

Spring 1996

## TV Or Not TV--That is the Question

Christo Lassiter

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/jclc>

 Part of the [Criminal Law Commons](#), [Criminology Commons](#), and the [Criminology and Criminal Justice Commons](#)

---

### Recommended Citation

Christo Lassiter, TV Or Not TV--That is the Question, 86 J. Crim. L. & Criminology 928 (1995-1996)

This Criminal Law is brought to you for free and open access by Northwestern University School of Law Scholarly Commons. It has been accepted for inclusion in Journal of Criminal Law and Criminology by an authorized editor of Northwestern University School of Law Scholarly Commons.

# TV OR NOT TV—THAT IS THE QUESTION

CHRISTO LASSITER\*

## I. INTRODUCTION

The Courtroom Television Network, now in its fifth year, is the first serious commercial effort to televise selected trials nationally and to provide expert commentary on what happens in America's courtrooms.<sup>1</sup> More than twenty million viewers have access to the Court TV network.<sup>2</sup> Court TV has televised more than 340 trials.<sup>3</sup> Apart from its entrepreneurial aspirations,<sup>4</sup> Court TV hopes to permit the American public to see the inner workings of a trial courtroom.<sup>5</sup>

---

\* Associate Professor of Law, University of Cincinnati College of Law and "Of Counsel" to the law firm of Post & Jacobs. B.A. 1978, University of Chicago; M.A. 1982, University of Michigan; J.D. 1983, University of Michigan School of Law. The views expressed are solely the views of the author and do not necessarily reflect the views of anyone associated with the University of Cincinnati or with Post & Jacobs. The author gratefully acknowledges Ronna G. Schneider, Professor of Law, University of Cincinnati College of Law for introducing me to this topic, Dean Joseph P. Tomain for helping me to develop my thoughts and to Professor Michael Tigar at the University of Texas Law School and Professor Arnold H. Loewy at the University of North Carolina at Chapel Hill School of Law for reviewing a draft of this article and providing valuable comments. Finally, the author is most grateful to Jennifer Stainforth and Todd Huntley, research assistants extraordinaire and Michele Murphy, library research assistant extraordinaire.

<sup>1</sup> Court TV's fare consists primarily of state criminal prosecutions, but also includes civil cases.

<sup>2</sup> Telephone Interview with Steve Brill, Chief Executive Officer of Court TV (Jan. 11, 1995); see also Laura Morice, *Court TV's Dramas Are Stranger Than Fiction*, STAR TRIB., June 18, 1994, at 1E.

<sup>3</sup> Morice, *supra* note 2, at 1E.

<sup>4</sup> See also Steven Brill *Talks About Court TV* (PBS television broadcast, Dec. 19, 1995).

<sup>5</sup> [O]ne day in 1989 Mr. Brill thought up the idea for Court TV. It came to him while riding in the back seat of a New York taxi, listening to radio coverage of a local trial. "This is good drama," Mr. Brill thought. "Why not do it all day? And on television?" It seemed like a perfect way to reach non-lawyers.

Since its debut in the summer of 1991, Court TV's live coverage has included such "good stories" as the William Kennedy Smith rape trial, the Jeffrey Dahmer insanity hearing, the Rodney King police-brutality trial, the Woody Allen/Mia Farrow custody hearing, the Reginald Denny beating case and—not to be overlooked—that blockbuster of a trial featuring the Menendez brothers, Lyle and Erik, who shot their parents and then went shopping for a Porsche and a couple of gold watches.

When it comes to storytelling, these trials have got it all. Sex. Violence. Cannibalism. Corruption. Greed. Racial injustice. Wife battering. Family intrigue. You could say they are the Greek myths and Russian novels of our time; the modern-day equivalents of the tragic Electra ("Accused of Murdering Mother and Mother's Lover with Brother," as Court TV might caption it on your screen) or the brothers

Televised coverage of trials is a growth industry, fueled by an oversupply of lawyers competing for clients in an information-intensive free market economy<sup>6</sup> as well by a public eager for courtroom drama.<sup>7</sup> Forty-seven states have adopted legislation which allow television cameras in the courtroom in some form, subject to the judge's discretion.<sup>8</sup> However, the exercise of this discretion may yield to the

Karamazov ("Accused of Murdering Father").

"A trial is a story," says Mr. Brill, "and that's part of the fascination. It's about people who are in peril. Someone in that courtroom is either in danger of losing his or her life or losing a lot of money. And they're trying to fight off that peril. And there's a result. Do they win? Or do they lose?"

A trial, when televised live, he says, is also a cliffhanger. Nobody knows the end until the end. Not the judges, not the viewers, not the lawyers, not the defendants. That's the basis for Court TV's recent advertising campaign: "Great Drama. No Scripts."

"It's very exciting," says Mr. Brill, "because anything can happen." And he argues that a sense of community can come out of watching a live event on television: "It gives people a feeling that we're doing this together," he says.

Alice Steinbach, *Steven Brill Plans to Bring the O.J. Simpson Trial to the Small Screen*, BALTIMORE SUN, Sept. 25, 1994, at 1J.

<sup>6</sup> In response to a mushrooming population of lawyers, the bar has increasingly acceded to governance per free market principles. Lawyers may advertise for business. See *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). It should not be surprising then, that in-court cameras with their implications for publicity and free advertising have garnered a following among legal practitioners with marketing or political ambitions.

<sup>7</sup> Paula Span, *Court TV, Tried and True; The Network That Even Lawyers Thought Would Be a Snore Has Turned into a Sleeper*, WASH. POST, Jan. 12, 1994, at D1.

<sup>8</sup> This oft-quoted figure somewhat mischaracterizes the depth and breadth of camera accessibility. Television coverage of trials is not as overwhelming as generally reported. While 47 states permit live television coverage of trials in some form, only about 26 states regularly allow cameras in the courtroom. Furthermore, most states which allow cameras in the courtroom give an individual judge wide discretion to exclude them, especially in domestic and probate courts. See Wendy Benjamin, *Shroud of Secrecy Increasingly Veils Trials in Texas*, HOUSTON CHRON., Mar. 13, 1994, at A1.

The 47 states which permit live television coverage of trials place various types of limitations on such coverage. The limitations are as follows. *Appellate only*—Eight states (Delaware, Idaho, Illinois, Louisiana, Maine, Maryland, Nebraska and Utah) limit coverage to appellate proceedings only. *Defense consent*—Many states require consent to televise all or part of the trial proceeding. Eleven states (Alabama, Arkansas, Indiana, Maryland, Minnesota, Mississippi, Oklahoma, Pennsylvania, Tennessee, Texas and Utah) have enacted statutes which require exclusion of cameras in the absence of defense consent in criminal cases. *Civil cases*—Ten states (Alabama, Arkansas, Indiana, Maryland, Minnesota, Mississippi, Pennsylvania, Tennessee, Texas and Utah) have enacted statutes which require exclusion of cameras in the absence of defense consent. *Victim consent*—Nine states (Alaska, Iowa, Kansas, Maryland, Missouri, New York, North Carolina, North Dakota and Ohio) permit exclusion of cameras for portions of the victim's testimony. Three states (Connecticut, New Jersey and Virginia) have enacted statutes permitting exclusion for the entire trial when the charges involve allegations of sexual misconduct. Two states (Hawaii and Wisconsin) provide for a presumption of good cause to exclude cameras during the taking of testimony from child witnesses. *Witness consent*—Thirteen states (Alabama, Arkansas, Indiana, Minnesota, Mississippi, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Tennessee, Texas and Utah) have enacted statutes permitting exclusion of cameras for that portion of the trial relating to the witnesses' testimony upon the objection of that witness. *Civil trials only*—Pennsylvania permits television coverage of civil trials only. Texas has no

siren call of the media. Only Indiana, Mississippi, South Dakota and the District of Columbia impose an absolute ban against in-court cameras.<sup>9</sup>

Despite the surge in popularity of televised court proceedings, the bar has always, at best, been ambivalent about embracing cameras in the courtroom. Television coverage of a high profile criminal case such as the O.J. Simpson trial—the new “trial of the century” and perhaps the most watched event in history<sup>10</sup>—has by its very success or excess renewed interest in the wisdom of allowing cameras in court.<sup>11</sup>

Contemporaneous with the excesses of television coverage, a discernible tide has risen against cameras in court, especially in simulcasts of high profile cases.<sup>12</sup> It is not yet determined how state courts

statutory rules regarding televised coverage of criminal trials. Eliminating for double counting, these statutory limitations lower to 26 the number of states with statutorily unrestricted opportunities. Of course, in these 26 states, individual judges may exercise discretion to deny the application for televised coverage. See *infra* Appendix A, for a comprehensive summary of state statutes.

<sup>9</sup> See *infra* Appendix A.

<sup>10</sup> The O.J. Simpson case has been an intensely watched worldwide event. Bernard Weinraub, *The Simpson Case: The News Media; TV News Displays Air Power in Chase*, N.Y. TIMES, June 20, 1994, at A1, A12; Steven Brill, *The Eye That Educates*, N.Y. TIMES, July 15, 1994, at A27. See also *Critics Sound Off on O.J. Simpson Trial*, CRAIN COMM. INC. ELECTRONIC MEDIA, Nov. 6, 1995, at 54, available in LEXIS, News library, ARCNEWS file; David Shaw, *A National, Real-Life, Cross-Channel Soap Opera*, L.A. TIMES, Oct. 9, 1995, at S3; Michael Gartner, *O.J. Circus? Blame T.V.*, USA TODAY, Oct. 3, 1995, at 11A. One indicator of the media obsession with the O.J. Simpson trial is the media's criticism of its own obsession with covering the O.J. Simpson trial. See *ABC News Nightline* (ABC television broadcast, July 22, 1994).

<sup>11</sup> See Robert C. Fellmeth, *Sequester Us All Not Just the Jury*, L.A. TIMES, Oct. 21, 1994, at B7. Famed white collar defense lawyer Robert Bennett stated that he hoped the televised Simpson proceedings would slow the movement toward television in courtrooms. Bennett called the practice “grotesque, because the serious business of deciding whether someone murdered two people or not is now just entertainment. Nobody's suggesting secret trials. But if this were just handled by the print media, it wouldn't be hyped to the point that it's hyped.” *Id.* Senator Arlen Specter (R-Pa.) urged the Senate Judiciary Committee Chairman, Senator Orin Hatch (R-Utah), to hold hearings into Judge Lance Ito's decision to allow the televising of the Simpson trial. Jack Reeves, Jack Tory, & Pat Griffith, *Specter Criticizes Televised Trials*, PITTSBURGH POST-GAZETTE, Oct. 15, 1995, at B6. President Clinton stated that the Simpson trial was conducted in a “circus atmosphere” due in large part to the live television coverage and remarked that he is opposed to cameras in the courtroom. John Broder, *Clinton Says Televising Simpson Trial Led to “Circus Atmosphere,”* L.A. TIMES, Sept. 22, 1995, at A28. Prior to deciding whether to allow television coverage of the Simpson trial, Judge Ito had received approximately 12,400 letters from people urging him to ban TV cameras from the courtroom. *Thousands Urge Ito to Ban TV Cameras; Media Groups Will Press the Judge at a Hearing Today to Allow Television Coverage of the Simpson Trial*, ORLANDO SENTINEL, Nov. 7, 1994, at A5.

<sup>12</sup> See, e.g., John Ellement, *Judge Bans TV Cameras at Salvi Trial*, B. GLOBE, Jan. 26, 1996 at 1 (John Salvi killed two abortion clinicians); *Reliable Sources: The Susan Smith Trial—No Cameras Allowed* (CNN television broadcast, July 2, 1995); Lyle Denniston, *Camera's Eye on Blind Justice; Simpson Trial Spells Trouble for Cause of TV Coverage in Court*, BALTIMORE SUN, Oct. 1, 1995, at 1F (listing high profile cases that will not be televised, including the cases of Susan Smith, convicted of drowning her two sons, Richard Allen Davis, accused of the

will cope with the problems of televisions' impact on trials in the aftermath of the O.J. Simpson trial. This question is already under review in a number of influential jurisdictions. For example, the New York State legislature recently rejected a bill to continue its experiment with cameras in the state trial level courts.<sup>13</sup> The state legislatures from California<sup>14</sup> to Georgia<sup>15</sup> have re-examined or adopted more restrictive measures designed to limit cameras in court, while Tennessee has become less restrictive in allowing camera coverage since the O.J. Simpson trial.<sup>16</sup> In-court camera coverage has only on-again/off-again appeal in federal courts, where judges are appointed with life tenure and do not depend on high visibility for re-election. In the 1994 U.S. Judicial Conference, the policy-makers for the federal courts rejected a proposal to allow television cameras in federal courts on a permanent basis,<sup>17</sup> effectively banning cameras from the federal court

---

abduction and murder of Polly Klaas, and Yolanda Saldivar, convicted of murdering the popular Mexican-American singer Selena); Ann W. O'Neill & J. Michael Kennedy, *Judge Bars Television Cameras from Courtroom for Menendez Retrial*, L.A. TIMES, Oct. 7, 1995, at B1; Sharon Waxman, *Nice Doggy? In his Murder Trial Rapper Shows Another Side*, WASH. POST, Dec. 2, 1995, at C1, C4 (Judge Paul Flynn banning television cameras from the trial). See generally Phil Willon, *King of His Court; Constitutional Guarantees of a Free Press and an Open Trial Are Threatened in the Courtroom of a Judge Who Would "Protect" the Public from Its Own Loathsome Interests*, TAMPA TRIB., Mar. 10, 1996, at 1; Robert Marquand, *More Judges Say 'Cut!' to Cameras in Court*, CHRISTIAN SCI. MONITOR, Jan. 10, 1996, at 4.

