memorandum and Order at 8-9).
\item \textsuperscript{48} Minute Order, at 4.
\item \textsuperscript{49} See Mirell, supra note 11.
\item \textsuperscript{50} Memorandum and Order at 10, \textit{Cable News Network} (No. B104967).
\item \textsuperscript{51} Reporter’s Transcript of Proceedings at 31-32, \textit{Rufo} (No. SC031947). Baker insisted that all counsel had stipulated to the order and that Rule 5-120 would not stop the lawyers from making public comments, as it had no effect on the public comments by plaintiffs’ counsel during depositions.
\end{itemize}
what he meant by this term despite explicit requests that he do so. Not all of these witnesses were represented by counsel and their interests may not have been the same as the parties. Such witnesses may not have had the wherewithal to mount an expensive challenge to the gag order; they simply had to accept the infringement on their rights.

Applying a uniform analysis eliminates these issues and always gives full value to First Amendment rights to impart and receive information in this context. Such a uniform analysis would also make it difficult for trial judges to avoid the appropriate analysis of the interests at stake by taking relief in the variety of judicial views about how much orders are to be evaluated.

The gradual erosion of First Amendment protections, even in cases employing prior restraint analysis, may be responsible for the deference the court of appeal gave to the gag order issued by Judge Fujisaki. Though the Ninth Circuit in the Levine case used "prior restraint" analysis and modified the district court's gag order, it still upheld a restrictive order on trial participants. Similarly, the Supreme Court's willingness to adopt more lenient standards for restraints on attorney speech in disciplinary codes in Gentile played a major role in the court’s willingness to affirm Judge Fujisaki's order.

The Simpson gag order decision furthers this trend by applying the same devalued First Amendment analysis to parties and witnesses. Even though parties are not officers of the court, Judge Fujisaki reasoned that: "Mr. Goldman has elected to seek redress against the defendants in this civil trial. . . . [H]aving submitted to the jurisdiction of the Court he must abide by the law and rules governing this trial." But why must Goldman give up his right to speak about matters of public concern relating to this trial simply because he is a litigant? Judge Fujisaki offers no answer other than an apparent waiver theory.

Goldman should have been able to discuss victims' rights or other public issues relating to the case, so long as such comments were not a "clear and present danger" to the integrity of the trial process. Goldman had, in fact, become an active participant in an important public debate about victims' rights and the flaws in the criminal justice system. Public reaction to the Simpson criminal proceeding generated many calls for reform and many specific proposals. The proceedings inspired

52. Id. at 28.
53. The court of appeal solved this particular problem by dealing with it as a vagueness issue in the form of the order. Memorandum and Order at 12-15, Cable News Network (No. B104967).
54. Levine v. United States Dist. Court, 764 F.2d 590, 598 (9th Cir.1985)
unprecedented public interest and debate about the criminal justice system. Goldman had an important interest in participating in the debate about the lessons of the Simpson criminal proceedings while that debate was occurring, not later when the debate might be over or may have changed its direction and media and public interest waned. In public debate, the timeliness of interventions may be as important as their substance.

Similarly, Simpson has an enormous interest in convincing the public that he should not be shunned as a murderer and wife beater. The rest of his life may be affected by perceptions formed during the civil trial, yet Judge Fujisaki’s order has prohibited his response to harmful allegations in the court of public opinion. Witnesses would be prohibited from responding to criticism of their testimony or credibility, and would risk the possibility of unrebutted stains on their reputations.

Only exceptionally weighty reasons could justify a nearly six-month ban on public comment by Goldman on these issues. Though the court of appeal seemed to believe that its modifications in the August 23, 1996 Order removed the vagueness, Judge Fujisaki had made it clear that Goldman should not speak of victims’ rights or reform of the criminal justice system. The court of appeal failed to set Goldman free. The reasons used by the courts to suppress Goldman’s rights simply do not withstand careful analysis. In its First Amendment analysis, the court of appeal ignored the fact that the August 13th Order was a classic prior restraint on Goldman. The failure to address Goldman’s rights squarely allowed the court to avoid dealing with First Amendment interests at stake in this case.

V. THE NEED FOR ANY GAG ORDER AT ALL: WHERE’S THE PREJUDICE?

One of the central arguments made by the media and the ACLU in challenging Judge Fujisaki’s gag orders is that no gag order was necessary in these circumstances or, at least, there were no factual findings upon which a gag order could be issued. Judge Fujisaki avoided this issue by simply finding that there was a “circus atmosphere” and pervasive publicity, and, consequently, a threat of prejudice. The court of appeal agreed with these “findings” because they were based on “common human experience.” This analysis misses the point.

