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High Profile Cases in a Technological Age

Susan Webber Wright

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Wright: Wright: High Profile Cases in a Technological Age
Earl F. Nelson Memorial Lecture

**High Profile Cases In a
Technological Age**

*Honorable Susan Webber Wright**

Thank you for inviting me to deliver the Nelson Lecture.¹ It's quite an honor. I warn you that I am a technological idiot who doesn't know the difference between "analog" and "digital," and who resisted learning to use a mouse—the kind attached to a computer. When I hear the word "mouse" I think first of a rodent. I still write by hand as many letters to friends as I send by e-mail.

It's not that we have never had high profile cases before—in our early history, there was the treason trial of Aaron Burr, which authorities in Richmond had to move from the courthouse to the state capitol building because of the crowds of interested onlookers, or so I was told when I toured Richmond. In the Twentieth Century, we have experienced the trial of the kidnapper of the Lindbergh baby, the Julius and Ethel Rosenberg trial, the Sam Shepard trial, and others we could name. But ever since the O.J. Simpson trial, America has had an increased and sustained interest in the law and courtroom procedures. This interest is manifested in a proliferation of television programs—both documentaries and dramas—about courts and lawyers. It is even more evident in actual court proceedings that are televised, and have made television personalities of judges, such as Judge Judy, and lawyers, such as the lawyers involved in the O.J. Simpson trial. Even witnesses (remember Cato?) can become instantly famous. This public interest was further heightened by the criminal trials following the terrorist bombing of the federal building in Oklahoma City and the guilty plea of the "Unabomber."

During the decade of the 1990s, the United States experienced a technological revolution beyond what any clairvoyant could have ever predicted. This "Age of the Internet" has had an impact upon every facet of society,

* The Honorable Susan Webber Wright is Chief Judge of the Eastern District of Arkansas. Judge Wright has served as U.S. District Judge since May 1990 and as Chief Judge since July 1998. Prior to her judgeship, Judge Wright served on the faculty at the University of Arkansas at Little Rock School of Law. Judge Wright graduated from the School of Law at the University of Arkansas at Little Rock with High Honors. She earned an M.P.A. from the University of Arkansas at Fayetteville and a B.A. from Randolph-Macon Women's College.

1. The Earl F. Nelson Memorial Lecture was established by the Trustees of the University of Missouri Law School Foundation in memory of Mr. Nelson, one of the Founders of the Foundation and a Former Member of the Board of Curators of the University of Missouri. The Lecture was delivered by Judge Wright on March 10, 2000 at the University of Missouri-Columbia School of Law.

including the law and courts. Judges and lawyers now use technology for legal research, communication, legal education, presentation of evidence in court, and security.

What I will try to describe this afternoon is the confluence of these two developments: the increased interest in courts, particularly the high-profile case, and the development and spread of sophisticated technology. As a social and public institution, the courts are obligated to address public demands not only by providing a forum for the administration of justice, but also by providing the means by which interested members of the public can observe court proceedings and gain access to public documents. I will describe some of the things courts are doing to respond to these demands.

Next, I will try to describe how advances in technology and science are changing the way courts go about their business of seeking the truth and administering justice. These changes affect all cases—both high profile and routine. But they are most evident to the public in the highly publicized case.

Even though technological innovations have assisted courts in many ways, they have also created new problems and legal issues, particularly in the area of individual privacy. I will make an effort to show by way of specific examples how these privacy issues arise and how courts might address them.

I. TECHNOLOGY AND THE PUBLIC'S ACCESS TO COURT RECORDS AND PROCEEDINGS (OR COPING WITH THE MEDIA)

I imagine that the law school invited me here for this lecture because I was assigned—by random draw, I might add—the case of *Paula Jones v. William Jefferson Clinton*.² To say the least, the case was high-profile—even notorious. Even though the case never went to trial, I was faced with many issues that ordinary cases never present. Before the case was dismissed on a motion for summary judgment, the court had made substantial preparations for actually going to trial. I will describe for you some of the challenges I faced in presiding over this litigation and how technology affected the management of the case. I will also describe how technology has affected our court's business in general. As you will see, technology, especially the Internet, has made a huge difference for our court. (Incidentally, I do not want to discuss an equally important topic: the strain that a high-profile case can place on the Presidency. I will focus only on the court.)