<sup>13</sup> THE MAJORITY REPORT OF THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS (May 1994) recommended that cameras be permanently allowed in the courtroom. As a result, the Committee on Rules introduced N.Y.A.B. 12289, 215th G.A., 2d Reg. Sess. (1994) to the Assembly Committee on the Judiciary in July of 1994. The Assembly referred the bill to the Committee on the Judiciary. It did not pass. New York's most current experimental camera law, N.Y. JUD. LAW § 218 (Consol. 1994), expired January 31, 1995. Currently two bills have been introduced in the Assembly and the Senate to address this issue. N.Y. A.B. 664, 218th G.A., 1st Reg. Sess., 1995, again proposes that the New York experimental camera law be permanently enacted. As a back-up measure, the Senate bill, prefiled as 1995 N.Y. S. 496, 1995 Reg. Sess., would continue to allow cameras in the courtroom on an experimental basis until July of 1997.

<sup>14</sup> The California Judicial Council is reexamining the use of cameras in the courtroom. See Maura Dolan, *Key State Panel to Consider Major Changes for Trials*, L.A. TIMES, Oct. 31, 1995, at A1.

<sup>15</sup> There is also interest in restricting the use of cameras in Georgia. Both Georgia House Speaker Tom Murphy and State Representative Randy Sauder have proposed legislation which would limit cameras in the courtroom. Peter Manitiuis, *Limit Sought on Cameras in Court; Speaker's Bill Worries Media Lawyer; Senate Noncommittal So Far*, ATLANTA J., Dec. 20, 1995, at B1.

<sup>16</sup> See *Allowing Tennesseans into State Courtrooms*, TENNESSEAN, Dec. 26, 1995, at 12A. (Tennessee has adopted new, less restrictive rules for the use of cameras in the courtroom. Previously, all parties were required to agree to the use of recording devices in the courtroom. Effective January 1, 1996, the decision to use recording devices in the courtroom is one left to the discretion of the presiding judge, with some limitations.).

<sup>17</sup> THE PRELIMINARY REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE U.S. (Sept. 27, 1994) [hereinafter FEDERAL EVALUATION]; *Conference Acts on Courtroom Cameras*, 26 THIRD BRANCH 1 (Oct. 1994). Although the judicial conference did not issue writ-

rooms.<sup>18</sup> In 1996, the U.S. Judicial Commission reversed that absolute position by a fourteen to twelve vote to allow cameras in federal court rooms if the individual judge chooses to do so.<sup>19</sup> The United States Supreme Court has not formally considered, nor appears likely to approve, any request to televise oral arguments before the Supreme Court.<sup>20</sup> Other countries also hesitate to permit cameras in the courtroom. Reported resistance includes courts in Canada,<sup>21</sup> England,<sup>22</sup>

---

ten reasons, the *New York Times* reported that judges voting not to extend coverage were concerned about negative effects of television cameras on courtroom dignity and on jurors and witnesses. See Linda Greenhouse, *U.S. Judges Vote Down TV in Courts: 3-Year Experiment to End on Dec. 31*, N.Y. TIMES, Sept. 21, 1994, at A18; Linda Greenhouse, *Disdaining a Sound Bite, Federal Judges Banish TV*, N.Y. TIMES, Sept. 24, 1994, at E4. But see Henry J. Reske, *Cameras in Federal Court Vote Delayed: Judicial Conference Instead Focuses on Long Range Plan Implementation*, 81 A.B.A. J. 16 (Dec. 1995).

<sup>18</sup> The vote to ban cameras from federal courts followed a three year experimental period allowing cameras in selected courtrooms. The experimental plan created a temporary exception to FED. R. CRIM. P. 53. Rule 53 provides that the "taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." *Id.*

<sup>19</sup> Linda Greenhouse, *Reversing Course, Judicial Panel Allows Televising Appeals Courts*, N.Y. TIMES, Mar. 13, 1996, at A1.

<sup>20</sup> Steve Marshall, *Justice Speaks: No TV in High Court*, USA TODAY, Feb. 13, 1995, at 3A. This article reports on Justice Ginsburg's remarks to the American Bar Foundation session in Miami on Sunday, February 12, 1995. Justice Ginsburg criticized reporters for occasional slips in rushed reporting. *Id.* Justice O'Connor, during a Stanford Alumni gathering, stated her opposition to the use of cameras in appellate proceedings. Tony Mauro, *One Highly Placed Source Speaks in Favor of O.J. Television Coverage*, RECORDER, Oct. 24, 1995, at 3 ("[televising appellate proceedings] would be such a drastic change that it might unduly pressure lower courts to follow suit"). In contrast, Justice Breyer favored cameras in the appellate courtroom as a judge on the First Circuit and may be expected to continue his advocacy on the inclusion of cameras in oral argument before the United States Supreme Court. *The Judge Stephen G. Breyer Confirmation Hearings*, FED. NEWS SERV., July 12-13, 1994. See also Mauro, *supra* (Justice Breyer stating "[t]he arguments for [cameras] seem reasonable"). Justice Kennedy also spoke in favor of the use of cameras in the courtroom, at least in the Simpson trial, stating, "I'm glad the trial was on television. I think some very important lessons will come out of it from the standpoint of the legal process." *Id.* See also Ronald Goldfarb, *The Invisible Supreme Court*, N.Y. TIMES, May 4, 1996, at A15 (Televising Supreme Court hearings would educate the public).

<sup>21</sup> *R. v. Squires*, 18 Ex. C.R. 22 (1992) (dismissing appeal of conviction and \$500 fine under § 67(2) (a) of the Judicature Act (Ont.), which prohibited the taking of or attempt to take any photograph, motion picture or other record capable of visual representations of any person entering or leaving a room in which a judicial proceeding is to be or has been convened). See also Tony Atherton, *Menendez Story is Shallow Free*, OTTAWA CITIZEN, May 21, 1994, at F6; see also Julie R. L. Dam, *The Devil Incarnate: Ending a Sensational Trial, A Toronto Jury Sends Double Murderer Paul Bernardo to Prison for Life*, TIME, Sept. 11, 1995, at 52 (No cameras are allowed in Canadian courts. According to Canadian lawyer, Clay Ruby, "75% of Canadians approved of the way the trial was conducted and about 65% approved of the press coverage.").

<sup>22</sup> John Aston, *Wigs Should Go, But No Cameras in Court, Says Lord Taylor*, Press Ass'n Newfile, Sept. 30, 1992, Law Court New Section. See also Allain Laing, *TV Coverage of English Courts 'Set Back 50 Years'*, HERALD (Glasgow), Aug. 28, 1995, at 5.

Ireland,<sup>23</sup> Scotland,<sup>24</sup> and Italy.<sup>25</sup>

This Article discusses the prejudicial impact of cameras in the courtroom. At the outset, it is important to distinguish between the effect of cameras *in* the courtroom and cameras *outside* of the courtroom.<sup>26</sup> Likewise, it is important to distinguish between pretrial television publicity<sup>27</sup> and television publicity occurring during the trial. This Article focuses on the impact of in-court cameras on the judicial process; it explores the ways that merely adding a camera to the reporter's arsenal of media tools significantly alters the judicial process in ways which pad and pen never did. The wisdom of hindsight presages reconsideration of current practices permitting cameras in the courtroom. TV or not TV in the courtroom is indeed the question. The answer is worth reconsideration starting from first principles.

The lens cap should be put back on cameras in the courtroom. Why not televised trials? The answer in a word is that television makes trials more political and less judicial. In the Anglo-American legal tra-

---

<sup>23</sup> John Maher, *Opposition to Court Television Proposal Grows; Traumatic Impact on Defendants and Witnesses Feared*, IRISH TIMES, Oct. 20, 1994, at 7.

<sup>24</sup> Bruce McKain, *Lord Hope Lays Down Law on TV in Courts*, HERALD (Glasgow), Apr. 7, 1994, at 3. See also Chris Mullinger, *LA Law 'Courting Contempt of Scots Justice'*, SCOTSMAN (Glasgow), Feb. 8, 1995, at 5.

<sup>25</sup> Robert Graham, *Trial By Television, Italian Style*, FIN. TIMES, Oct. 4, 1995, at Arts 17. In the trial of former prime minister, Giulio Andreotti, the court did not allow live television coverage. *Id.* While live radio coverage was permitted, television coverage was permitted only in edited form. *Id.* This ruling was contrary to earlier rulings in anti-corruption trials held in northern Italy. *Id.*

<sup>26</sup> See Jonathan M. Purver, Annotation, *Publication or Broadcast, During Course of Trial, of Matter Prejudicial to Criminal Defendant, as Contempt*, 33 A.L.R. 3d 1116 (1970 and Supp. 1995); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 23.1(b) (2d ed. 1992); *Project: Twenty-Fourth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1993-1994: III. Trial*, 83 GEO. L.J. 1081, 1140-44 (1995) [hereinafter *Twenty-Fourth Annual Review*]; Scott M. Matheson, Jr., *The Prosecutor, the Press and Free Speech*, 58 FORDHAM L. REV. 865 (1990); Mercy Hermida, *Trial by Tabloid*, 7 ST. THOMAS L. REV. 197 (1994); Robert S. Steven, *Prejudicial Publicity Surrounding a Criminal Trial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "Media Circus"*, 26 SUFFOLK U. L. REV. 1063 (1992); Joel H. Swift, *Model Rule 3.6: An Unconstitutional Regulation of Defense Attorney Trial Publicity*, 64 B.U. L. REV. 1003 (1984); Lynn Weisberg, Comment, *On a Constitutional Collision Course: Attorney No-Comment Rules and the Right of Access to Information*, 83 J. CRIM. L. & CRIMINOLOGY 644 (1992).

<sup>27</sup> See Annotation, *Pretrial Publicity in Criminal Case as Affecting Defendant's Right to Fair Trial-Federal Cases*, 10 L. Ed. 2d 1243 (1963); Peter G. Guthrie, Annotation, *Pretrial Publicity in Criminal Case as Ground for Change of Venue*, 33 A.L.R. 3d 17 (1970 and Supp. 1995); Jeffrey F. Ghent, Annotation, *Validity and Construction of Federal Court's Pretrial Order Precluding Publicity or Comment About Pending Case by Counsel, Parties, or Witnesses*, 5 A.L.R. Fed. 948 (1970 and Supp. 1995); LAFAVE & ISRAEL, *supra* note 26, at § 23.2; *Twenty-Fourth Annual Review, supra* note 26; Hermida, *supra* note 26; Fred Graham, *Proceeding: Keynote Address: The Impact of Television on the Jury System: Ancient Myths and Modern Realism*, 40 AM. U. L. REV. 623 (1991).

dition, ideally, courts are elevated above the morass of public clamor, political crassness, personal bias, and petty idiosyncracies to perform the solemn task of deciding competing factual claims in accordance with objectively neutral law. The high mark of secular justice in the advanced stage of modern nations is the separation of justice from general politics.<sup>28</sup> Television is the newest of technology, but it takes us back to the oldest problem for jurisprudence, the merging of justice and politics.

Here is how the eye of a camera brings a political focus to a trial process which is designed to minimize political considerations. To begin, court television viewers are not screened by voir dire, their consideration of matters are not limited by the strict laws of evidence, nor are they sworn to follow court instructions for evaluating the case under consideration. Somewhat like a boxing match, the television public emotes politically at what it sees in a free consciousness form round-by-round. The public reaction becomes the media's recognized perception of the trial—and just as frequently the media creates the news it wants to report. This political, non-deliberative reaction becomes known to the parties at trial via cameras outside of the courtroom through nightly analysis and investigative journalism. Knowledge of the public's reaction in the minds of the trial participants becomes a form of technological tampering that taints the proceedings with political input from the sidelines. Although the rights of a free press and the educational and inspirational potential of television are not easily denied, these considerations must be balanced against the infusion of general politics which television introduces to any process or event it showcases.

Television coverage of a trial would be worthwhile where major issues of law having societal significance were under discussion. And therein lies an argument for using the television as communicator and educator.<sup>29</sup> But in the vast majority of cases there is little in the way of precedent-setting issues.<sup>30</sup> In the main, courts adjudicate highly personal disputes involving intimate details amassed from the personal

---

<sup>28</sup> John H. Wigmore, 1 A PANORAMA OF THE WORLD'S LEGAL SYSTEMS: THE GREEK LEGAL SYSTEM 319 (1928).

<sup>29</sup> Television's role as communicator and educator in providing intelligence on matters of interest to society for the purpose of aiding a democratic people is its most important and most frequently abused ability.

<sup>30</sup> See Paul Feldman, *The Mundane Murder Trial Down the Hall*, L. A. TIMES, Apr. 6, 1995, at A1, compares a typical murder case with the O.J. Simpson trial down the hall. In the typical case there are no computer monitors or video screens—just a prosecutor and a defense lawyer and a few witnesses. See, e.g., Miles Corwin, *Murder on 49th Street; Felipe Gonzales Angeles' Shooting Was Typical of Most of the 836 Homicides in Los Angeles Last Year: No Press Coverage, Few Leads, the Victim Quickly Forgotten. What it Did Have Was a Couple of Cops Driven to Find His Killer*, L.A. TIMES MAG., Mar. 26, 1995, at 22.



lives of people and comprising nothing of interest to the general public beyond that of prurient voyeurism. The trial process represents the best possible human effort to do justice in an imperfect world. In-court camera coverage, which in the words of Steve Brill "gives people a feeling that we're doing this together,"<sup>31</sup> can be prejudicial to the very judicial process it seeks to showcase by infecting it with political bias of all kinds, petty, personal and demographic. Television cameras do so by creating a comprehensive and instantaneous feedback loop between the trial participants and the television audience. This feedback loop provides a medium by which the reactions of a remote public to the ongoings at trial become known to the trial actors. When the trial actors respond to public reaction, the trial loses its judicial character and becomes a bully pulpit for the reigning political concerns as orchestrated by the media.<sup>32</sup>

There are three prejudicial effects of cameras in the courtroom. First, the trial, in reality, operates on a larger theme than the matter under charge; the judicial process is corrupted by a substitution of the solemn, calm, deliberate judgment of the finder of fact for the outrage of an inflamed public. Second, the adversarial system, designed for neutral and dispassionate judicial prosecution, transforms into an instrument of a politically motivated persecution. Third, the public outcry leads to a political vice of judicial disposition against a disfavored minority.<sup>33</sup>

---

<sup>31</sup> Steinbach, *supra* note 5.