The courts may bemoan the fact that the Simpson case has generated pervasive publicity. There may be regret about how the criminal proceedings were handled, so that the public was saturated with Simpson-related information. The only issue in the context of this gag order is whether the speech of these trial participants at this time jeopardized the
fair trial interests. This is the only proper justification for any gag order. There was no such evidence introduced or even discussed in any of the proceedings on the gag order in this case.

There was already a mountain of evidence in the public domain, both admissible and inadmissible, from the Simpson criminal and civil proceedings by the time Judge Fujisaki acted in August of 1996 to suppress public comments by trial participants. The criminal trial, and seemingly every thing or person associated with it, had been covered by the media to a degree seldom seen before. Nearly every participant in the criminal trial had published or was writing a book. Every bookstore in Los Angeles had these books on their shelves. As a result, the question became what interests were being served by the gag order?

The most legitimate ground for a gag order is to protect the jury pool from prejudicial pre-trial publicity. In Los Angeles County, however, this is a weak justification for a gag order, given the fact that Los Angeles has the largest jury pool in the United States. Thus, there was no reasonable possibility that prejudicial pre-trial publicity was likely to undermine a fair trial in any case, much less this one where whatever damage was done was accomplished long ago.

The other, more limited, and more reasonable, ground to support such a gag order would be to prevent the actual empaneled jury from being exposed to prejudicial publicity during the trial. There is more justification for a gag order, in the context of a non-sequestered jury, to prevent jurors from exposure to prejudicial, extra-judicial comments during a trial. The issue, though, in this case was whether the incremental risks of comments by these trial participants, in the context of a proceeding in which all of the evidence, admissible or not, was in the public domain, posed a risk of sufficient weight to overcome the First Amendment rights of trial participants.

The answer given by Judge Fujisaki in his August 23rd order was the following:

The Court has considered the rights of freedom of speech of the persons encompassed by this order and the rights of the public and press, then weighed these considerations against the duty of

55. Powell v. Superior Court, 283 Cal. App. 3d 785, 795 (1991) (6.526 million potential jurors in Los Angeles County). With this many potential jurors in Los Angeles County it is inconceivable that the voir dire process will not be sufficient in virtually every case to eliminate the impact of pre-trial publicity.

56. It is difficult to know exactly what Judge Fujisaki's rationale was because he did not address any of the arguments made by the media or the ACLU on this crucial threshold issue. Minute Order issued Aug. 23, 1996 at 4–5, Rufo (No. SC031947).
this Court to conduct the trial in a neutral and detached environment necessary to insulate rational argument and dispassionate decision-making from the passions that will inevitably arise from extra-judicial commentary on the part of those who are hereby constrained. The Court has a further duty to ensure that the jury receive and consider admissible evidence in rendering its verdict, which can only be accomplished through the trial process. It is anticipated that the jury will not be sequestered. The experience in the criminal trial clearly demonstrated pervasive dissemination by all of the media of the comments and opinions of counsel therein regarding the trial proceedings, evidence received as well as not received or nonexistent, the merits of the case, the jury and the judge. This experience compels the conclusion that the probability is extremely high that the jury will be exposed to such extra-judicial commentary regarding this trial, inadmissible evidence, misinformation and opinions, outside of the trial process, despite judicial admonitions and the best efforts of the jurors to avoid such exposure.57

This rationale superficially focuses on the appropriate concern about preventing contamination of the jury with information that might prejudice its deliberations. However, Judge Fujisaki’s analysis is strangely disconnected from reality. Though factual findings might have been made on this point, there was no evidence in the record that lawyers had been primarily, or even partially, responsible for the ills Judge Fujisaki found in the criminal trial or sought to avoid here.58 Moreover, because the criminal jury was sequestered, the attorneys in the criminal proceeding did not have to be concerned with contaminating the jury. Judge Fujisaki had no apparent basis for his conclusion that admonitions to counsel in the civil trial would have been insufficient to deal with any potential prejudice he feared. There is no record that such admonitions had been given. Indeed, all of the civil counsel publicly committed themselves to avoiding such comments and no evidence was presented that this was a misrepresentation.

57. Minute Order issued Aug. 23, 1996 at 4, Rufo (No. SC031947). In an earlier portion of this Order, Judge Fujisaki used a similar analysis, calling the atmosphere at the criminal trial a "circus atmosphere," to reject media requests for television coverage and other media access, including sketch artists. Id. at 1-2.

58. Simpson’s attorney, Robert Baker, complained about the plaintiffs’ comments after depositions early in the case at the August 23, 1996 hearing. Reporter’s Transcript of Proceedings at 30-31, Rufo (No. SC031947). However, Judge Fujisaki made no findings about any particular action of the lawyers or parties.
More importantly, the finding in this case that it was extremely likely that the jury would be exposed to extra-judicial commentary, inadmissible evidence, misinformation and opinions outside the trial process was marginally relevant to the issue of a gag order on trial participants. It was apparent to all that the only way to avoid this problem was to hold a sequestered trial, preferably on a distant island or on another planet. Judge Fujisaki could not control the public nature of the trial, and could not stop the public, especially the punditry, from expressing detailed views about every aspect of the case. His decision was based not only on the events surrounding the civil proceedings, but also on the enormous body of information from the criminal proceedings and in the public domain. Predictably, surrogates for each side bombarded the public nightly with all the information Judge Fujisaki believed would prejudice the integrity of the proceedings.