When I refer to a high degree of public interest in a case, what I really mean is that there is a lot of media interest. One thing that our technological age has wrought is more media outlets: more television stations, more news sources on the Internet, more reporters, and more queries for the court to answer.

When I was assigned *Jones v. Clinton*, I was fortunate to have already presided over a high-profile trial in which I was forced to handle numerous press

2. *Jones v. Clinton*, 858 F. Supp. 902 (E.D. Ark. 1994).

queries and demands. This case, which I call the “Perry County Bankers” case, was a prosecution by the Office of Independent Council against two local bankers who had connections to President Clinton.³ We went to trial in the summer of 1996 in a large courtroom, and even though it was crowded at times, I believe that any news reporter who wanted to be there was able to find a seat. However, the lawyers—both defense and prosecution—and I were concerned that members of the press might distract the jury. The distraction was not intentional, mind you, but it was distraction nonetheless, and came in several forms. One distraction was the click-click-click of reporters’ fingers on their laptop computers as they all stayed busy writing down what they found significant in the case. Similarly, beepers and cell phones going off within the hearing of the jury and other participants was a nuisance and a distraction. So just as technology has spurred the proliferation of reporters with the proliferation of news outlets, it is technology that reporters carry with them that can be distracting in a traditional courtroom.

But perhaps the most worrisome distraction is that reporters, when they hear something from the witness stand that is newsworthy, are apt to race each other to the courtroom exit to be the first to report the news to their outlets. Even though judges routinely tell jurors not to read any newspaper stories, watch any television, or listen to any radio stories about the case, such an admonition might not be worth much if the jurors are allowed to watch reporters’ reactions to live testimony in the courtroom.

With these concerns, I entered a pretrial order governing courtroom conduct in the Perry County Bankers trial. Among other things, this order prohibited the use of laptops, beepers, and cell phones in the courtroom. It provided that any member of the public could enter the courtroom at any time, so long as there was room. However, the order stated that no one could leave the courtroom until the court declared a recess. This would prevent the aforementioned mad scramble to the exit when something newsworthy took place. The reporters did not like this at all—they said that I did not understand the demands of their jobs in meeting deadlines. A couple of reporters, one from a major newspaper and one from a major network, approached the bench during a recess when the jury was out of the courtroom and tried to reason with me, even suggesting that this order was contrary to the First Amendment. Then they told me that people were even laughing at me about it—that they were calling my courtroom the roach motel. (For those of you who do not know what that is, it’s a roach trap; the roach is able to enter it but can’t leave.) These gentlemen did not change my mind. I even checked with the lawyers in the case, who advised me that they preferred that I keep the order in place. But after that, whenever I would get a little bored with the trial, I would look out into the courtroom audience and see all these roaches.

3. United States v. Branscum, No. LRP-CR-96-49 (E.D. Ark. June 7, 1996) (indictment returned Feb. 20, 1996).

Of course, the Eighth Circuit Court of Appeals⁵ and the United States Supreme Court⁶ both ruled that I was wrong to delay the trial and reversed my ruling. The first significant challenge to me as a judge was after the Supreme Court had remanded the case with orders that the trial was not to be delayed merely because a defendant was the President of the United States. After consulting with the lawyers, I executed a scheduling order setting discovery deadlines and a trial date. Almost immediately the lawyers had discovery disputes. The media interest was intense. Much of the discovery involved matters that were, to say the least, embarrassing, not only to the parties, but also to persons who had no interest in the case and who wanted their privacy protected. Furthermore, the possibility that a fair trial might be jeopardized if discovery were public concerned the attorneys on both sides. Therefore, the parties entered into an agreed protective order to keep discovery under seal. Thanks to our telephone technology, I was able to conduct regular, multi-party telephone conferences from the relative seclusion of my chambers.