<sup>32</sup> The detrimental impact of interjecting unbridled public attention into high profile trials converts a judicial process into a political process. From the high profile trials of antiquity beginning with Socrates (accused of anti-democratic teaching and advocating the overthrow of the democratically elected government, tried before the marketplace public consisting of the court) and Jesus Christ (accused of religious heresy and advocating allegiance to spiritual rule over an occupying government, tried before the public outside the court) to the high profile trials of modern day, including John T. Scopes (accused of teaching evolution in the religious fundamentalist South, tried before a radio audience), Richard Hauptmann (Dutch immigrant accused of kidnapping and causing the death of the baby of Charles Lindbergh, the first solo airplane pilot across the Atlantic, tried before a news reel audience) to O.J. Simpson (a black sports and entertainment celebrity accused of murdering his white wife and her waiter friend, tried before a worldwide television audience), a three point paradigm of politicization becomes evident. First, unbridled public influence substitutes the solemn, calm, deliberate judgment of the finder of fact for the outrage of an inflamed public. Second, unbridled public influence manipulates a trial system designed for neutral and dispassionate judicial prosecution into an instrument of a politically motivated persecution. And third, it permits a political disposition against a politically vulnerable minority. The result is an injustice under the law. The greater the sweep of the audience, the greater is the effect.

<sup>33</sup> The cases chosen by the media as *cause celebre* with uncanny frequency exploit a politically vulnerable defendant to showcase problems with greater implications for society. Thus in modern times the media has focused on black defendants to coordinate national concern about the *cause du jour*. The O.J. Simpson trial carries the additional baggage of highlighting a new "get tough attitude" on domestic violence. The Michael Jackson accusa-

This Article is organized into seven sections. Part II develops the current state of the law regarding live television coverage of trials. Parts III and IV marshal the arguments favoring and opposing cameras in the courtroom, respectively. Part V describes the prejudicial impact of television on trials due to the comprehensive and instantaneous feedback loop between the trial and the remote public. Finally, Part VI offers some concluding observations on the continuing propriety of allowing cameras in the courtroom.

## II. A BRIEF LEGAL HISTORY OF CAMERAS IN THE COURTROOM AND THEIR CURRENT STATUS IN THE COURTS

The history of cameras in the courtroom began crudely in a New Jersey trial room in 1935.<sup>34</sup> The case before the New Jersey trial court concerned the alleged kidnapping of the Lindbergh baby by Bruno Richard Hauptmann.<sup>35</sup> Because the case involved a celebrated American hero,<sup>36</sup> media attention was intense<sup>37</sup> and predictably adverse to the defendant. The *Hauptmann* case was the first to show trial proceedings by audio-visual technology to a remote public, albeit against the instructions of the court. After they had promised the judge that they would only film the trial during recesses, the newsreel cameramen at Hauptmann's trial persuaded the trial judge to allow a camera in the balcony, which overlooked the jury and witness stand. Films of the recordings, however, showed up in newsreel theaters during the trial.<sup>38</sup> The trial judge ultimately barred all in-court photographic equipment during the trial proceedings because the intense media interest created a chaotic and carnival-like atmosphere, which dis-

---

tion suddenly awakened the media to the problem of child sexual molestation. The Mike Tyson trial is heralded as raising consciousness about date-rape, despite not being televised due to a statutory prohibition against cameras and notwithstanding the contemporaneous televised trial of William Kennedy Smith who was acquitted of a date rape charge. The Clarence Thomas confirmation hearings/de facto trial-by-television precipitated concern to end sexual harassment in office settings. And the Marion Berry trial developed heightened concern about personal misconduct by elected government officials.

<sup>34</sup> Marie Adrine, *Lawyers, Witnesses Tune Out Cameras; Focus on Cases*, N.J. LAWYER, Feb. 17, 1992, at 1.

<sup>35</sup> *New Jersey v. Hauptmann*, 180 A. 809 (N.J.), cert. denied, 296 U.S. 649 (1935) (motion picture and sound recording).

<sup>36</sup> Charles Lindbergh was the first pilot to successfully make a transatlantic flight.

<sup>37</sup> See MARC A. FRANKLIN, *MASS MEDIA LAW: CASES AND MATERIALS* 597 (2d ed. 1982). Authorities found the Lindbergh child buried in a shallow grave near the Lindbergh house, following an alleged kidnapping. The story was front page news for weeks. HAROLD L. NELSON & DWIGHT L. TEETER, JR., *LAW OF MASS COMMUNICATIONS* 265 (3d ed. 1978). New theories about the case continue to draw large audiences today. A LEXIS/NEWS search using the inquiry "Bruno Hauptmann" drew 66 references in the Current News (last two years) library.

<sup>38</sup> J. EDWARD GERALD, *NEWS OF CRIME: COURTS AND PRESS IN CONFLICT* 152 (1983).

rupted the dignity and decorum befitting a courtroom.<sup>39</sup> The jury subsequently found Hauptmann guilty and the court sentenced him to death.

In the aftermath of the overwhelming media coverage of the Hauptmann trial,<sup>40</sup> the American Bar Association (ABA) House of Delegates adopted Judicial Canon 35, which recommended a ban of all photographic and broadcast coverage of courtroom proceedings.<sup>41</sup> Of course, ABA canons are advisory only and do not bind the state or federal courts. Thus notwithstanding Canon 35, in the years following *Hauptmann*, a smattering of western states began to embrace the emerging technology known as television. Among those western states which began broadcasting trials were Colorado,<sup>42</sup> Oklahoma,<sup>43</sup> and Texas,<sup>44</sup> which landed the first case challenging the prejudicial impact of cameras in the courtroom before the United States Supreme Court in 1965.

---

<sup>39</sup> *Id.*; *New Jersey v. Hauptmann*, 180 A. 809 (N.J.), *cert. denied*, 296 U.S. 649 (1935) (motion picture and sound recording).

No trial in this century has so degraded the administration of justice. If the life of one man and the unhappiness of hundreds are to be commercialized for the benefit of entertainment, of radio broadcasters, newspaper publishers, newsreel producers; if a public trial means protection from star-chamber tyranny but not from the indignities of the mob, then the ancient institution of trial by a jury of peers is without meaning.

ANTHONY SCADUTO, *SCAPEGOAT: THE LONESOME DEATH OF BRUNO RICHARD HAUPTMAN* 117 (1976).

<sup>40</sup> The ABA committee looking into the media coverage of the Hauptmann trial described it as the "most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." *Report of Special Committee on Cooperation Between Press, Radio and Bar*, 62 REP. OF A.B.A. 851, 861 (1937).

<sup>41</sup> ABA Canon 35 (1937) states, in pertinent part:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

ABA CANONS OF JUDICIAL ETHICS 35 (1937). Tracking the developing technology of moving pictures, in 1939 the ABA amended Canon 35 to explicitly prohibit television coverage as well as still or newsreel cameras. See Justice Harlan's concurring opinion in *Estes v. Texas* for a historical development of Canon 35. *Estes v. Texas*, 381 U.S. 532, 596-601 (1965) (Harlan, J., concurring). In addition, Justice Harlan noted that prior to the adoption of Canon 35, the ABA had considered broadcast of court proceedings to be improper. *Id.* at 597 n.3 (Harlan, J., concurring) (citing ABA Comm. on Professional Ethics and Grievances, Formal Op. 67 (1932)).

<sup>42</sup> *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 296 P.2d 465 (Colo. 1956) (en banc) (the first order allowing for camera coverage in Colorado courts and outlining many arguments pro and con).

<sup>43</sup> See *Cody v. State*, 361 P.2d 307 (Okla. Crim. App. 1961) (the decision to allow or exclude cameras in the courtroom is left to the discretion of the judge and exclusion does not deny defendant the right to a public trial).

<sup>44</sup> See *Estes*, 381 U.S. 532 (1965).

A. THE FOURTEENTH AMENDMENT DUE PROCESS CLAUSE AND THE PREJUDICIAL IMPACT OF CAMERAS IN THE COURTROOM

The Supreme Court first took up the question involving the constitutionality of television coverage of trial proceedings during the heyday of the Warren Court in *Estes v. Texas*.<sup>45</sup> In *Estes*, the Court accepted a broad side challenge to television coverage under the Due Process Clause of the Fourteenth Amendment. In reversing the trial court and the Texas Court of Criminal Appeals,<sup>46</sup> the Court in *Estes* found that televising and broadcasting portions of a trial in which there was widespread interest, over the objection of the criminal defendant, was inherently invalid and infringed upon the fundamental right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment.<sup>47</sup> The holding in *Estes* may be read as being limited to the specific facts of that case. The relevant facts include media sensationalism and chaos in broadcasting, occasioned by the absence of a pooling arrangement and the excesses of television coverage permitted by a hapless judge in a high profile case.

There were six opinions in *Estes*. Three opinions argued for reversal on grounds of prejudice due to television coverage, and three Justices dissented in separate opinions. Justice Clark wrote the opinion of the Court, which sought a per se rule opposing cameras in the courtroom.<sup>48</sup> Chief Justice Warren wrote a concurring opinion, joined by Justices Douglas and Goldberg, which agreed with Justice Clark's desire to impose a per se ban, but relied on actual examples of prejudice by stressing the chaotic nature of the trial. Justice Harlan, explicitly opposing a per se ban, concurred with Justice Clark subject to restricting the holding to sensationalized and chaotic trials such as the one presented on the facts before the court.<sup>49</sup> Thus, the intersection of common ground between the three concurring opinions makes the holding of *Estes* a fact specific due process rejection of televised coverage and not a general ban based upon presumptive prejudice.

The nature of the facts in *Estes*, while typical of the sensational and carnival-like atmosphere which attracts television coverage, were

---

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 534.

<sup>47</sup> *Id.* at 544.

<sup>48</sup> Justice Clark sought to extrapolate somewhat from the facts of the case to advance arguments opposing cameras based upon speculation as to their prejudicial impact. Justice Clark's prior experience as a district attorney in Dallas, Texas, served him well because his arguments about the prejudicial impact of cameras in the courtroom proved unerringly true in the O.J. Simpson trial, the defining high profile, high technology case one generation later.

<sup>49</sup> *Estes*, 381 U.S. at 595 (Harlan, J., concurring).

certainly of a lesser scale than the Hauptmann trial thirty years before. The District Court for the Seventh Judicial District of Texas at Tyler convicted Billie Sol Estes, a financier, for the criminal felony of swindling.<sup>50</sup> The evidence showed that through false pretenses and fraudulent representations, Estes induced certain farmers to purchase non-existent fertilizer tanks and accompanying equipment, and to sign and deliver to him chattel mortgages on fictitious property.<sup>51</sup> The case required a change of venue following trial publicity totaling eleven volumes of press clippings including national notoriety.<sup>52</sup> Newspaper reporters and photographers, television cameras, and spectators filled the courtroom.<sup>53</sup> The pretrial hearings were carried live by both radio as well as television, and the court permitted news photography throughout.<sup>54</sup> At least twelve cameramen operated in the courtroom; cables and wires snaked across the courtroom floor, three microphones rested on the judge's bench and others beamed at the jury box and the counsel table.<sup>55</sup> Veniremen had been exposed to the highly publicized pretrial hearing considering the question of in-court camera coverage.<sup>56</sup> Although the court had begun to exert some measure of control by the time the actual trial began, conditions remained chaotic. The enormous press and television coverage soon made the trial witnesses and original jury panel aware of the notorious character of the accused and the peculiar public importance of the case. The jury too soon realized "that they themselves were televised live and that their pictures were rebroadcast on the evening show."<sup>57</sup> The trial judge allowed cameras in the courtroom over the objection of the accused, but modified his order daily in an attempt to regain control of the court.<sup>58</sup> Partly due to technical difficulties and partly due to the court's evolving rulings concerning television coverage, live television coverage extended only to the prosecution's opening and closing arguments; the public did not see both sides of the case.<sup>59</sup>

*Estes* remains the Supreme Court's most comprehensive indictment against television coverage of criminal trials. Although the Court's arguments may be dismissed as speculative, they serve the modern debate on cameras in the courtroom by framing the concerns

---

<sup>50</sup> *Id.* at 534.

<sup>51</sup> *Id.* at 534, n.1.

<sup>52</sup> *Id.* at 535.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 536.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 536-37.

<sup>58</sup> *Id.* at 537.

<sup>59</sup> *Id.*

of traditionalists with clarity and prescience. The Court's arguments retain considerable vitality with respect to the problems of television coverage of today's headline cases. Justice Clark's opinion delivered on behalf of the Court raises four concerns with allowing televised coverage of trial proceedings. First, Justice Clark was concerned with the potential impact of television on the jurors. Second, he noted that the quality of the testimony in criminal trials will often be impaired if cameras are allowed to operate. Third, he expressed his uneasiness that a major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. Finally, Justice Clark stated that we cannot ignore the impact of courtroom television on the defendant.

