

PUBLIC RIGHTS, PRIVATE RITES

Reliving *Richmond Newspapers* For My Father*

Laurence H. Tribe**

I.

When I've been asked about my first Supreme Court argument, my resumé reflex has easily generated a routine reply: The case was *Richmond Newspapers v. Virginia*.¹ A man was on trial for the fourth time for stabbing a hotel manager to death. The first trial had resulted in a conviction, thrown out on appeal because the state had introduced inadmissible evidence. The second and third trials had both ended in mistrials. From the perspective of the accused, the fourth time was a charm. He waived his right to a jury and his right to have the trial conducted in public view; the prosecutor made no objection and the trial judge, giving no special justification, simply expelled all observers from the courtroom—including the press and even the victim's children, who were summarily denied any right to watch what passed for justice being done. After a brief hearing behind closed doors, the defendant was acquitted and set free. A transcript was made available a couple of days later to those who were baffled by the sudden reversal of fortune, but we all know what cold comfort and limited information a printed page of dialogue conveys.

Less than a year earlier, in a case where the press and the public had similarly been excluded—there, from a pretrial hearing on a motion to suppress evidence, *Gannett Co. v.*

* © Laurence H. Tribe. This essay first appeared at 6 Green Bag 2d 289 (2003).

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1. 448 U.S. 555 (1980).

*DePasquale*²—the Supreme Court had ruled that the Sixth Amendment right to a “public trial” belonged solely to the accused and was thus the accused’s to assert or to waive. Because the accused in *Richmond Newspapers* had waived his right to a public trial, persuading the Court to hear the case—especially so soon after *Gannett*—was a real challenge. In fact, when counsel for Richmond Newspapers first contacted me about the case, he told me that the client had “[a]t present . . . decided not to petition the United States Supreme Court for certiorari,” a decision I convinced the client to reverse. But because this essay is about my first *argument* and not about the distinct business of persuading the Court to grant review, I’ll skip to the merits and turn to the no less challenging puzzle of how one might overcome the accused’s waiver of his Sixth Amendment right to have the proceedings conducted in public.

It was settled that the accused had no “mirror-image” *right* to insist that the proceedings be *private*, and it seemed to me relevant, possibly crucial, that this was therefore a case where a state official—the trial judge—was entrusted with discretionary power to decide what the public would be permitted to observe and what it would be prevented from observing. That wouldn’t be so unusual if we were dealing with purely *internal* government matters like Oval Office consultations. But this discretionary government power was being exercised with respect to a proceeding that someone *outside* the government—namely, the accused—*could* have made public had he wished to do so. That took the case outside the realm of government control over information generated internally for government’s own use and made it look more like government determination of what sights and sounds in the public domain were fit to be seen and heard. Wasn’t that the essence of censorship?

Well, in a way. But there was one problem, at least as I saw the case: To make an argument based on the First Amendment freedoms of speech and press, one classically needed to have a *willing speaker*: the right to observe and hear is just the flip side of a right to broadcast or speak, and in this case nobody in the courtroom wanted to speak to mere spectators—not to the Richmond Newspapers, and certainly not to the victim’s family.

2. 443 U.S. 368 (1979).

So the First Amendment didn't completely suffice—unless one treated it as a very broad structural guarantee of access to information in an open society, a guarantee not enumerated anywhere in the Bill of Rights, but one reinforced by the Ninth Amendment's mandate that the Constitution's "enumeration . . . of certain rights, shall not be construed to deny or disparage others retained by the people."³

But the Ninth Amendment, I learned as I briefed *Richmond Newspapers* and as I found myself being lobbied hard by the pillars of the media bar, was barely to be mentioned in polite society, much less was it ready for prime time.

Who was I, an utter novice at Supreme Court advocacy, to buck the conventional wisdom on something so basic? Well, I was a lawyer who'd taken a case because he believed in it, who'd been teaching and would teach generations more of law students about the kinds of questions the case raised, who'd gone on record a couple of years earlier in a treatise, *American Constitutional Law*,⁴ on most of the issues the case touched, and who cared a lot more about keeping faith with what he'd feel bound to write and teach in years to come, and with how he thought the Court should be approached, than with what the Poo-Bahs of the establishment thought of him. That's who I was. And am. So the Ninth Amendment argument stayed in. And, I'm happy to report, in the end it hit its target.