Our court is blessed to have talented and innovative systems personnel. In 1996, we began making pleadings in civil cases available to the public on our website.⁷ So when I released the order granting summary judgment, it was instantly available on the Internet. Later, after the case had settled, and the court had unsealed many of the discovery pleadings and orders, they too were made available, as were the exhibits that accompanied them, and the transcripts that had been filed. I cannot exaggerate the degree to which the availability of the Internet has assisted our court in giving the public access to these documents and to other pleadings and orders in this case and in other cases. We now have criminal case pleadings available as well. With the exception of documents under seal and a huge class action case that was transferred to me only this week, our court scans every pleading in every case and makes it available on the web.

So what work did this save us in *Jones v. Clinton*?⁸ It saved untold thousands of pages of copies of pleadings and immeasurable frustration of both court personnel and the public, as the public would have made its demands on the court and awaited a response. Another tremendous advantage was the fact that this information was instantaneously and immediately available equally to all. We had no more reporters scrambling over each other at the clerk's office door to be first to get copies. As you probably know, those in the business of reporting the news are highly competitive with one another, and one reason a reporter can be tenacious and annoying is that he or she is attempting to get the scoop before the competition. When all reporters know that they will have simultaneous access to the same information, they become much less

5. *Jones v. Clinton*, 72 F.3d 1354 (8th Cir. 1996).

6. *Jones v. Clinton*, 520 U.S. 681 (1997).

7. Our site is found at <<http://www.ark.uscourts.gov>>.

8. *Jones v. Clinton*, 974 F. Supp. 712 (E.D. Ark. 1997).

obstreperous, and the court can continue on with its normal operations with much less hassle.

I will give you an idea of the extent of the public interest in getting information about this case on the Internet:

- (1) Our district opened its website around September 1996. Between then and the time the case was dismissed in April 1998, there were approximately 1.3 million hits on our site.
- (2) After the case was dismissed, and we started releasing sealed documents, we had about 300,000 hits. We had also provided to news organizations, by electronic copy, all of these documents, and the news organizations made them available on their own websites. This kept down the number of hits on our site.

This fast flow of information had a collateral effect of generating numerous telephone calls and letters to my chambers. During the peak of this activity (which was in the spring of 1998) we routed our telephone calls to a single employee in the clerk's office who did little else but answer our telephones. She took messages from the public, but forwarded calls that pertained to other, routine court business to chambers. No one has ever counted the number of letters we received, but we did manage to acknowledge them (again, with the technology of word-processing).

Of course, the press asked my staff and me for interviews. I had a simple rule: we don't do interviews. It's my position that a judge has the unique duty to speak cogently on the record in the cases assigned to that judge. I have always believed that in a case of great public interest, it's best for the judge to confine her remarks to the record of the case.

II. COURTROOM TECHNOLOGY

I now will divert my remarks to some more general observations about technology and how it is affecting the work of the courts in all cases, not just in the high-profile ones.

In four pilot district courts in the United States (including the Western District of Missouri), there is a new system of case management whereby pleadings are filed electronically, which allows an attorney to file pleadings from his or her office and retrieve documents from the web. If courts nationwide implement this type of system (and the Administrative Office of the United States Courts anticipates that this will be nationwide eventually), attorneys will no longer have to make trips to the courthouse to file pleadings, they will be less dependent on courier services and the mail, notice to other parties will be immediate, and pleadings could be filed at all hours of the day. There are parallel advantages to those who work at the courthouse—the reduction in paper alone would represent a drastic change in case management. For several years now federal courts have used automation systems to track pleadings and orders.

Electronic filing should be compatible with the existing systems and would curtail the work of clerk's office employees who now enter information from paper documents into the system.

In a high-profile case, if electronically-filed documents are available to the public on the Internet, news organizations will no longer stake themselves out at courthouse doors to await crucial pleadings or court orders. The advantages should be similar to the advantages our court has enjoyed by placing court documents on the Internet. As I speak, federal courts across the country make court documents available through a system known as PACER. Unlike the Eastern District of Arkansas, most districts do not have their own individual websites. I am told that we might eventually have to give up ours in an effort to collect users' fees charged to those who access PACER—at a rate of seven cents a page. I believe our system is preferable, because it's free and, I'm told, much faster.