The Court left for another day the question of whether the Constitution absolutely prohibited the televising of state criminal trials.<sup>60</sup> Building towards that day, by 1978 six states, led by Colorado after a short hiatus following *Estes*, adopted rules permitting in-court cameras, and ten other states, led by Florida, experimented with programs to televise trials.<sup>61</sup>

By 1978, the Supreme Court had undergone major personnel shifts since the *Estes* decision. And by 1981 television was very much a part of mainstream life and its mystique in the eyes of the general public appeared to be receding. Moreover, by 1981 many state courts had begun to develop a wealth of experience in overcoming the physical obstructions of cameras in the courtroom.<sup>62</sup> Thus when the day finally came to consider a per se ban sixteen years later in *Chandler v. Florida*,<sup>63</sup> the decision was all but anticlimactic. *Chandler* involved the constitutionality of revised Canon 3A(7) of the Florida Code of Judicial Conduct, which permitted electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge, and which implemented guidelines on trial judges obligating the court to protect the fundamental right of the accused in a criminal case to a fair trial.<sup>64</sup> The prosecution charged Chandler and

---

<sup>60</sup> In the following year, the Supreme Court in a related matter reversed the conviction of Dr. Sam Sheppard due to the prejudicial impact of pretrial publicity and the trial court's failure to protect the defendant's right to a fair trial. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

<sup>61</sup> The states adopting rules permitting televised coverage were Alabama, Colorado, Georgia, New Hampshire, Texas, and Washington. The states permitting televised coverage on an experimental basis were Alaska, California, Florida, Idaho, Louisiana, Minnesota, Montana, North Dakota, Oklahoma, Tennessee, West Virginia, and Wisconsin. See *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 790 (1979) (appendix).

<sup>62</sup> *Chandler v. Florida*, 449 U.S. 560, 582 (1981).

<sup>63</sup> *Id.*

<sup>64</sup> Under the current version of Canon 3A(7) of the Florida Code of Judicial Conduct,

others with conspiracy to commit burglary, grand larceny, and possession of burglary tools in connection with a breaking and entering of a well known Miami Beach restaurant.<sup>65</sup> The case attracted media attention apparently because John Sion, an amateur radio operator, by sheer coincidence, had overheard and recorded conversations between the defendants over their police walkie-talkie radios during the break-in.<sup>66</sup>

The trial court permitted electronic coverage of the trial over the objection of the accused. The defense questioned the jury during voir dire, also televised, as to their ability to be fair and impartial despite the presence of cameras during some, or all, of the trial.<sup>67</sup> Each juror responded that television coverage would not affect her decision in any way.<sup>68</sup> The court refused to sequester the jury, but instructed the jury not to watch or read anything about the case and suggested that the jurors "avoid the local news and watch only national news on television."<sup>69</sup> The court declined to instruct the jury not to watch any television, since "no witness' testimony was [being] reported or televised [on the evening news] in any way."<sup>70</sup> Finally, the television camera, only one, was in place for the testimony of Sion, the State's chief witness. The camera returned for closing arguments, but did not depict any side of the defense's case.<sup>71</sup> Except for one minor admonishment, there was no evidence of disorderliness.<sup>72</sup> The jury convicted and the defendants appealed under *Estes* without tendering evidence of specific prejudice.<sup>73</sup>

The Florida Supreme Court denied review, holding that the appeal, which was limited to a challenge to Canon 3A(7), was moot by reason of its decision in *In re Petition of Post-Newsweek Stations, Florida, Inc.*<sup>74</sup> In *Post-Newsweek Stations*, the Florida Supreme Court, having pointedly rejected the argument that either the First or Sixth Amend-

---

the State of Florida remains one of the most open to cameras in the courtroom.

<sup>65</sup> *Chandler*, 449 U.S. at 567.

<sup>66</sup> *Id.* Thus, the media attention was more of a human interest than a high profile celebrity case. The publicity was not on the order of Billie Sol Estes and certainly nowhere near that of the O.J. Simpson trial. "Nothing of the 'Roman circus' or 'Yankee Stadium' atmosphere, as in *Estes*, prevailed here." *Id.* at 582.

<sup>67</sup> *Id.* at 567.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 567-68. The Supreme Court noted that the jury, though not sequestered, was not exposed to "sensational coverage" in the sense of *Estes* or of *Sheppard* (the lower court's holding was overturned due to prejudicial impact of *pretrial* publicity). *Id.* at 582.

<sup>70</sup> *Id.* at 586.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> 370 So. 2d 764 (1979).

ments to the United States Constitution mandated entry of the electronic media into the judicial proceedings, carefully framed its conclusion that the due process clause did not prohibit electronic coverage of judicial proceedings per se.<sup>75</sup>

The United States Supreme Court, in an unanimous opinion by Chief Justice Burger,<sup>76</sup> affirmed the Florida trial court's admission of cameras in the courtroom. In *Chandler*, Justice Burger identified Justice Harlan's concurring opinion in *Estes* as the fifth and critical vote upon which *Estes* rested.<sup>77</sup> Noting that Justice Harlan did not support a per se ban of television cameras in the courtroom, and following an analysis of Justice Harlan's concerns and a discussion of the Court's holding in *Estes*, Chief Justice Burger observed that *Chandler* presented the "countervailing factors" alluded to by Justice Harlan, namely those of educational and informational value to the public.<sup>78</sup>

On the important issue of prejudice, the Court in *Chandler*, at a minimum, appeared to increase the quantum of evidence necessary to trigger a finding of prejudice. "To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters."<sup>79</sup> The Court observed there was no showing "that the presence of the cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast."<sup>80</sup>

Accordingly, in the combination of *Estes* and *Chandler* the Supreme Court struck with Solomon-type wisdom, holding that the Constitution neither prohibited nor mandated televised coverage of trial proceedings where there were safeguards in place to ensure the court could honor the defendant's right to a fair trial and there was no showing of specific prejudice.<sup>81</sup>

---

<sup>75</sup> *Id.* at 774.

<sup>76</sup> Burger, C.J., delivered the opinion of the Court, in which Brennan, Marshall, Blackmun, Powell, and Rehnquist, J.J., joined. Stewart, J. and White, J., filed separate concurring opinions and Stevens, J., took no part in the decision of the case. 449 U.S. at 561 (1979).

<sup>77</sup> *Id.* at 571.

<sup>78</sup> *Id.* at 572.

<sup>79</sup> *Id.* at 581 (citing *Murphy v. Florida*, 421 U.S. 794, 800 (1975)).

<sup>80</sup> *Id.* at 581.

<sup>81</sup> *Id.* at 582-83. In *Estes*, 381 U.S. 532, Justice Clark's plurality opinion indicated that camera coverage in the courtroom involves a per se denial of due process, but only three other Justices supported that proposition. The fifth vote, coming from Justice Harlan's concurrence, while not explicitly requiring a showing of specific prejudice under the high sensationalized and chaotic circumstances of *Estes*, did explicitly reject a per se ban.



B. SIXTH AMENDMENT GUARANTEE OF A PUBLIC TRIAL AS A CHECK AGAINST THE ABUSES OF SECRET PROCESS<sup>82</sup>

1. *Scope of the Right of Publicity*

*Chandler* and its progeny make clear that televised coverage of judicial proceedings does not per se violate a defendant's due process rights.<sup>83</sup> However, the court may exclude cameras from the courtroom if there is an express finding that the defendant's due process rights would be substantially violated by camera coverage.<sup>84</sup> Although

---

<sup>82</sup> U.S. CONST. amend. VI, which governs criminal trials, states, *inter alia*, "in all criminal prosecutions, the accused shall enjoy the right to a . . . public trial. . . ." *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968) (making the Sixth Amendment provisions entitling the defendant to a trial in "all criminal prosecutions . . . by an impartial jury of the State and district wherein the crime shall have been committed" applicable to the States pursuant to the incorporation doctrine). In *Estes*, Justice Clark stated that the purpose of the Sixth Amendment guarantee was to protect the defendant against the abuse of secret process. *Estes*, 381 U.S. at 538-39 (quoting Justice Black in *In re Oliver*, 333 U.S. 257, 268-70 (1948) (footnotes omitted)). Chief Justice Warren's concurring opinion also stressed that the acknowledged purpose behind the publicity requirement was "to provide a fair and reliable determination of guilt." *Id.* at 557 (Warren, J. concurring).

<sup>83</sup> *Chandler v. Florida*, 449 U.S. 560 (1981); *Bell v. Patterson*, 279 F. Supp. 760 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968), *cert. denied*, 403 U.S. 955 (1971); *Williams v. State*, 461 So. 2d 834 (Ala. Crim. App. 1983); *State v. Cardenas*, 704 P.2d 834 (Ariz. Ct. App. 1985); *Ford v. State*, 633 S.W.2d 3 (Ark. 1982); *Gonzales v. People*, 438 P.2d 686 (Colo. 1968) (en banc); *Jent v. State*, 408 So. 2d 1024 (Fla. 1981), *cert denied*, 457 U.S. 1111 (1982); *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764 (Fla. 1979); *State v. Ji*, 832 P.2d 1176 (Kan. 1992); *Willard v. State*, 400 N.E.2d 151 (Ind. 1980); *State ex rel. Grinnell Communications Corp. v. Love*, 406 N.E.2d 809, (Ohio 1980); *State ex rel. Cosmos Broadcasting Corp. v. Brown*, 471 N.E.2d 874 (Ohio Ct. App. 1984); *State v. Newsome*, 426 A.2d 68 (N.J. Super. Ct. App. Div. 1980); *State v. Jessup*, 641 P.2d 1185 (Wash. Ct. App. 1982). *But see* *Estes v. Texas*, 381 U.S. 532 (1965) (though Justice Clark's opinion indicated that television camera coverage in the courtroom involves a per se denial of due process, only three other Justices supported per se rule).

<sup>84</sup> *Georgia Television Co. v. State*, 363 S.E.2d 528 (Ga. 1988) (court found that defendants' rights would be substantially violated by the increased notoriety camera coverage would give the case). Courts are most likely, however, to find a violation of due process if an otherwise competent defendant will be rendered incompetent or unable to effectively participate in her own defense due to the influence of cameras in the courtroom. *State v. Green*, 395 So. 2d 532 (Fla. 1981); *State v. Gregory M.*, 22 Media L. Rep. (BNA) (N.Y. Fam. Ct. July 11, 1994) (court prohibited camera coverage where defendant stated he would not testify in his own behalf if coverage was allowed); *State ex rel. Miami Valley Broadcasting Corp. v. Kessler*, 413 N.E.2d 1203 (Ohio 1980). *But see* *Gore v. State*, 573 So. 2d 87 (Fla. Dist. Ct. App. 1991) (where defendant and his psychologist maintained that camera coverage would render him incapable of participating effectively in his trial, the court did not find either testimony to be credible and allowed camera coverage regardless); *State v. Ji*, 832 P.2d 1176 (Kan. 1992) (judge allowed camera coverage despite defense's assertion that due to defendant's delusional beliefs camera coverage would prevent a fair trial by exciting defendant and encouraging him to use the coverage as a forum for arguing those beliefs); *State v. Hovey*, 742 P.2d 512 (N.M. 1987) (court allowed camera coverage of portions of the trial over defendant's objection that cameras made him nervous and would affect his credibility); *People v. Shattell*, 578 N.Y.S.2d 694 (App. Div. 1992) (assertion that camera coverage of some witnesses and not others would bias the jury in their weighing of the

the framers of the Constitution did not prioritize the Sixth Amendment guarantee of publicity as a check against the abuse of secret process above the media's First Amendment right of access, in a part of *Estes* left unchallenged by *Chandler*, the Court recognized just such a priority. However, once *Chandler* found that the Sixth Amendment did not preclude cameras in the courtroom per se, some courts began to interpret the scope of the Sixth Amendment right to a public trial as establishing a right for the general public to observe the trial.<sup>85</sup> Thus, an issue developed as to the scope of the Sixth Amendment right to a public trial: was it limited to the defendant's guarantee of publicity as a check against the abuses of secret process, or did it extend an independent right to the media to inform the public about the trial proceedings?

The Court answered this question in *Gannett Co. v. DePasquale*,<sup>86</sup> holding that the public had no independent right of access to a *pre-trial* judicial proceeding under the Sixth Amendment.<sup>87</sup> In *Gannett*, the defendants were on trial for murder and the judge excluded the public and press from a pretrial suppression hearing and prevented them from receiving an immediate transcript of the hearing.<sup>88</sup> In finding no independent right of public access to the trial, the Court stated that Sixth Amendment rights to a speedy and public trial were personal to the accused and that the Sixth Amendment did not guarantee any right of access for the public.<sup>89</sup> While the Court acknowledged the public's interest in open proceedings, it stated that this interest was adequately protected by the presence of trial participants in the adversarial system.

In short, the Court defined the contours of the Sixth Amend-

---

importance of various testimony was found to be speculative and no prejudice was found).

<sup>85</sup> *United States v. American Radiator*, 274 F. Supp. 790 (D. Pa. 1967); *Phoenix Newspapers, Inc. v. Jennings*, 490 P.2d 563 (Ariz. 1971); *Phoenix Newspapers, Inc. v. Superior Court*, 418 P.2d 594 (Ariz. 1966); *Oxnard Publishing Co. v. Superior Court*, 68 Cal. Rptr. 83 (Ct. App. 1968); *People v. Holder*, 332 N.Y.S.2d 933 (App. Div. 1972).

<sup>86</sup> 443 U.S. 368 (1979).

<sup>87</sup> *Id.* at 370-71, 394. The defense requested that the hearings be closed without objection from the prosecutor or press. The next day the press asserted a right of access to the transcript.

<sup>88</sup> *Id.* at 375.