As Justice Stevens was to write in his concurring opinion, "never before ha[d] [the Court] squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."⁵ Where was that protection to be found in the Constitution's text? Nowhere, exactly, but the plurality opinion of Chief Justice Burger made a point of recalling how James Madison—responding to widely voiced concerns at the time of the Founding that adding any finite list of rights to the Constitution to assuage the fears of some about potentially excessive government power might perversely backfire, carrying a negative implication about rights not mentioned—had

3. U.S. Const. amend. IX.

4. Laurence H. Tribe, *American Constitutional Law* (1st ed., Found. Press 1978) (available in its current incarnation as Laurence H. Tribe, *American Constitutional Law* vol. 1 (3d ed., Found. Press 2000)).

5. *Richmond Newspapers*, 448 U.S. at 582 (Stevens, J., concurring).

spearheaded a move that “culminat[ed] in the Ninth Amendment,” which was to operate as a “constitutional ‘saving clause,’ . . . to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined.”⁶ The right recognized in *Richmond Newspapers*, although it was later described simply as a First Amendment right (and might thereby be said to have emerged with free speech wings that had shed the Ninth Amendment chrysalis from which it sprang), became the first of only two rights ever grounded by a Supreme Court majority or plurality in an analysis that spelled out its debt to the Ninth Amendment as a rule about how to construe the Constitution. The other such right was that of reproductive choice, whose reaffirmance in a 1992 plurality opinion, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,⁷ was also expressly linked to the Ninth Amendment as a rule of construction.

II.

Richmond Newspapers became a landmark, albeit not one whose final shape can yet be drawn with any real authority. In the wake of the unspeakable events of 9/11, the war on international terrorism not just abroad but at home has predictably called forth arguments for heightened government secrecy, including the closure of deportation and other hearings previously open to the public. Courts grappling with the need to strike a balance consistent both with public safety and with our constitutional traditions have derived conflicting conclusions as to the reach of *Richmond Newspapers*’ principle of public access, with some deferring to the executive branch⁸ and others stressing history’s lesson that “[d]emocracies die behind closed doors.”⁹ Large public questions are at stake. So it’s easy for me to “do” *Richmond Newspapers* as a still unfinished chapter in the development of constitutional law, and it’s a cinch for me to “do” the case as an entry in my c.v., a few lines in a professional biography.

6. *Id.* at 579 n. 15.

7. 505 U.S. 833 (1992).

8. *N. J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002).

9. *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 683 (6th Cir. 2002).

This time, though, I felt the tug of something very different. Asked to write in a personal vein about my first argument at the Court, I felt an impulse I had always previously suppressed whenever the cursor pointed to the “*Richmond Newspapers*” icon on my mental desktop. It was an impulse born, I think, of a simple desire to release a painful truth, a jagged connection, a link whose roots are personal, not professional or academic or legal. It was an impulse that I had previously held in check by a sense that it would be indecorous, self-indulgent, egotistical, for me to inject into the account of *Richmond Newspapers* as a public fact anything quite so private as what the case happened to mean by virtue of its seemingly accidental intersection with my life’s trajectory.

Yet, as I reflected on it, I began to wonder whether the private story—the story that repeats itself silently whenever the public script turns to *Richmond Newspapers*—might in some way have affected what I had dared to say on that February day, or how I argued this point or that. Maybe it did, in some remote way, even affect what the Court wrote in the case. None of us is in full command of precisely which private facts might have left their trace on the public world. But my main reason for deciding to tell the story here was just that it’s too large a part of who I am for me to leave it permanently submerged.

Whether that story matters to anybody but me is, in the end, beside the point. Maybe most of the deepest stories, the stories that frame and etch our lives, are like that: whether and why they “matter” and to whom is outside the frame—like what “really” happened, in a novel you’ve just finished reading, to a character whose fate the author left unresolved, as in the haunting image with which Dylan Thomas closed but never ended one of his loveliest poems—the image in which:

The ball I threw while playing in the park
Has not yet reached the ground.¹⁰

III.

So here’s my story. It begins with a brief, too brief, phone conversation I had with my father late in the evening on

10. The poem is *Should Lanterns Shine*.

February 3, 1980. Not long before, I'd received Virginia's brief on the merits in *Richmond Newspapers*. I'd begun writing my reply brief, due ten days later, and preparing for the oral argument, set for February 19. The next day—February 4—would be my parents' fortieth wedding anniversary. I'd planned to wait until that day to phone them, but Carolyn had urged me not to wait, to phone home that night instead. (Carolyn and I had been married just sixteen years then. "Just sixteen?" When I was growing up, anyone who had been married for even fifteen years had to be ancient. Next year, it will be *our* fortieth anniversary. Can that possibly be true?) I wanted to wait until it was my parents' actual anniversary day, but I went along with Carolyn, not wanting to argue. So I phoned and wished my mother and father a happy "not-quite-anniversary" that night, and then I said good-bye. That would be the last time I would ever hear my father's voice.