My first experience with modern courtroom technology was in January 1993 when an out-of-state attorney set up a portable system in my courtroom that would permit the jury and me to view documents on monitors. It was quite handy and convenient. What I remember most, however, is that the monitor he provided me was a television that could pick up local broadcasts. It was positioned on the bench in such a way that I was absolutely the only person in the courtroom who could see the screen. In other words, the jury, the lawyers, the witness, and court personnel could not tell that I spent most of the day viewing, without sound, the inauguration festivities of President Bill Clinton. Now our courthouse is equipped with one integrated high-technology courtroom, and a second courtroom, which is adjacent to my chambers, is currently being outfitted for this high technology.

For those of you who have tried cases involving numerous documents, it is not difficult to imagine just how helpful an integrated technology courtroom would be. Probably some of you have used this type of high-tech courtroom, but for those of you who have not had this experience, let me explain the advantages. If an attorney is to question a witness about a document that has not been received in evidence, the attorney first shows the document to opposing counsel, unless counsel already has a copy. If opposing counsel has a copy, he or she must be given a few seconds—or minutes, in some cases—to find it. Then the judge might wish to view it, and the lawyer must approach the bench to give it to the judge to review. Again, if the judge has been provided a copy, the judge must find his or her copy, which usually takes place when opposing counsel is finding his copy.

Then the attorney wishing to get the document in evidence must hand it to the witness to identify it and ask the court to receive it. If the court receives it, frequently counsel asks to publish it to the jury, or hand it to the jury for examination. If there are twelve jurors, they look at it *seriatim*, or if the jurors have copies, because the document has been received earlier, the jurors must be given time to locate their copies. This process is sometimes repeated many, many times over in a trial. Our new technology permits the judge or the

attorney, with the flick of a switch, to permit an image of the document to appear on monitors for everyone in the courtroom to view. To say that this speeds things along is an understatement.⁹ Now all the documents needed for a trial can be provided on a computer disk for display on the screens of courtroom monitors. This has the potential to drastically reduce the amount of paper required.

Since the advent of the video camera, witnesses who are unavailable to testify live at trial have testified on videotape.¹⁰ Some courtrooms are now equipped for live telecasting. For example, in one of our state prisons, there is a room from which inmates can appear via telecast before a magistrate judge in Little Rock. This has not been used for jury trials, but for hearings before magistrate judges. Such technological advances will undoubtedly lead to important issues for the courts: for example, should such telecasting be allowed in jury trials? An amendment to the Federal Rules of Civil Procedure has made this possible in "compelling circumstances."¹¹ What about jurors—should they be allowed to attend a trial by watching it on monitors in their homes? I understand that the William and Mary courtroom technology project, Courtroom 21, envisions this. But it's not a reality in federal court today. Another possibility is for courts of appeals to conduct oral arguments via telecast, something else that is envisioned by Courtroom 21.¹²

Before I would feel comfortable allowing remote testimony, I would like to know whether testifying witnesses are more likely to be truthful when they are physically present in the courtroom, with its formality, than in another place, such as a lawyer's office. Similarly, I would like to know the effect, if any, upon a juror's attitude if that juror is not in the courtroom but is viewing the proceedings elsewhere (perhaps from the sofa in the juror's own living room). Another jury issue is whether the use of large monitors in the courtroom tends to make a witness whose image appears on them more credible.¹³

Another development is the use of computer technology for accident reconstruction.¹⁴ All of us have seen computerized animation of recent tragic plane crashes. Courts sometimes admit this type of evidence as demonstrative

9. Fredric L. Lederer, *Courtroom Technology From the Judges' Perspective* (visited June 15, 1997) <<http://www.courtroom21.net/judicial.html>>.

10. See FED. R. CIV. P. 32(c).

11. In 1996, the Federal Rules of Civil Procedure were amended. Now Rule 43 provides that "[t]he court may, for good cause shown in compelling circumstances and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location." FED R. CIV. P. 43.

12. See *High-Tech Court Goes Online with Digital Testimony, CD-ROMs, in 5 CORRECTIONS PROFESSIONAL* No. 6 (Nov. 19, 1999).