<sup>89</sup> *Id.* at 379-80. The right to a public trial, like other Sixth Amendment guarantees, is personal to the accused and does not confer an independent right of access to the public. *Id.* The Sixth Amendment guarantee of a public trial is for the benefit of the defendant alone. *Id.* at 380-81 (citing *In re Oliver*, 333 U.S. 257 (1948); *Estes v. Texas*, 381 U.S. 532 (1965)). The Court recognized a strong societal interest, but asserted that by the time of the adoption of the Constitution, public trials were clearly associated with the protection of the defendant, and pretrial proceedings, precisely because of the same concern for a fair trial, were never characterized by the same degree of openness as were actual trials. *Id.* at 384-91.

ment right of publicity as one belonging to the defendant, the purpose of which is to ensure against the abuses of secret process. In *Chandler*, the Court held that televised criminal proceedings did not inherently interfere with the defendant's right to a fair trial, and therefore the federal constitution does not prohibit electronic coverage of criminal trials.<sup>90</sup> Following *Chandler*, numerous state courts have found that permitting electronic coverage of criminal proceedings does not violate a criminal defendant's Sixth Amendment rights.<sup>91</sup> And, consistent with its decisions limiting the Sixth Amendment guarantee of publicity to a personal right of the defendant, the Court later recognized limits on press access to the courtroom to fulfill the defendant's Sixth Amendment right of publicity.<sup>92</sup> Following on the directive of these holdings, the Seventh Circuit in *United States v. Kerley* found that the Sixth Amendment right to a public trial did not guarantee the defendant the right to broadcast his trial.<sup>93</sup>

## 2. *The Burden of Proof to Show Prejudice*

Recall that under *Chandler's* interpretation of the Fourteenth Amendment, the due process clause neither prohibited nor mandated televised coverage of trial proceedings where there were safeguards in place to ensure the court could honor the defendant's right to a fair trial and where there was no showing of specific prejudice. The interplay of textual rights found in the First and Sixth Amendments com-

---

<sup>90</sup> *Chandler v. Florida*, 449 U.S. 569, 578-79, 582 (1981).

<sup>91</sup> See, e.g., *People v. Spring*, 200 Cal. Rptr. 849, 853-854 (Ct. App. 1984) (presence of television camera during trial did not violate criminal defendant's Sixth Amendment right to a fair trial); see also *State v. Smart*, 622 A.2d 1197, 1206-07 (N.H. 1993) (televised coverage of high-profile murder trial did not prejudice defendant), cert. denied, 114 S. Ct. 309 (1993); *Stewart v. Commonwealth*, 427 S.E.2d 394, 401-2 (Va. 1993) (presence of video cameras during criminal trial did not violate defendant's due process rights), cert. denied, 114 S. Ct. 143 (1993); *Florida v. Garcia*, 12 Media L. Rptr. (BNA) 1750 (Fla. Cir. Ct. 1986) (criminal defendants did not have right to bar broadcast coverage of criminal proceedings).

<sup>92</sup> *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-10 (1978) (the Sixth Amendment does not require that the media be given physical access which would give them the opportunity to electronically record judicial proceedings). The Sixth Amendment does not create a right of unlimited media access to the courtroom. *Estes*, 381 U.S. at 541-44; see also *Tribune Review Publishing Co. v. Thomas*, 153 F. Supp. 486, 493 (D. Pa. 1957), aff'd, 254 F.2d 883 (3d Cir. 1958); *Van Orden v. State*, 469 N.E.2d 1153, 1157 (Ind. 1984), cert. denied, 471 U.S. 1104 (1985); *Cody v. State*, 361 P.2d 307, 317-18 (Okla. Crim. App. 1961).

<sup>93</sup> 753 F.2d 617, 620 (7th Cir. 1984). In this case, the defendant faced charges of dodging the draft. He sought to photograph and broadcast his court proceedings. *Id.* at 617-18. After finding that such coverage was prohibited by the Federal Rules of Criminal Procedure Rule 53, the *Kerley* court turned to the First and Sixth Amendment questions presented in the case. *Id.* at 620. The court stated that the Supreme Court has expressly rejected such an extension of Sixth Amendment rights. *Id.* (citing *Warner Communications*, 435 U.S. at 610).

pletes the prejudice analysis. Two decisions involving the press, *Richmond Newspapers* and *Globe Newspaper*, recognize a limited First Amendment right of access by the print media. In these two cases, the Supreme Court implicitly reversed itself on the burden of proof requirement to show prejudice. Under the First Amendment guarantee, in highly sensational and chaotic circumstances such as occurred in *Estes*, the defendant need not show specific prejudice.<sup>94</sup> However, while not expressly reversing the assignment of the burden of proof established in *Chandler*, the Court seemed to suggest that some quantum of evidence would be necessary to trigger a finding of prejudice under the Sixth Amendment.<sup>95</sup> In *Globe Newspapers* the Court struck down a Massachusetts state law making exclusion of the press mandatory during the testimony of minors alleging sexual abuse; the Court expressly placed the burden of proof on the defendant to demonstrate prejudice.<sup>96</sup> Thus, the First Amendment right of access places the burden of proof to show prejudice on the party opposing press coverage; the Sixth Amendment right to a fair trial requires some quantum of evidence that inclusion of cameras in the courtroom, over the objection of the defendant, would prejudice the defendant and constitute a violation of the publicity element of the Sixth Amendment right to a fair trial.

Specific prejudice is fact specific. There are numerous appellate court decisions finding that camera coverage of the trial did not per se violate the defendant's due process rights and therefore sustaining the conviction under the circumstances of the case.<sup>97</sup> But the greater wealth of appellate authority seems to rest with courts sustaining the exclusion of cameras from the courtroom where the defendant objected to their presence and where the trial court made an express finding that the defendant would suffer actual prejudice due to camera coverage.<sup>98</sup>

---

<sup>94</sup> See *Estes*, 381 U.S. at 544.

<sup>95</sup> See *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

<sup>96</sup> See *Globe Newspaper Co. v. Superior Ct.* 457 U.S. 596, 606-07 (1982).

<sup>97</sup> See, e.g., *Bell v. Patterson*, 279 F. Supp. 760, 769 (D. Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1068), *cert. denied*, 403 U.S. 955 (1971); *Williams v. State*, 461 So. 2d 834, 837 (Ala. Crim. App. 1983); *State v. Cardenas*, 704 P.2d 834, 836 (Ariz. Ct. App. 1985); *Gonzales v. People*, 438 P.2d 686, 687-88 (Colo. 1968) (en banc); *Jent v. State*, 408 So. 2d 1024, 1029 (Fla. 1983), *cert. denied*, 457 U.S. 1111 (1982); *In re Post-Newsweek Stations, Fla. Inc.*, 370 So. 2d 764, 771 (Fla. 1979); *Willard v. State*, 400 N.E.2d 151, 158 (Ind. 1980); *State v. Ji*, 832 P.2d 1176 (Kan. 1992); *State ex rel. Grinnell Communications Corp. v. Love*, 406 N.E.2d 809, 810-11 (Ohio 1980); *State ex rel. Cosmos Broadcasting Corp. v. Brown*, 471 N.E.2d 874 (Ohio Ct. App. 1984); *State v. Newsome*, 426 A.2d 68, 72-73 (N.J. Super. Ct. App. Div. 1980); *State v. Jessup*, 641 P.2d 1185, 1194 (Wash. Ct. App. 1982).

<sup>98</sup> *Georgia Television Co. v. State*, 363 S.E.2d 528 (Ga. 1988) (court found that defendant's rights would be substantially violated by the increased notoriety camera coverage would give the case). Courts seem more likely, however, to find a violation of due process

## C. FIRST AMENDMENT RIGHT OF ACCESS

## 1. Access by the Press

The Court has often addressed the First Amendment guarantees in broad terms, suggesting that the right to a "public trial" is abridged if the press is excluded. For example, the opinion in *Craig v. Harney*<sup>99</sup> contains the following significant language:

A trial is a public event. What transpires in the courtroom is public property. Those who see and hear what transpired can report it with impunity. There is no special prerequisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit or censor events which transpire in proceedings before it.<sup>100</sup>

It is equally well established that freedom of the press is not confined to newspapers or periodicals but is a right of wide import and "in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion."<sup>101</sup>

While finding no independent right of the broadcast media to televise trials under the Sixth Amendment, the majority of the Justices deciding *Gannett* specifically pointed out that they were not addressing any First Amendment issues.<sup>102</sup> But in the year following *Gannett*,

---

if an otherwise competent defendant will be rendered incompetent or unable to effectively participate in her own defense due to the influence of cameras in the courtroom. See *State v. Green*, 395 So. 2d 532 (Fla. 1981); *State ex rel. Miami Valley Broadcasting Corp. v. Kessler*, 413 N.E.2d 1203, 1205 (Ohio 1980); *State v. Gregory M.*, 22 Media L. Rep (BNA) 2252, 2254 (N.Y. Fam. Ct. July 11, 1994) (court held that because respondent was considering testifying in his own behalf but was reluctant to do so if camera coverage were allowed, such coverage should not be allowed). *But see Gore v. State*, 573 So. 2d 87, 89 (Fla. Dist. Ct. App. 1991) (where defendant and his psychologist maintained that camera coverage would render him incapable of participating effectively in his trial, the court did not find either testimony to be credible and allowed camera coverage regardless); *State v. Ji*, 832 P.2d 1176, 1199 (Kan. 1992) (judge allowed camera coverage despite defense's assertion that due to defendant's delusional beliefs camera coverage would prevent a fair trial by exciting defendant and encouraging him to use the coverage as a forum for arguing those beliefs); *State v. Hovey*, 742 P.2d 512, 515 (N.M. 1987) (court allowed camera coverage of portions of the trial over defendant's objection that cameras made him nervous and would affect his credibility); *People v. Shattell*, 578 N.Y.S.2d 694, 696 (App. Div. 1992) (assertion that camera coverage of some witnesses and not others would bias the jury in their weighing of the importance of various testimony was found too speculative and no prejudice was found).

<sup>99</sup> 331 U.S. 367 (1947).

<sup>100</sup> *Id.* at 374.

<sup>101</sup> *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938); *Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952). See also *Maryland v. Baltimore Radio Show Inc.*, 338 U.S. 912 (1950); *Craig v. Harney*, 331 U.S. 367 (1947).

<sup>102</sup> *Gannett Co. v. DePasquale*, 443 U.S. 368, 392 (1979). The Court distinguished its decision in *Gannett* in a subsequent case. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 571 (1980) (plurality opinion), the Court recognized a public right to attend trials based on the First Amendment and that the press works as a surrogate for the public in the courtroom.

the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,<sup>103</sup> explicitly addressed the print media's First Amendment right of access to trial and held that the First Amendment implicitly provides some protection against the exclusion of the press from criminal trials.<sup>104</sup> In a plurality opinion delivered by Chief Justice Burger, the Court in *Richmond Newspapers* first focused on the fact that criminal trials were historically open to the public.<sup>105</sup> The plurality then found an implicit right of access in the First Amendment guarantees of a free press, free speech, and the right of assembly.<sup>106</sup> The right to publish what takes place at a trial, the plurality then reasoned, would lose meaning if the press were denied access to a trial.<sup>107</sup> The Court also championed the role of the press in enhancing the public confidence in the integrity of the trial process. It noted that "[t]o work effectively, it is important that society's criminal process satisfy the appearance of fairness," and the appearance of justice can best be provided by allowing people to observe it.<sup>108</sup> However, the Court in *Richmond Newspapers* did not find the media's right of access to be absolute, but rather concluded that reasonable limitations could be imposed.<sup>109</sup>

While the Court in *Richmond Newspapers* specifically granted access to attend criminal trials, the plurality noted that civil trials,<sup>110</sup> as well as criminal trials, are presumptively open to the public and press.<sup>111</sup> The divergence of the theories relied upon by the plurality

---

<sup>103</sup> *Richmond Newspapers*, 448 U.S. at 580 (plurality opinion).

<sup>104</sup> *Id.* The absence of a majority opinion and the number of divergent opinions makes it difficult to say much more about the decision with any certainty. G. Michael Fenner & James L. Koley, *Access to Judicial Proceedings: To Richmond Newspapers and Beyond*, 16 HARV. C.R.-C.L. L. REV. 415, 420-21 (1981). Although the judgment was by a margin of seven to one, the greatest number of justices joining one opinion was three. *Id.* at 421 n.30. Moreover, as a result of the number of opinions, the decision in *Richmond Newspapers* lacked a unifying rationale. See Lillian R. BeVier, *Like Mackerel in the Moonlight: Some Reflections on Richmond Newspapers*, 10 HOFSTRA L. REV. 311, 321 (1982). BeVier argues that the plurality opinion in *Richmond Newspapers* failed to adequately explain why *Gannett* was decided on Sixth Amendment grounds and *Richmond Newspapers* on First Amendment grounds, and that the number of opinions reflected a certain intransigence and an absence of consensus among members of the Court on the media's right of access to report on trial proceedings. *Id.*

<sup>105</sup> *Richmond Newspapers*, 448 U.S. at 563-75 (plurality opinion).

<sup>106</sup> *Id.* at 577 (plurality opinion).

<sup>107</sup> *Id.* at 576-77 (plurality opinion).

<sup>108</sup> *Id.* at 571-72 (plurality opinion).

<sup>109</sup> *Id.* at 581 n.18 (plurality opinion). Justice Brennan concurred with the plurality on the grounds that the First Amendment played an important structural role our republican form of government. *Id.* at 587-88 (Brennan, J., concurring).

<sup>110</sup> See Carolyn E. Riemer, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267, 1283 n.60 (1985) for an excellent discussion on the First Amendment right to televise civil trials.

<sup>111</sup> *Richmond Newspapers*, 448 U.S. at 577 n.12 (plurality opinion). In a concurring opinion, Justice Brennan also found a right of access, but based the finding on the structural

and Justice Brennan in his concurrence made the scope of the right of access recognized in *Richmond Newspapers* unclear.