If Carolyn hadn't convinced me to call San Francisco that night, I wouldn't be able to recall to this day just when it was that I would have spoken with my father last. We didn't talk all that often, my father and I. We loved each other a lot, but not that many *words* were involved. The next day, forty years to the day after my parents were married in Shanghai, my father suddenly collapsed at home while my mother was at work. He was 78, not really *old* even by 1980 standards, but not young either. He'd had his share of ailments, but his mind was clear and nothing like this had seemed to be in the wings. Yet he had suffered a massive cardiopulmonary failure from which he never recovered.

That afternoon I found myself oddly tired, having no idea yet what had just happened to my father a continent away. I lay in bed and, as Carolyn and I both remember my telling her at the time, I had felt a peculiar numbness, an eerie detachment that I couldn't recall ever having felt before. We both remember my telling her that the only way I could describe it was to say I felt that I was, well, *dying*. Within minutes, the call came from San Francisco telling Carolyn, who then told me, that my father had collapsed and been taken to the hospital. He was in critical condition. There was no way to predict whether he would survive the night. My first reaction was disbelief. Then grief, fear, guilt, hope that he would take a sudden turn for the better,

then certainty that he wouldn't. I took the first flight home I could. Out the airplane window, I thought I saw a shooting star. It took longer than usual to disappear from view. Somehow I knew it was my father. I cried all the way across the country. My father had died before the plane landed in San Francisco.

The next several days remain a blur. Twenty-three years later, though, the pain itself still remains sharp. It helped, in an odd way, that the *Richmond Newspapers* reply brief remained to be completed and filed and that the oral argument in the case, the first I was to present at the Court (although the lawyers who had retained me to do the case hadn't realized, I later learned, that I would be cutting my teeth on quite so large a bone), was set for just two weeks later. It gave me something external to worry about. For just that reason, I suppose it helped, oddly, that the Supreme Court Clerk's Office, while always extremely helpful—one quickly learns that the clerk of just about any court is unbending in inverse proportion to the court's power and its rank in the judicial hierarchy—informed me the Court would be unable to change the date this close to a scheduled argument, despite something as wrenching as a parent's sudden death. (Having dealt with the Supreme Court Clerk's Office a good bit since then, I have the feeling that, if I had been around the track a few more times, I might have found a way around the situation; the Clerk and Deputy Clerks are a tremendously thoughtful and resourceful group once you get to know them. But that was my first time up, and I didn't really have a clue about how to ask for what.) So the briefing and argument schedule were fixed in stone, and in those days—that was long before I'd developed the tiny coterie of brilliant former students and friends (who, at one time or another, included Kathleen Sullivan and Peter Rubin, and who still include Tom Goldstein, Jonathan Massey, and Brian Koukoutchos) who would work on cases with me and could have stood in for me in a pinch—there was nobody to whom I could hand the baton.

In none of the thirty or so Supreme Court cases that I've argued since *Richmond Newspapers* have I passed the days leading up to oral argument in anything like the unfocused, disoriented frame of mind in which I felt those days and nights slip by. In retrospect, I imagine I must have concentrated somehow on the details of the case, the themes I wanted to

stress, the major problems I saw in the position I thought the Court should take. I know that urgent phone calls imploring me, above all else, to forget that “crazy Ninth Amendment argument,” didn’t even scratch the surface of what I was feeling. Literally all I recall about writing the reply brief—which ended (I’ve just reread it) with a call upon the Court to vindicate “a tradition . . . demonstrably central to the public awareness and institutional accountability that define our form of government”—is that I refused to use that brief as a vehicle for backing away from the Ninth Amendment, whose affirmation of rights unwritten and unseen I think I was almost beginning to identify, in some then still unconscious way, with the mystery of why I’d fortunately agreed to call my father the night before his anniversary; of why I’d felt the knock of doom before our phone had rung; and, above all, of what I’d seen streaking across the predawn sky out of the airplane window.

Reflecting now on my resolute commitment to arguing the case in Ninth Amendment terms—and thus in terms of the Constitution’s “tacit postulates,” which my opening brief had reminded then-Justice Rehnquist and Chief Justice Burger that they had only recently described as no less “engrained in the fabric of the document [than] its express provisions”¹¹—I think my grief may have permitted me to see a bit more clearly through the fog of superficial arguments and objections and may have steeled me against the kinds of eleventh-hour distractions and importunings that co-counsel, meaning to be helpful, are prone to inject as a Supreme Court argument nears.