13. I have heard this referred to as the "Oz Effect."

14. See, e.g., Kristin L. Fulcher, *The Jury as Witness: Forensic Computer Animation Transports Jurors to the Scene of a Crime or Automobile Accident*, 22 DAYTON L. REV. 55 (1996).

evidence to help explain a witness's testimony.¹⁵ Even though I have heard anecdotes of judicial reluctance to allow such animation evidence, I believe that we will be seeing more and more of it in the near future.

Some have suggested that all this technology in the courtroom—which can be very colorful—will make the courtroom more entertaining. They cite studies that say people remember more of what they see than what they hear.¹⁶ In a high profile case, the technology might add to the publicity the trial receives because the public's interest is heightened and sustained. I believe that there will be new demands to allow television cameras in federal courtrooms.

III. TECHNOLOGICAL AND SCIENTIFIC EVIDENCE

While courtroom technology and the Internet have made the flow of information faster and more entertaining, advances in science and technology have also made it easier for the finder of fact, usually a jury, to determine the truth. I'll cover a couple of examples, although there are numerous others.

My first example is DNA evidence. It has both incriminated and exonerated criminal suspects. Even though its use is primarily in criminal cases, it has also been used in civil cases. I had a particularly interesting civil case a few years ago in which DNA evidence was introduced. The issue was whether a laboratory monkey that had bitten a lab worker had contaminated the worker with a deadly simian herpes virus.¹⁷

My second example does not involve particularly sophisticated technology, but the ready availability of video and tape recorders to law enforcement officials. The practices of law enforcement agencies of taping interviews of witnesses and of making video recordings of traffic stops has added new evidentiary tools that are proving valuable to judges and juries. In one case in my court, the plaintiff alleged that a police officer had illegally conducted a search of his car without his consent. His attorney filed the appropriate motion to suppress, and requested a hearing. But when the attorney had an opportunity to view a videotape of the arrest, he withdrew the motion to suppress. He later told me that the entire stop was "textbook perfect," and that he had no legitimate basis to suppress the fruits of the search.

Conversely, videotaping the activities of law enforcement officers does not always exonerate them: it can incriminate them as well. The Rodney King case is a good example. Another recent example took place in my home state and was reported in our local paper last month: a police officer was videotaped by a civilian as he punched and then grabbed a suspect around the neck for several

15. *See, e.g.*, *Hinkle v. City of Clarksburg, W. Va.*, 81 F.3d 416, 425 (4th Cir. 1996) (upholding admission of video animation of shooting incident).

16. *See Lederer, supra* note 9.

17. The case, tried to the court pursuant to the Federal Tort Claims Act, settled after a few days of trial.

seconds. The newspaper reported that the civil suit against the officer settled for an undisclosed sum of under \$100,000.

In criminal cases, it is common for law enforcement officers to testify concerning their interviews with suspects and witnesses. Frequently their testimony includes matters such as the demeanor of the witness. Technological advances have made tape recording and even video recording inexpensive and simple. Therefore, if an officer testifies about an interview that he did not tape record when he had an opportunity to do so, there might be a question concerning just why the interview was not taped. This is a ticklish subject for some law enforcement agencies—but I know of at least one judge who is considering instructing the jury that it may consider the fact that the interview was not recorded despite the ready availability of a tape recorder or video camera. In essence, he would be inviting the jury to give less weight to the officer's testimony.

IV. PRIVACY

Of course, there is a downside to all of these advances. I have already mentioned some of them. But what concerns me most is exactly what has concerned most others who have addressed it: the potential loss of privacy.

Recently a prominent officer of a high tech company said something to the effect that we should forget about privacy—that there is no longer such a thing. Anyone who is the least bit sophisticated in this technological age knows that there is some degree of truth in this statement: others can find out, through the Internet or otherwise, what we read, what we buy, when we are on the web, the sites we visit, what we write and receive on e-mail,¹⁸ what medications we take, and, in some instances, even our medical records. One article has even suggested that as a result of thermal detectors, law enforcement (or anyone, for that matter, with access to the technology) can tell what we are doing inside our homes.¹⁹ One federal court has even suggested that these devices can even reveal when people are engaged in sexual activity.²⁰

In the high profile trial the rapid and widespread flow of information from court documents poses a threat to the privacy of those involved in the trial. I'll give you a few examples.