Would there have been a greater chance of prejudice if the trial participants had been free to make public comments? Would an appearance by Goldman on the Geraldo Rivera or Larry King Live shows be more prejudicial than similar appearances by Christopher Darden? There is no reason to believe this is true. Moreover, the lawyers in the civil trial might have been able to address prejudicial commentary by others if allowed to respond publicly, as suggested by Goldman in his submissions, and as allowed in Rule 5-120.

There might be a more compelling rationale for a limited gag order if the comments of lawyers or other trial participants were more likely to include prejudicial materials or would have a more prejudicial impact on the jury. Though the trial participants in the Simpson civil proceedings no doubt had access to some information not already in the public domain, it is difficult to believe that this was a significant problem or that an admonition or more narrowly drafted order would not have resolved this issue. A more limited order addressing such specific materials would have been a more justifiable exercise of judicial discretion.

Gag orders on attorneys are sometimes justified on the grounds that attorney speech is likely to have a greater impact than other speech in this context. Whether or not this assumption is true generally, it does not seem to be a reasonable one in this case. There are so many lawyers and law professors spinning Simpson stories that the addition of the current civil attorney contingent would be unlikely to change the mix much. If anything, the ability of those most knowledgeable about the civil case to

speak might enable them to correct some of the misstatements of fact made in the media by those less knowledgeable. In any event, even if jurors violated their oaths not to expose themselves to media reports about the case, it seems likely the jurors would view the statements with appropriate skepticism. Moreover, jurors, if they violated admonitions not to listen to the media, should understand that what lawyers representing clients say to the media should be viewed with appropriate skepticism.

VI. LESS RESTRICTIVE ALTERNATIVES

A. The Importance of Admonitions

Both Judge Fujisaki and the court of appeal disregarded the possibility of alternatives to a gag order. The court of appeal missed the point entirely by discussing alternatives as though the issue was primarily one of pre-trial publicity.\(^\text{61}\) By the time the court of appeal issued its order, the pre-trial publicity phase of the civil proceedings was essentially over. The court of appeal's statement that voir dire might not eliminate the effects of pre-trial publicity was irrelevant at that point. Without any pertinent analysis, the court of appeal stated that there were "no reasonable alternatives" presented to the trial court and "none" presented on appeal.\(^\text{62}\)

One basis for this statement was that admonitions to the trial participants or the jury would be ineffective to prevent prejudice to the trial.\(^\text{63}\) However, there is no evidence that Judge Fujisaki ever attempted such admonitions, nor any real findings in the record to support either of these conclusions.

The failure to attempt such admonitions before issuing a sweeping prior restraint on speech is at odds with basic First Amendment principles. A court must determine that such an order is both "necessary" and the "least restrictive means" of achieving the objective of avoiding prejudice at trial. If admonitions are effective, then a gag order is both unnecessary and overly restrictive.

Moreover, Judge Fujisaki's failure to trust the jury's promise and his instructions to decide the case on the evidence introduced before it in court is troubling. Appellate courts regularly assume that juries abide by such

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62. Id. at 12.
63. In Levine v. United States Dist. Court, 764 F.2d 590, 592 (9th Cir. 1985), the district judge had admonished the lawyers without success before issuing an order.
admonitions and instructions in affirming criminal sentences. It is widely believed that such reliance is misplaced in that crucial context, yet the legal system tolerates this risk and makes assumptions that jurors fulfill their obligations.

However, in the gag order context, courts silence attorneys and other trial participants due to the risk that jurors will be exposed to the media despite their promise to avoid such influences. This rationale may make sense if there is certain specific, highly prejudicial information regarding either party that will not be admitted into evidence and that would have a dispositive effect on the jury if it was exposed to such information. For example, inadmissible information that a criminal defendant had been charged, but not convicted of, similar crimes in the past, or had confessed where the confession had been thrown out in pre-trial proceedings is the type of information that might be the subject of a narrowly tailored gag order. Gag orders directed specifically at such information pose less of a problem than the broad order at issue in the Simpson case.

In this case, jurors willing to violate their oaths could stock their shelves with Simpson books detailing discussions of evidence, surmise and speculation about Simpson’s guilt or innocence. Each night, such jurors could receive instruction about how to evaluate evidence by nearly the entire criminal trial teams of both sides, and they could have full access to the proceedings occurring outside their presence, including an account of evidence and testimony they were not permitted to have, from a broad range of media sources.