But as I think back to those days and nights now, most of what I remember is the non-stop sense of loss. I remember my surprise at the huge hole in my world where my father, not a physically large man, had been. I remember staring, as I prepared for the argument, at the watch my father had been given by the car dealership for which he worked, not for selling the most cars—he was much too honest ever to win a prize like that—but for being a really terrific guy, kind and generous to all the other salesmen (and they were all *salesmen* in those days) and the janitors and the customers, including the ones he’d

11. *Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., and Burger, C.J., dissenting).

persuaded they didn't really *need* to buy a car. That watch, which I still have, of course made me enormously proud of who my father was. I remember my hopeless, amateurish efforts to console my mother, then only 65, a woman of large, unrealized potential and abandoned dreams, born in Harbin, Manchuria, in 1915, who lived through two world wars the second of which left her alone caring for me while my father, by then an American citizen, was interned near Shanghai in a Japanese concentration camp. I remember how hard I'd found it to accept as a fact that I would never again see that sweet, gentle man, born in Byelorussia in 1902, whom I'd never gotten around to asking, and now could never ask, about how he'd managed to migrate through eight time zones to Siberia and through Manchuria to Shanghai while he was still in his teens; whom I'd never really asked, and now would never be able to ask, about his travels to California while he was still in his twenties, when he had become a United States citizen—a man who was, by all accounts, filled with mischief and adventure before his years of internment by the Japanese, the years that must have changed him so deeply before he became my father, the man whose eyes would well up with tears each time he and my mom saw me off at the airport, the proud and quiet man who would never hear me argue a case or read of my successes at the Court.

Even as I stood up to argue, a large part of me was not in that chamber, its pale marble columns gleaming against a sober background of mahogany and deep red velvet. Part of me was reliving my father's funeral, the open casket, the shock of discovering that the man I loved as "pop" was not actually *inside* that box, something I might never have fully accepted had I not been able to look for myself. I remember thinking just for a few seconds about the family of the murdered hotel manager in Virginia. I remember understanding, in a fuller way than I could have imagined when I first took the case, that the murdered man's wife and kids were among the victims of the state's decision to conduct that trial outside their gaze. For them, *seeing* the processes of justice conclude that the man on trial was innocent of their father's slaying might in some way have been like what I needed to see before the casket closed. I was thinking about that victim's family just as I stood up in the Supreme Court chamber that day, and I was gratified to see the eventual

plurality opinion rely, if only in passing, on the family's right to observe. I think my commitment to victims' rights, even to the point of working with an unlikely coalition of Senators across the political spectrum on a possible victims' rights amendment to the Constitution, has its roots in the emotional equation I felt as I stood before the Court to argue *Richmond Newspapers* so soon after seeing my father's body in that casket.

IV.

As I stood and heard myself for the first time intone the comfortingly unchanging formula, "Mr. Chief Justice, and may it please the Court," I was struck by how nearby the Justices were. They were close enough for ordinary conversation; it was only the power of their robes that put them at such a distance. The nine of them that day appeared neither imposing nor frightening but actually rather benevolent. Whatever nervous edge I've felt on every subsequent time up there—an edge I try to use to my advantage, an edge that dissipates only after the give-and-take of argument is underway—was something I don't recall feeling at all, even when I first stood up, on February 19, 1980. I had been through something large enough to put oral argument into perspective—and, put in perspective, what I was about to do seemed rather small. I hadn't done any sort of moot court to prepare for argument—the circumstances of my father's death and funeral put that out of the question—and that practice, of not preceding an argument with a moot of any kind, quickly turned into an invariable habit with me: I've never done one and never plan to.

To make matters easier (if less edgy and in a way less enjoyable) on my first time up, in those days the questioning by the Justices was more gingerly than it has since become. Often as many as three or four of the Justices would listen to an entire hour of oral argument without asking a single question. That February day was no different. I do recall how odd it felt to be asked a series of questions by Potter Stewart, the Justice for whom I had clerked a dozen or so years earlier. Those years had passed with amazing speed—though not quite as quickly, as I reflect on it, as the nearly quarter century that has flown by between then and now (although in other ways that gap feels

like an eternity). Not long before, it seemed to me as I stood up there, I'd been a law clerk in the Stewart chambers, working with him on opinions that years later I'd teach about, opinions like *Jones v. Alfred H. Mayer Company*¹² and *Katz v. United States*.¹³ But on that cold February day in 1980, I was just another lawyer advocating a cause, a lawyer who had lost a father and who had tried to help his own son (Mark, then 13) and daughter (Kerry, then 7) understand what that meant while comforting them with the thought that their turn to experience such loss still lay far ahead.