The Supreme Court further defined its *Richmond Newspapers* decision in *Globe Newspaper Co. v. Superior Court*.<sup>112</sup> In *Globe Newspaper*, the Court reviewed a Massachusetts law that prohibited access to trials during the testimony of a minor who was the victim of a sexual offense.<sup>113</sup> The Court held that this mandatory closure rule violated the First Amendment.<sup>114</sup> Justice Brennan, a champion of the media since his dissent in *Estes*, wrote the majority opinion. Justice Brennan cited two basic reasons why the right of public access to criminal trials is protected by the First Amendment. First, criminal trials historically have been open to the public and, over time, this presumption of openness has remained secure.<sup>115</sup> Second, public access to criminal trials plays an important role in the proper functioning of the judicial and governmental processes.<sup>116</sup> While affirming that the media's First Amendment right of access, though constitutionally guaranteed, is not an absolute right,<sup>117</sup> the Court held that the state must show a compelling government interest to successfully exclude the public and press from a trial.<sup>118</sup> In addition, an order preventing access must be narrowly drawn to serve this compelling governmental interest.<sup>119</sup> Although the Court found that the state's interest in protecting minors was a compelling one, the Court held that the mandatory closure rule unconstitutionally denied access because the statute was not narrowly tailored to meet the state's interest.<sup>120</sup>

Juror privacy is one area which has met the Court's standards to invoke a blanket denial of camera coverage. While the Court has recognized that the guarantee of open proceedings include access to voir

---

role the First Amendment plays in maintaining America's republican form of government. *Id.* at 587 (Brennan, J., concurring).

<sup>112</sup> 457 U.S. 596 (1982).

<sup>113</sup> *Id.* at 598.

<sup>114</sup> *Id.* at 610-11 & n.27. While recognizing that such closure may be appropriate in some cases, the Court in *Globe Newspaper* held that "a rule of mandatory closure respecting the testimony of minor sex victims [was] constitutionally infirm." *Id.* The Court asserted that need for closure should be ascertained on a case-by-case basis. *Id.* at 608.

<sup>115</sup> *Id.* at 605 (citations omitted).

<sup>116</sup> *Id.* at 605-6. The Court argued that access to trials allows for public scrutiny of the judicial process, which in turn enhances the integrity of the fact-finding process. Thus, access benefits both the defendant and the public. *Id.* at 606. In addition, the Court concluded that open trials result in an appearance of fairness that increases the public's respect for the judicial process. *Id.*

<sup>117</sup> *Id.* at 606 (citing *Richmond Newspapers, Inc., v. Virginia*, 448 U.S. 555, 581 n.18 (1980)) (plurality opinion).

<sup>118</sup> *Id.* at 606-07.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 607-09.

dire examination of potential jurors in a criminal case, the Court has placed limits on media access to venireperson questionnaires.<sup>121</sup> The concern for juror privacy regarding information contained in jury questionnaires devolves from potential embarrassment over publication of intimate details of life experiences and fear of strangers. Two episodes occurring in Texas courts in the same week of March 1994 show that these concerns are real. A Denton, Texas court jailed Diana Brandborg, a venire person, in a trial for refusing to answer jury selection questions she believed were too personal.<sup>122</sup> Later that week, in an unrelated matter, a defense attorney in Fort Worth allowed his client, who was on trial for robbery, to look at jury questionnaires. The accused then telephoned a potential juror and made threatening remarks to her.<sup>123</sup>

If courts are to limit camera access on the basis of an asserted psychological impact, they must do so on a case-by-case basis. The court has a general duty to ensure decorum in the courtroom, which stems from a need to maintain an atmosphere conducive to profound and undisturbed deliberation.<sup>124</sup> Any disruption of this atmosphere threatens the litigants' constitutional right to a fair trial.<sup>125</sup> Prohibiting cameras in the courtroom must bear a reasonable relationship to the concern of preserving dignity during judicial proceedings.<sup>126</sup>

---

<sup>121</sup> *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). *Press-Enterprise Co.* moved that the voir dire examination of jurors in the trial of a man charged with raping and murdering a teenage girl be open to the public. *Id.* at 503. While the *voir dire* lasted six weeks, only three days of the proceedings were open to the public. *Id.*

<sup>122</sup> CNN television broadcast, *Texas Woman in Jail for Not Answering Juror Questions*, Mar. 10, 1994 (Transcript #666-1), available in LEXIS, News Library, ARCNWS file; *Court Upholds Ruling In Jury Questionnaire Case*, AUSTIN AM.-STATESMAN, Sept. 10, 1994, at B4 (Texas Court of Criminal Appeals upheld contempt ruling against Brandborg); *Striking a Blow For Jurors' Privacy Rights*, TEX. LAW., June 26, 1995, at 5 (U.S. Magistrate Judge Robert Faulkner vacated the contempt order and three day jail sentence Brandborg had received for refusing to answer jury selection questions).

<sup>123</sup> UPI, *Jury Form Leads to Call From Felon to Woman*, Mar. 11, 1994, available in LEXIS, News library, ARCNWS file; CNN television broadcast, *Two Texas Cases Raise Questions About Jurors' Privacy*, Mar. 15, 1994 (Transcript #553-2), available in LEXIS, News library, ARCNWS file.

<sup>124</sup> See MODEL CODE OF JUDICIAL CONDUCT CANON 3.B(3) (1990) ("[a] judge shall require order and decorum in proceedings before the judge"); *State v. Clifford*, 123 N.E.2d 8, 10 (Ohio 1954) (empowering judge to maintain decorum), *cert. denied*, 349 U.S. 929 (1955); *In re Hearings Concerning Canon 35*, 296 P.2d 465, 467 (Colo. 1956).

<sup>125</sup> *Clifford*, 123 N.E.2d at 10; *State v. Gregory M.*, 22 Media L. Rep. (BNA) (N.Y. Fam. Ct. July 11, 1994).

<sup>126</sup> *In re Mack*, 126 A.2d 679, 682 (Pa. 1956), *cert. denied*, 352 U.S. 1002. See *In re Hearings Concerning Canon 35*, 296 P.2d 465, 468 (Colo. 1956) (en banc) (following demonstrations of camera equipment, court held that prohibition of cameras in the courtroom is no longer required to maintain dignity and decorum).



## 2. *Prior Restraints on Pretrial Publicity*

Although this Article addresses the impact of cameras in the courtroom during the trial proceedings, these influences are to a very real degree not entirely separable from pretrial television coverage and cameras outside the courtroom during trial. Because of the unavoidable overlap in subject matter, a brief analysis of Supreme Court case law involving pretrial publicity affords some indication of how the Court may deal with allegations of prejudicial impact due to trial publicity from in-court cameras.<sup>127</sup>

The first Supreme Court decision to strike down a state conviction solely on the basis of pretrial publicity was *Irvin v. Dowd*,<sup>128</sup> a case pre-dating *Estes*. There the county prosecutor and local police officials issued press releases announcing that Irwin was a "confessed slayer of six," and news stories added that he was a parole violator, and a fraudulent check artist.<sup>129</sup> Although the specific taint in *Irvin* was adequate to constitute a due process violation and reversible error, the Court, per Justice Clark, observed that pretrial disclosure of information known to the prosecution alone would not necessarily deny the defendant a fair trial:

In essence the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . "The theory of law is that a juror who has formed an opinion cannot be impartial." . . . It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, and widespread and diverse methods of communication, an important case can be expected to

---

<sup>127</sup> Perhaps *Sheppard v. Maxwell*, 384 U.S. 333 (1966) is the most notorious "trial by newspaper" case of all involving a fatal mix of excessive pretrial and trial publicity. This case spawned the television series, *The Fugitive*, and later the movie by the same name. Interestingly, the *Sheppard* case was the first high profile case of F. Lee Bailey, who is now one of America's best known defense lawyers, and was a member of O.J. Simpson's defense team. In *Sheppard*, the Court, per Justice Clark, with only Justice Black dissenting, agreed with the finding of the Ohio Supreme Court that the atmosphere of the defendant's murder trial was that of a "'Roman Holiday' for the news media." During the entire nine weeks of trial, reporters jammed the courtroom and the hustle and bustle of their comings and goings on made it difficult to hear witnesses notwithstanding the installation of a loud-speaker in the courtroom. The cameramen and television personnel deluged the corridor outside the courtroom. Prejudicial information, much of which was not admitted into evidence, flowed freely. And yet, court did not order jury sequestration until the beginning of deliberations. Finding that Dr. Sheppard did not receive a fair trial, the court reversed upon a totality of the circumstances standard, blaming the media for release of prejudicial information and the judge for lack of courtroom decorum. Dr. Sheppard won acquittal for the same offense upon retrial. Michael Furquhar, *Nowhere to Hide; The Bizarre Case of Dr. Sam Sheppard Will be Forever Linked to 'The Fugitive'*, WASH. POST, Oct. 3, 1993, at F1. *Sheppard* is an important case for highlighting media distraction generally, but its excesses were those of the press, and not that of the electronic media.

<sup>128</sup> 366 U.S. 717 (1961).

<sup>129</sup> *Id.* at 720, 726.

arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. . . . It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.<sup>130</sup>

In the *Chandler* era, the Court in *Murphy v. Florida*<sup>131</sup> affirmed its position taken in *Irwin* that pretrial publicity alone could not serve to deny a fair trial. In *Murphy*, Justice Marshall, writing for the majority stated:

[*Irwin, Estes, Sheppard and Rideau*] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process [as long as the juror is "equal to the task" of impartial judgment].<sup>132</sup>

Indeed, shortly after *Murphy*, the Court in *Nebraska Press Association v. Stewart*<sup>133</sup> struck down a Nebraska state judge's restraining order prohibiting the press from publishing certain information prejudicial to the defendant, such as the existence and contents of the defendant's confession and other statements from the defendant, until after the jury had been impaneled.<sup>134</sup> Although the Court indicated that prior restraints on the press come before the Court with a heavy presumption against their constitutionality,<sup>135</sup> the Court did not foreclose the possibility that a court could impose prior restraints in certain instances.<sup>136</sup> However, the Court recounted that over the years courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations without resorting to prior restraint.<sup>137</sup>

In *Patton v. Yount*,<sup>138</sup> the Court distinguished *Irwin* and overturned a lower court's reversal of Patton's second conviction four years after a notorious murder because the great majority of the veniremen "remembered the case," which, in the lower court's view, showed that time had not served "to erase highly unfavorable publicity

<sup>130</sup> *Id.* at 720, 723 (citations omitted).

<sup>131</sup> 421 U.S. 794 (1975).

<sup>132</sup> *Id.* at 799.

<sup>133</sup> 427 U.S. 539, 551-53 (1976).

<sup>134</sup> *Id.* at 543-44.

<sup>135</sup> *Id.* at 558 (citing *Carroll v. Princess Anne*, 393 U.S. 175, 181 (1968)).

<sup>136</sup> *Id.* at 569. The Court did not elaborate on what circumstances might justify a prior restraint. However the Court specified that the necessary pre-analysis before resorting to a prior restraint should focus on the nature and extent of the news coverage, the possible alternatives to restraining the press, and the effectiveness of the restraining order in protecting a defendant's right to a fair trial. *Id.* at 562.

<sup>137</sup> *Id.* at 563-65.

<sup>138</sup> 467 U.S. 1025 (1984).

from the memory of the community."<sup>139</sup> Justice Powell, writing for the majority, stated:

This conclusion, without more, is essentially irrelevant. The relevant question is not whether the community remembered the case, but whether the jurors at Young's trial had such fixed opinions that they could not judge impartially the guilt of the defendant.<sup>140</sup>

In contrast to the constitutional demands placed on the media, professional ethical standards generally govern the public statements of both the defense as well as the prosecution.<sup>141</sup> The Supreme Court's defining case concerning the regulation of lawyers is *Gentile v. State Bar of Nevada*,<sup>142</sup> in which the Court upheld the state's regulation of attorney speech, but voided the statute for vagueness. In this case, Gentile, a defense attorney, held a press conference the day after a grand jury indicted his client, Sanders, on criminal charges under Nevada law.<sup>143</sup> At the press conference, Gentile proclaimed his client's innocence and suggested that police misconduct tainted the government's sting operation, which allegedly netted his client.<sup>144</sup> Gentile did not answer reporter's questions or elaborate. Six months later, a jury acquitted Sanders.<sup>145</sup> Subsequently, the State Bar of Nevada filed a complaint against Gentile, alleging that statements he made during the press conference violated Nevada Supreme Court Rule 177, which prohibits a lawyer from making extrajudicial statements to the press that he knows or reasonably should know will have a "substantial likelihood of materially prejudicing" an adjudicative proceeding.<sup>146</sup> Rule 177 lists a number of statements that are "ordinarily . . . likely" to result in material prejudice, and provides that a lawyer "may state

---

<sup>139</sup> *Id.* at 1035.

<sup>140</sup> *Id.*

<sup>141</sup> A.B.A. STANDARDS § 8-3 governs broadcasting, televising, recording and photographing courtroom proceedings. A.B.A. STANDARDS § 8-3.6 govern the conduct of a criminal trial when problems relating to the dissemination of potentially prejudicial materials are raised. See A.B.A. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.6 (1983). See generally ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION 3-1.4 (Public Statements) and Standard 3-5.10 both of which generate a duty of reasonable care on the part of the prosecution to avoid extrajudicial statements that would in substantial likelihood prejudice the current and future criminal proceedings. STANDARD FOR DEFENSE FUNCTION, 4-1.4 (Public Statements) poses a similar duty on defense counsel. A.B.A. STANDARDS §8-2.1 recommends that police departments adopt regulations largely similar in content to rules restricting lawyers as to matters that may and may not be included in public statements from the commencement of the investigation until the completion of the trial. See Robert P. Isaacson, *Fair Trial and Free Press: An Opportunity for Coexistence*, 29 STAN. L. REV. 561, 568-69 (1977).

<sup>142</sup> 501 U.S. 1030 (1991).

<sup>143</sup> *Id.* at 1033.

<sup>144</sup> *Id.* at 1063.

<sup>145</sup> *Id.* at 1064.