In the *Jones v. Clinton* litigation, the plaintiff deposed several women, who were not themselves parties to the lawsuit, who allegedly had information

18. See Mark Harrington, *The Cookie Monster on Your Desktop/A Convenience or an Invasion of Privacy? New Concerns Over the Hidden Files that Track You on the Net*, NEWSDAY, Feb. 27, 2000 (Sunday Nassau & Suffolk Edition), at A8.

19. See David O. Markus & Mona Markus, *The Heat Is On: Thermal Imaging and the Fourth Amendment!*, 22 CHAMPION 22 (Dec. 1998).

20. *United States v. Cusumano*, 67 F.3d 1497, 1504 n.11 (10th Cir.), vacated on other grounds, 83 F.3d 1247 (10th Cir. 1995) (cited in Markus, *supra* note 19, at 22). <https://scholarship.law.missouri.edu/mlr/vol65/iss3/7>

relevant to the issues in the case. A few of these women wanted their identities to remain confidential, at least during discovery. The lawyers and I agreed to keep their identities a secret through the use of the appellations “Jane Doe 1, Jane Doe 2,” etc. I ruled that Rule 26 of the Federal Rules of Civil Procedure allowed the court to keep their identities under seal, and, as a result, any discovery material on file with the court that could be used to identify these Jane Does remains under seal.

The high-profile case also carries potential embarrassment for employees who work for companies that find themselves in litigation. Because private companies are not state actors, any privacy rights that may apply to governments are inapplicable to them. Employees’ e-mail, telephone conversations, and web activity are common objects of surveillance.²¹ Some might even persuasively argue that such surveillance is now necessary in light of the United States Supreme Court decisions requiring employers to take active measures to prevent discrimination, especially sexual harassment.²² It is perfectly reasonable to expect some of the information gained from this surveillance to become evidence in trials, and if the trial is a noteworthy one, this information can generate frontpage news.

The *Minneapolis Star Tribune* reported last month that Northwest Airlines, seeking to learn which employees were responsible for promoting an illegal job action, petitioned for and obtained a court order requiring employees to turn over their personal home computers for inspection.²³ Please understand that I am not criticizing the court’s ruling. However, I am pointing out that the technological age presents challenges to traditional notions of privacy. The privacy of jurors and court personnel can also be an issue: in a community the size of Little Rock, the names of jurors and their occupations are public, and it ordinarily takes very little effort to find their addresses, their employers, the names of their spouses, and other personal information. Anyone who finds this information can disseminate it on the web. The same can be said for court personnel, including judges. Right now, there is pending controversial litigation concerning the right of a news organization to publish, on the Internet, the financial disclosure reports of all federal judges. The law requires judges to file these reports.²⁴ The law also allows members of the public access to the reports, but reports are released only to applicants who identify themselves, and permits judges to redact portions of the reports that might threaten security.²⁵ These laws were enacted before the Internet was developed. I don’t care to offer my opinions on this matter, but I

21. See *Boss May Lurk as You Surf the Web*, L.A. TIMES, Aug. 9, 1999, at 3E.

22. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

23. Eric Wieffering, *Blurring of Home, Online and Work May Redraw Privacy Limits*, MINNEAPOLIS STAR TRIB., Feb. 13, 2000, at A1.

24. 5 U.S.C. § 105 (Supp. II 1996).

25. 5 U.S.C. § 105 (Supp. II 1996).

mention it only to show how technology has affected the privacy of the judges themselves.

V. CONCLUSION

The convergence of public interest and advanced technology will serve to make information instantly available and perhaps more interesting to the public. It should speed up the pace of trials and help conserve court resources, including judicial time. A likely result is more publicity for the high profile trial and, perhaps, even more cases that attain high-profile status. Technological and scientific advances are helping finders of fact to ascertain the truth, the ultimate goal of a jury. But all of these remarkable advantages threaten our privacy and raise questions of law and policy we are only now addressing. As they embrace technological changes, our federal courts face challenges to privacy. I welcome suggestions from you law students concerning how all of us might use technology to enhance our ability to serve the public and administer the law.