Thus, if admonitions were not effective means of controlling prejudicial publicity during the trial, the inescapable conclusion is that no fair trial was possible in the Simpson civil case. The refusal by Judge Fujisaki and the court of appeal to come to grips with this reality suggests that the avoidance of prejudicial publicity was not the primary reason for the gag order.

Other interests, including a desire to maintain judicial control over the proceedings, do not justify restrictions on the ability of trial participants, especially parties and witnesses, to join in the public debates surrounding the trial, some of which transcend the specific issues to be tried in the courtroom. Judicial interference with this public debate always raises serious First Amendment concerns. If gag orders cannot prevent prejudicial publicity, or in this case, have any significant impact on it, there is no basis for judicial interference with the free expression of trial participants.
B. The Eclipse of Disciplinary Rules.

One of the odd aspects of the court of appeal’s analysis was its total disregard for the newly-enacted California Rules of Professional Conduct Rule 5-120. My colleague, Doug Mirell, has demonstrated why Rule 5-120 should not be used as a template for gag orders. Surprisingly, Rule 5-120 had a minimal impact on the Simpson gag order proceedings, despite the fact that it was enacted in response to the Simpson criminal proceedings.

First, although this rule was adopted by the California Supreme Court after extensive hearings and public debate, Judge Fujisaki would not accept that the existence of Rule 5-120 eliminated the need for a gag order, either alone or in conjunction with admonitions, as argued by the ACLU. The court of appeal did not even consider this possibility. Rule 5-120 was an attempt to resolve free speech and fair trial issues in precisely this area. Yet Judge Fujisaki and the court of appeal both ignored the rule and its implications for this case.

Second, in response to the request by Goldman and the media to narrow the August 13th and August 23rd orders along the lines of Rule 5-120, the court of appeal appears to have found the rule too vague. Yet the August 13th and August 23rd gag orders are much less specific than Rule 5-120. Moreover, Rule 5-120 provides specific areas where attorneys are authorized to speak, including responses to prejudicial publicity initiated by others. This mitigates the restrictions somewhat by making it clear that the order is not intended to become a blanket restriction on attorney speech.

Clearly, Judge Fujisaki wanted to stop virtually any public comment by any trial participant. The court of appeal modified the scope of his order, but did not respond to the unduly restrictive ambition of the order, in a meaningful way. Adopting the portion of Rule 5-120 sought by Goldman would have done so, and the court of appeal’s failure to meet this argument squarely reflects either a failure of analysis or will.

VII. CONCLUSION

The judicial consideration of the gag order issues in the Simpson civil proceedings revealed the erosion of First Amendment standards in this

64. Memorandum and Order at 14, Cable News Network (No. B104967).
65. See Mirell, supra note 11.
area in the past decade. Limitations on the speech of trial participants to ensure that criminal defendants get the fair trial they are entitled to under the Sixth Amendment—the paradigm in Sheppard v. Maxwell and Nebraska Press—have given way to "relaxed" standards whenever the speech of trial participants is at stake in criminal or civil proceedings.

The erosion of the First Amendment rights in the jurisprudence that preceded the suppression of speech in the Simpson civil gag order seems as much about judicial control as it is about preserving the integrity of trials. Though the impetus for such control may be well-intentioned in most cases, the suppression of speech in this context carried with it the same evils as the suppression of speech in other areas of our public life.

For better or worse, and I believe it is for the better, trials are the focus of great public interest. Many issues of importance or interest to the public are resolved in the litigation process. Court decisions have an enormous impact on people's lives beyond the litigants in many cases. Judicial institutions should be subjected to the same standard as other government institutions, and judges should be scrutinized as well. By gagging trial participants, a trial court can attempt to suppress criticism of its conduct or decisions in public debate just at the moment when the public is most interested. Comments heard weeks or months later may not have the same impact. 67

The court of appeal's decision on the Simpson gag order is unpublished and thus of no precedential value. Given the intensity of the media coverage of the untelevised civil proceedings, the fact that the trial participants have been silenced during the trial may have even gone unnoticed by most of the public. It is difficult to believe that the gag order has had any significant effect on the publicity surrounding the trial. 68 So too, the loss of First Amendment rights is difficult to measure.

Perhaps the gag order is a small defeat for the First Amendment. But if other courts analyze these issues in the same way as Judge Fujisaki and the court of appeal, First Amendment values in this area will continue to be devalued, and what should be protected speech will be further suppressed. In another context this may have more significant implications. Thus, it is apparent that more durable standards are necessary to prevent this result from recurring.

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67. This is the basis for the holding that the suppression of speech even for a short time is always irreparable injury. Elrod v. Burns, 427 U.S. 347, 373 (1976).
68. This claim would not be true regarding the decision not to televise the civil trial, but that is a different story.