<sup>146</sup> *Id.* at 1033.

without elaboration . . . the general nature of the . . . defense notwithstanding subsection 1 and 2 (a-f)."<sup>147</sup> The Disciplinary Board found that Gentile violated the Rule and recommended that he be privately reprimanded.<sup>148</sup> The State Supreme Court affirmed, rejecting his contention that the rule violated his right to free speech.<sup>149</sup>

The United States Supreme Court reversed, upholding the statute's general provisions, but voided the conviction for vagueness under the circumstances of the case.<sup>150</sup> According to the Court, the statute's safe harbor provision misled Gentile into thinking that he could give his press conference without fear of discipline.<sup>151</sup> Given the Rule's grammatical structure and the absence of a clarifying interpretation by the state court, the Court held that the Rule fails to provide fair notice to those to whom it is directed and is so imprecise that discriminatory enforcement is a real possibility.<sup>152</sup>

By necessary operation of the word "notwithstanding," the Rule contemplates that a lawyer describing the "general nature of the . . . defense without elaboration" need fear no discipline, even if he . . . knows or reasonably should know that the statement will have a substantial likelihood of materially prejudicing an adjudicative proceeding.<sup>153</sup>

Both "general" and "elaboration" are classic terms of degree which, in this context, have no settled usage or tradition of interpretation in law, and thus a lawyer has no principle for determining when his remarks pass from the permissible to the forbidden.<sup>154</sup>

Ethical rules regulating free speech are necessarily written and interpreted with flexibility at a premium. As a result enforcement is a tricky business, and this problem is magnified given the opportunities presented by a notable high profile case such as the O.J. Simpson trial. As a general rule, the Court will not usually allow prior restraint on unfavorable pretrial publicity by the media, but will allow it for some state regulation of attorneys. In reviewing the allegedly prejudicial impact of publicity on the defendant's right to a fair trial, a court evaluates the nature of the information and its release, the degree of media exposure, the weight the publicity carries among venirepersons, and, ultimately, the ability of the jurors to reject the taint of extra-judicial information and to judge impartially the guilt of the defendant. The Court has stated that neither venirepersons' form deni-

---

<sup>147</sup> *Id.* at 1048.

<sup>148</sup> *Id.* at 1033.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1048 (1991).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 1048-49.

als of bias, nor the mere exposure to and retention of prejudicial information memory is dispositive.<sup>155</sup> Counsel are allowed, and the trial judge *sua sponte* has a duty to inquire into the willingness and ability of venirepersons<sup>156</sup> and jurors to set aside preconceived notions and to judge the defendant impartially, and to determine the questions properly placed before the jury in accordance with the judge's instruction on the law. Change of venue and the passage of time are factors which may mitigate against prejudicial publicity.<sup>157</sup> However, reversal is required only where there is manifest error contrary to the constitutional requirements for a fair trial.

### 3. *Drawing the Line: Distinctions Between the Print and Broadcast Media Access to Courtrooms*

The Supreme Court has not held that the public's First Amendment right of access to judicial proceedings extends to television coverage of trials.<sup>158</sup> Indeed, *Nixon v. Warner Communications, Inc.*,<sup>159</sup> the

<sup>155</sup> *Irwin v. Dowd*, 366 U.S. 717, 722-23 (1961).

<sup>156</sup> A.B.A. STANDARDS, FAIR TRIAL AND FREE PRESS 8-3.5 governs the selection of a jury in those criminal cases in which questions of possible prejudice are raised.

<sup>157</sup> A.B.A. STANDARDS, FAIR TRIAL AND FREE PRESS 8-3.3 governs the consideration and disposition of a motion in a criminal case for change of venue or continuance based on a claim of threatened interference with the right to a fair trial.

<sup>158</sup> See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Estes v. Texas*, 381 U.S. 532 (1964). Generally, however, courts do not view the prohibition of cameras in the courtroom as a violation of the media's First Amendment rights. See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978); *Estes v. Texas*, 381 U.S. 532 (1964) (plurality opinion); *State v. McNaught*, 713 P.2d 457 (Kan. 1986). The courts in these cases found the prohibitions to be reasonable measures for maintaining an atmosphere of dignity and decorum in the courtroom. See also *United States v. Hastings*, 695 F.2d 1278 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983); *Mazzetti v. United States*, 518 F.2d 781 (10th Cir. 1975). Broadcasting receives less First Amendment protection than any other form of communication. See *FCC v. Pacifica Found.*, 438 U.S. 726 (1978). Although there may be a public right to attend trials under the First Amendment, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-76 (1980) (plurality opinion), this does not create a right to see any particular trial via television. *Westmoreland v. Columbia Broadcasting System, Inc.*, 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

*But see* *Stahl v. State*, 665 P.2d 839 (Okla. Crim. App. 1983) (dissenting opinion) (the First Amendment right may be used so long as it is used properly, newsgathering and disseminating agencies have equal rights in this matter), *cert. denied*, 464 U.S. 1069 (1984); *Lyles v. State*, 330 P.2d 734 (Okla. Crim. App. 1958) (court eliminated the prohibition on cameras in the courtroom, holding that the public has a right of access to judicial proceedings and that the right to gather and disseminate information extends to the broadcast media). Electronic media increases the sources of information and amount of information that is accessible to the public without editorial control. M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459 (1989). The problem is that this increases the distribution of both true and false information, and false information will compete with the truth for public attention. *Id.*

<sup>159</sup> 435 U.S. 589 (1978).

Court's latest decision arguably involving this question, may be interpreted as providing a fairly dispositive answer opposing a First Amendment right for televised coverage of trials. In *Warner Communications*, the television media sought to disseminate the Nixon Watergate tapes.<sup>160</sup> The Court considered the issue as an assertion of the electronic media's right to physical access of the tapes, not as an intangible right of access, and arguably did not foreclose extending First Amendment protection for television coverage trials.<sup>161</sup> The Court's holding in *Warner Communications*, however, leaves little doubt as to its sentiments:

In the first place, . . . there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is "a safeguard against any attempt to employ our courts as instruments of persecution," it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial—or any part of it—be broadcast live or on tape to the public. The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed.<sup>162</sup>

In the lower courts, the First Amendment case law, while establishing a limited right of access to witnesses and report on trial proceedings by the print media, has not been extended to the broadcast media despite specific opportunities to do so.<sup>163</sup> To the contrary, the Eleventh Circuit in *Hastings v. United States*<sup>164</sup> upheld a per se ban against cameras in federal courtrooms.<sup>165</sup> In *Hastings*, a news organization sought to televise a trial in federal court, and the criminal de-

---

<sup>160</sup> *Id.* at 591.

<sup>161</sup> *Id.* In *Warner Communications*, the defendant sought to copy, broadcast, and sell the Watergate tapes that were admitted into evidence at the trial of President Richard Nixon's former advisors. *Id.* at 594. The Supreme Court rejected Warner Communication's claim that there was a First Amendment right to copy and publish the tapes. *Id.* at 608-09. The Court held that the press had no greater right of access to the tapes under the First Amendment than the public, and that the public has never had such a right of physical access. The court read the issue as one involving physical right of access rather than access to public information. *Id.* at 609.

<sup>162</sup> *Id.* at 610 (citations omitted).

<sup>163</sup> Part IV and V, *infra*, suggest reasons to draw such a distinction between the print and broadcast media and to draw the line for in-court access at the inclusion of the print media and to the exclusion of the broadcast media.

<sup>164</sup> 695 F.2d 1278 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983). The defendant Hastings, a federal judge, was indicted for conspiracy and obstruction of justice. *Id.* at 1279 n.6. This indictment accused Hastings of accepting a bribe from an undercover agent posing as a criminal defendant. *Id.* Hastings favored televising the trial, arguing that it would serve to restore his reputation. *Id.*

<sup>165</sup> In addition to *Hastings*, two other circuit courts have faced similar questions. See *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985); *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111 (2d Cir. 1984).

endant also requested that the court permit coverage of the trial.<sup>166</sup> In refusing to open the trial to television cameras, the Eleventh Circuit rejected the television station's First Amendment challenge to the federal court system's total ban on cameras in the courtroom. The television station asserted a First Amendment right to record and broadcast the trial; the court found the television station's request to televise the trial more analogous to the request for the Watergate tapes in *Warner Communications* (physical access to the Nixon watergate tapes) than to the media's request for access in *Richmond Newspapers* (First Amendment right of access involving print media) and *Globe Newspaper* (state law mandating exclusion of public during testimony of witness alleging molestation violated the First Amendment right of access).<sup>167</sup>

*Hastings* is most interesting for its discussion of the competing interests to be weighed. The *Hastings* court distinguished the Supreme Court's decision in *Globe Newspaper*, which held that a per se exclusion of the public violates the First Amendment<sup>168</sup> and reasoned that the federal courts' per se exclusion of cameras was a reasonable time, place, and manner restriction,<sup>169</sup> because the additional benefit of allowing cameras in the courtroom would advance First Amendment concerns only minimally, while judicial economy and efficiency are served significantly by the per se exclusion.<sup>170</sup> The court noted that there are two institutional considerations that support the ban of cameras from federal courtrooms. First, there is an institutional interest in preserving order and decorum in the court.<sup>171</sup> Second, there is an interest in procedures designed to ensure a fair trial and increase the truth-seeking function of a trial.<sup>172</sup>

The *Hastings* court also listed the factors favoring media coverage of trials.<sup>173</sup> First, free access "fosters public confidence in the fairness of the criminal justice system."<sup>174</sup> Second, public access allows the public to act as a check on potential abuses of the judicial system.<sup>175</sup> Third, the right of access promotes the truth-seeking function of a trial.<sup>176</sup> The court commented, however, that allowing the media a

---

<sup>166</sup> *Hastings*, 695 F.2d at 1281.

<sup>167</sup> *Id.* at 1279-80.

<sup>168</sup> *Id.* at 1282.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* at 1283.

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

different form of access—the use of cameras—would not add measurably to the public's confidence in the judicial system.<sup>177</sup> The court stated that access of cameras would not aid in the truth-seeking process, but rather would likely have an adverse impact because of its effect on jurors and witnesses.<sup>178</sup> Consequently, the Eleventh Circuit concluded that access of cameras would advance First Amendment concerns only minimally.<sup>179</sup> The court also found that the per se rule against cameras in the courtroom was reasonable<sup>180</sup> as the infringement on First Amendment rights was minimal or nonexistent. Thus a per se rule best served considerations of judicial economy and efficiency.<sup>181</sup>

The Second Circuit also wrestled with the issue of cameras in federal courtrooms in *Westmoreland v. Columbia Broadcasting System, Inc.*<sup>182</sup> In *Westmoreland*, the Cable News Network sought to televise the courtroom proceedings of the libel suit brought by General William Westmoreland against CBS for charges made on the news show *Sixty Minutes*.<sup>183</sup> In discussing the First Amendment issues implicated in the request to televise the trial, the court stated that it was unprepared to take the leap from the constitutional right of access to a finding that a right to televise trials exists under the First Amendment.<sup>184</sup> Still more courts have declined a similar leap by refusing to provide the media with a constitutional right to film and broadcast judicial proceedings in the context of challenges or proposed changes to the state rules governing cameras in the courtroom.<sup>185</sup> Within the common law there is a stream of citations, which uniformly recognize "that freedom of the press does not give representatives of the media the constitutional right to broadcast, record, or photograph court

---

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* The Seventh Circuit, in *United States v. Kerley*, 753 F.2d 617 (1985), also found that the ban of cameras from federal courtrooms was a time, place, and manner regulation of the First Amendment.

<sup>181</sup> *Hastings v. United States*, 695 F.2d 1275, 1284 (11th Cir.), *cert. denied*, 461 U.S. 931 (1983).

<sup>182</sup> 752 F.2d 16 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985).

<sup>183</sup> *See Westmoreland v. CBS, Inc.*, 596 F. Supp. 1170, 1171 (S.D.N.Y. 1984). One allegation at issue was whether officers high in the United States military command had willfully distorted intelligence data to substantiate optimistic reports about the progress of the Vietnam war. *Id.*

<sup>184</sup> *Westmoreland*, 752 F.2d at 23.

<sup>185</sup> *In re Arkansas Bar Assoc.*, 609 S.W.2d 28 (Ark. 1980) (court did not view proposal to allow broadcasting and photographing certain trials as a First Amendment issue, but rather as a mere extension of Arkansas' recognition of the public's right to attend trials); *In re Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 774 (Fla. 1979); *In re Extension of Media Coverage for a Further Experimental Period*, 472 A.2d 1232, 1234 (R.I. 1984).



proceedings."<sup>186</sup>

Despite the distinction which the courts consistently make in excluding cameras from the courtroom while simultaneously including the press, the Supreme Court has held that differential treatment of different media is impermissible under the First Amendment guarantee in some contexts, absent an overriding governmental interest.<sup>187</sup> Furthermore, since the Supreme Court's decisions in *Warner Communications* and *Chandler*, it has handed down numerous decisions that substantially broadened the right of access to judicial proceedings, at least as far as the press is concerned.<sup>188</sup> Finally, there is a growing body of literature supporting the view that an absolute ban on televised trials would violate the First Amendment right of access.<sup>189</sup>

### III. ARGUMENTS FAVORING TELEVISION IN THE COURTROOM

#### A. TELEVISION INSPIRES PUBLIC CONFIDENCE IN THE TRIAL PROCESS

In addition to the First and Sixth Amendment arguments discussed in section II proponents of televised trial coverage increasingly argue the educational potential of television as a basis for the inclusion of cameras in the courtroom. It is well established as a matter of

<sup>186</sup> See Annotation, *Validity, Propriety, and Effect of Allowing or Prohibiting Media's Broadcasting, Recording, or Photographing Court Proceedings*, 14 A.L.R.4th 121, 129 (1982 and Supp. 1995).

<sup>187</sup> See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (invalidating differential tax scheme that applied only to certain publications protected by the First Amendment); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 234 (1987) (same); see also *Cable News Network v. American Broadcasting Cos., Inc.*, 518 F. Supp. 1238, 1244-45, 1246 (N.D. Ga. 1981) (discriminatory treatment of television media in coverage of White House impermissible).