I think I had felt emboldened by the circumstances not to pull my punches. If I felt convinced, as I did, that the victims of the Virginia murder belonged in that courtroom—both in the literal reality of the courtroom back in Virginia, and in the virtual reality of the Courtroom in Washington D.C.—the fact that their doctrinal relevance was less than perfectly plain wasn't going to deter me from bringing them to life. And when then-Justice Rehnquist had oddly asked me, early in the argument, just *where* Hanover County, in which the trial took place, was located, I remember thinking about how my plans actually to *visit* the courthouse had been upended by the funeral. I remember realizing that I obviously mustn't mention that simple human fact in my reply to the Justice. I couldn't appear to be asking for his sympathy, I remember thinking. So I said: "It's some miles from Richmond, Mr. Justice." Justice Rehnquist, who was ultimately the sole dissenter in the case, was conspicuously studying a large map. He looked up at me over the edge of the unfolded paper he was holding up at the bench and said, matter-of-factly, "Well, . . . that's like, *most* places are some miles from Richmond. . . ."

What comes back to me most clearly about that moment was that I felt not the slightest embarrassment at my obvious inability to satisfy the Justice's curiosity. All I said was, "I'm afraid I haven't been in Hanover County, Justice Rehnquist." At another time, in another context, I might well have felt driven to try to say something clever. Not that time. So, I didn't know where Hanover County was. Big whoop. I did know—and my

12. 392 U.S. 409 (1968).

13. 389 U.S. 347 (1967).

brief had explained and my argument had underscored—that the Hanover County Courthouse, a diagram of which I’d hired an architect to draw so we could include it as an appendix to our brief and a photo of which I’d appended for good measure, was the place where, I’d been delighted to discover in the library (which was where we used to do research back in the day, prior to the advent of the web), Patrick Henry had delivered one of his soaring orations extolling liberty and savaging the tyranny of King George III—and that he’d delivered it to a packed courtroom, with people literally hanging from the rafters, a sight I thought the Court could more easily conjure with the aid of that architect’s diagram. So much for the argument that, as the trial judge had vaguely hinted, something peculiar about the architecture of the building might have made it unsuitable for the presence of public observers.

Virginia’s Attorney General was up next. I listened to his half hour, taking a note or two, and then stood up, with two minutes of my half hour remaining, for what the transcript suggests was a fairly spirited rebuttal. The red light on the Court’s podium must have gone on when the transcript shows me saying, awkwardly, “My time is up.” (Pretty klutzy way to close, but then I don’t think I’ve ever found a really elegant way to wind up without overstaying my welcome in a Court that, if nothing else, certainly runs on schedule.) But Chief Justice Burger kept me at the podium. He wanted to probe the sources of other rights (he had quite a litany to ask about) that, as I’d urged was true of the right to observe trials, might be rooted more in constitutional tradition and structure than in explicit constitutional text. I imagine—this is pure supposition, not actual memory—that I must have worked at suppressing a huge grin, realizing, as I must have realized by then, that the Chief, not someone I’d tentatively counted in my corner when the day began, was seemingly asking for help in sketching what was to become the analysis in his plurality opinion overturning the decision of the Virginia Supreme Court and holding that criminal trials must, absent extraordinary need, be open to the press and public.

Needless to say, I was only too happy to oblige. Our back-and-forth must have gone on for a couple of minutes, with the red light on all the while (one lesson you learn arguing at the

Court is to take those lights *very* seriously, but not quite as seriously as you take the Chief Justice), until the Chief finally asked—referring to my submission that only a closure order narrowly tailored to a compelling need could overcome the right I was asking the Court to declare—whether we “could prevail by applying a different standard than compelling need.” “We could prevail by applying *any* standard other than no need at all,” I replied. When the Chief said, “That’s right,” his words must have been music to my ears. And when I said, “Thank you,” I’m sure I meant it. I sat down. A few months after that, on July 2, the last day of the 1979-80 Term, the Court handed down its ruling in *Richmond Newspapers*. We had won. We had won, but my father was still gone.

I looked back just a few days ago, when I began writing this memoir, at the desk calendar that I kept in 1980. February 5 is clearly and starkly marked as the day my father died, at 9:28 a.m. on the west coast. February 19 contains a scribbled “LT to argue in USSCt.,” without so much as a mention of the name of the case. For July 2, the day I expected I’d surely find some sort of notation marking the Court’s ruling in my client’s favor in *Richmond Newspapers v. Virginia*, I found I’d written nothing about the case at all. Nothing at all.