<sup>188</sup> See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking down state law closing courtroom during testimony of minors who are sex crime victims); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (right of access to voir dire); and *Press-Enterprise v. Superior Court*, 478 U.S. 1 (1986) (right of access applies to preliminary hearings).

<sup>189</sup> See Carolyn E. Riemer, *supra* note 110; Kathleen M. Krygier, *The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms*, 3 COMM. LAW CONSPICUOUS 71 (1995); Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599 (1992); M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1461 (1989); Richard H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, T. V., 9 HASTINGS COMM. & ENT. L.J. 749 (1987); Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475 (1985); See also Bernard Schwartz, *Death TV? Is There a Press Right of Access to News That Allows Television of Executions*, 30 TULSA L.J. 305 (1994); see generally Beth Hornbuckle Fleming, Comment, *First Amendment Right of Access to Pretrial Proceedings in Criminal Cases*, 32 EMORY L.J. 619 (1983); Jeanne L. Nowaczewski, Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286 (1984); Lewis F. Weakland, Note, *In The Courthouse: The Legacy of The Gannett and Richmond Newspapers Public Right of Access*, 59 S. CAL. L. REV. 603 (1986).

federal constitutional law that the public has a right of access to judicial proceedings, which has historically been considered vital not only to protect the rights of the parties, but also to increase public confidence by ensuring that the proceedings are conducted fairly.

As the United States Supreme Court recognized in *Press-Enterprise v. Superior Court*.<sup>190</sup>

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>191</sup>

The Court continued: “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>192</sup>

The ability to observe the conduct of judicial proceedings becomes particularly important in cases where there are highly charged public issues involved, including claims of prejudice, favoritism, and official misconduct. It may be argued that in high profile cases, it is even more critical that the public receive the maximum amount of information about the process by which a particular result has been achieved:

When a shocking crime occurs, a community reaction of outrage and public protest often follows . . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society’s responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful “self-help,” as indeed they did regularly in the activities of vigilante “committees” on our frontiers. . . . It is not enough to say that results alone will satiate the natural community desire for “satisfaction.” A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process “satisfy the appearance of justice” . . . and the appearance of justice can best be provided by allowing people to observe it.<sup>193</sup>

In modern times, the press has played an ever-increasing role in providing valuable information to the public regarding the conduct of

<sup>190</sup> 478 U.S. 1 (1984).

<sup>191</sup> *Id.* at 13 (quoting *Press-Enterprise v. Superior Court*, 464 U.S. 501 (1984) (*Press-Enterprise I*)).

<sup>192</sup> *Id.* (quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980)).

<sup>193</sup> *Richmond Newspapers*, 448 U.S. at 571-72 (citations omitted).

judicial proceedings.<sup>194</sup> In cases where physical access to the courtroom is extremely limited, the public's right of access truly becomes viable only through the surrogate media.<sup>195</sup> To enable the media to most effectively perform that function, the maximum amount of information must be available to pass on to the interested public, and the most effective means of making that information available in its truest form is through courtroom cameras.<sup>196</sup>

As Justices Brennan and Marshall observed in *Richmond Newspapers*:

In advancing these purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[recording] . . . would be found to operate rather as [cloak] than [check]; as [cloak] in reality, as [check] only in appearance."<sup>197</sup>

Similarly, the importance of the public's "attendance" at courtroom proceedings is best served by the availability of contemporaneous, complete audio and video accounts of the trial, which can only occur if cameras are present in the courtroom. Through electronic coverage, members of the public can observe for themselves the demeanor, tone, contentiousness and perhaps even competency and veracity of the trial participants.<sup>198</sup> Moreover, the ability of the press to accurately and completely report on proceedings that the public may choose not to attend or watch in their entirety is immeasurably enhanced by their own access to video footage of the proceedings themselves.

In the absence of television broadcast, the public and members of the press not fortunate enough or able to obtain permanent seats in the courtroom will be relegated to relying upon the eyes and ears of others, or upon a "cold" transcript, for information about trials.<sup>199</sup> In an age when the public increasingly relies on television technology, it

<sup>194</sup> Donald E. Lively, *Modern Media and the First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599 (1992).

<sup>195</sup> Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1559 (1985).

<sup>196</sup> Many of the time and space limitations which have been a problem with communication in the past are eliminated by electronic communication. More information can pass to larger audiences, faster (often instantaneous), and with less expenditure of effort and resources. M. Ethan Katsh, *The First Amendment and Technological Change: The New Media Have a Message*, 57 GEO. WASH. L. REV. 1459, 1461 (1989).

<sup>197</sup> 448 U.S. at 597 n.22 (Marshall, J. and Brennan, J., concurring) (emphasis added; citations omitted). *But see infra* counter arguments at Section VI.G.

<sup>198</sup> Nancy T. Gardner, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 493 (1985).

<sup>199</sup> *See id.*

may seem strange to limit trial coverage to fifteenth century technology.<sup>200</sup> Indeed, if the vast majority of people receive news through the electronic media, excluding cameras from the courtroom might be unacceptable when the trial at issue appears to be newsworthy, volatile and complex. Arguably, complete broadcast coverage of the trial is important to achieve the valuable ends served by increasing public access to judicial proceedings.

#### B. TELEVISION AS EDUCATOR

It is axiomatic that an educated citizenry is essential to a healthy and functioning democracy. Only an informed public can know, observe and, when necessary, change the laws and procedures that provide the structure of any democracy. Only an informed public can work to ensure that those laws and procedures are fairly and lawfully implemented by government officials, including judges, law enforcement officers, prosecutors, and others. Television broadcasts of trial proceedings would also provide a unique and powerful educational opportunity both in the United States and abroad for the public to learn about courts and court proceedings. Further, students, educators, and lawyers would additionally benefit by being able to observe "firsthand," via the broadcast and videotape, the trial and its participants.

It is well recognized that education of citizens regarding the legal system is one of the primary benefits of media coverage of trials. It is undeniably good and right that the public knows the workings of one of the most essential aspects of government, namely, the courts.

That televised court proceedings can be an immensely important and powerful educational tool is widely recognized.<sup>201</sup> Indeed, in his concurring opinion in *Estes*, Justice Harlan recognized that "television is capable of performing an educational function by acquainting the public with the judicial process in action."<sup>202</sup> The majority opinion in *Richmond Newspapers* agreed:

When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case: "The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent

---

<sup>200</sup> Gutenberg is credited with inventing the printing press in 1435. See MARSHALL McLuhan, *THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN* (1962) (discussing change of ideas, beliefs, and values spurred by technological advancements and the consequences for an "open society").

<sup>201</sup> "Much of what most adults learn about government—it's institutions and members, their activities, decisions, defects, strengths, capabilities—stems from the mass media." DAVID L. PALETZ & ROBERT M. ENTMAN, *MEDIA POWER POLITICS* 5 (1981).

<sup>202</sup> *Estes*, 381 U.S. at 589 (Harlan, J., concurring).

acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never have been inspired by a system of secrecy."<sup>203</sup>

Undoubtably the public has a need for such education. As one commentator noted, television access to trials is essential to "educate a public largely ignorant about the conduct of state and federal trials . . . [T]here is no field of governmental activity about which the people are so poorly informed as the judicial branch."<sup>204</sup>

Through televised coverage, millions of television viewers can be reached worldwide. In the United States, for example, "[t]elevision is our . . . most common and constant learning environment, the mainstream of our culture. In a typical American home, the set is on for more than seven hours each day, engaging its audience in a ritual most people perform with great regularity."<sup>205</sup> Furthermore, students in elementary schools, high schools, colleges, law schools, and even practicing lawyers, can learn much from watching videotapes of these proceedings long after the trial has been completed.<sup>206</sup> As Justice Frankfurter expressed several years ago, he longed for the day when "the news media would cover the Supreme Court as thoroughly as it did the World Series," believing that "the public confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."<sup>207</sup> In addition, camera coverage of judicial proceedings leads to heightened public awareness of societal problems such as domestic abuse, date rape, sexual harassment and violent crimes.<sup>208</sup>

---

<sup>203</sup> *Richmond Newspapers*, 448 U.S. at 572 (citations omitted).

<sup>204</sup> See Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128 (1991); Richard H. Frank, *Cameras In The Courtroom: A First Amendment Right Of Access*, 9 HASTINGS COMM. & ENT. L. J. 749, 795-96 & n.289 (1987).

<sup>205</sup> Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1085 n.172 (citation omitted). As of 1985, television was the principal source of news for 64% of the American public and the sole source of news for nearly half of this country's population. See *id.* at 1085 & nn.169-70 (citing a 1985 Roper study related to public attitudes toward television).

<sup>206</sup> Court TV offers videos for sale, Court TV Law Center, Court TV Store, available at <http://www.courtstv.com/store>, as well as educational, Court TV Law Center, Court TV for Kids, available at <http://www.courtstv.com/kids>, and CLE programming, Court TV Law Center, Inside Court TV available at <http://www.courtstv.com/insidectv>. See also *Nuremberg Trials Offered Free to Schools*, THE MORNING CALL (Allentown), Dec. 7, 1995, at B11; *Court TV Cable Channel To Offer Three Hours of Student Programs*, Education Technology News, No. 24, Vol. 12, Nov. 21, 1995, available in LEXIS, News library, ARCNWS file.

<sup>207</sup> Piccus, *supra* note 205, at 1087 & nn.186-87 (citations omitted).

<sup>208</sup> Jonathan Friendly, *CNN Plans to Cover Sex Abuse Trial*, N.Y. TIMES, Apr. 25, 1984, at C22.

C. EMPIRICAL SURVEYS INDICATE THAT CAMERAS IN THE COURTROOM  
DO NOT HAVE ANY NEGATIVE EFFECT ON THE PROCEEDINGS

Several states<sup>209</sup> have conducted studies on the potential impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, jurors, attorneys and judges.<sup>210</sup> In all of these states, the courts permitted electronic media coverage in both civil and criminal proceedings, although the majority of coverage was in criminal cases.<sup>211</sup> The results from the state studies were unanimous: the impact of electronic media coverage of courtroom proceedings, whether

<sup>209</sup> Among them Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Virginia, and Washington.

<sup>210</sup> Arizona—Untitled [hereinafter *The Arizona Study*], which is at handwritten page 39 of the Information Service Memorandum IS 88.002, *TV Cameras In the Courts, Evaluation of Experiments* (with Attachments) (Sample Survey); California—Evaluation of California's Experiment With Extended Media Coverage of Courts, Submitted by Ernst H. Short and Associates, Inc. (Sept. 1981) [hereinafter *The California Study*]; see also *Cameras In Court, 1983 Report To The Governor And Legislature*; Florida—Untitled [hereinafter *The Florida Study*]; Louisiana—*Report On Pilot Project On The Presence Of Cameras And Electronic Equipment In The Courtroom* (undated) [hereinafter *The Louisiana Study*]; Minnesota—*Report Of The Minnesota Advisory Commission On Cameras In The Courtroom To The Supreme Court* (Jan. 1982) [hereinafter *The Minnesota Study*]; Nevada—*Final Statistical Report Cameras In The Courtroom In Nevada* (1980) [hereinafter *The Nevada Study*]; New York—*Report Of The Chief Administrator To The New York State Legislature The Governor And Chief Judge On The Effect Of Audio-Visual Coverage On The Conduct Of Judicial Proceedings*, Matthew T. Crosson (March 1991) [hereinafter *The 1991 New York Study*]; *Report of The Committee On Audio-Visual Coverage Of Court Proceedings*, Hon. Burton B. Roberts, Chair (May 1994) [hereinafter *The 1994 New York Study*]; Washington—*Cameras In the Courtroom—A Two-Year Review In The State Of Washington, A Project Of The Washington State Superior Court Judges' Association Committee On Courts and Community* (Sept. 1978) [hereinafter *The Washington Study*].

Most of these state studies, and studies from Hawaii, Kansas, Maine, Massachusetts, New Jersey, Ohio and Virginia, are described in ELECTRONIC MEDIA COVERAGE OF COURTROOM PROCEEDINGS: EFFECTS ON WITNESSES AND JURORS, SUPPLEMENT REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (1994).

<sup>211</sup> California's report on the effect of electronic coverage of court proceedings is probably the most comprehensive of the state evaluations that have been completed. In addition to evaluating the impact of cameras on jurors and witnesses through surveys, as many other states have done, the researchers involved in the California evaluation also observed the jurors' behavior. In addition, the California study included observations and comparisons of proceedings that were covered by the electronic media, and proceedings that were not. See generally *The California Study* at 20, 55-67, 82-98. The California results were favorable to including cameras in the court room. For example, after systematically observing proceedings where cameras were and were not present, consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances. *The California Study* at 103-04. Furthermore, the behavior observations in California also reinforced survey results from California and other state and federal courts, which had found that jurors in proceedings where electronic media were present were equally attentive to testimony as jurors in proceedings without such coverage. *Id.* at 86-88, 105-06, 111. The California Study also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras. *Id.* at 78-79.

civil or criminal, shows few side effects.<sup>212</sup>

In September 1990, the Judicial Conference of the United States implemented what was to be a three year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts.<sup>213</sup> The Federal Evaluation indicated, among other things, that:

- \* overall, attitudes of judges towards electronic media were neutral and became more favorable after experience under the experimental program;
- \* generally, judges and attorneys who had experience with electronic media coverage reported observing small or no effects on camera presence on proceeding participants, courtroom decorum, or the administration of justice;
- \* overall, judges and court personnel reported that the media were very cooperative and complied with program guidelines and other restrictions that were imposed.<sup>214</sup>

Indeed, the Federal Judicial Center's "Summary of Findings" concluded that no negative impact resulted from having cameras in the courtroom.<sup>215</sup> In 1994, the Federal Judicial Center specifically found that results from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most respondents believe electronic media presence has minimal or no detrimental effects on jurors or witnesses.<sup>216</sup> As with the handful of state surveys, the federal survey found that "[m]ost participants [say] electronic media presence has no or minimal detrimental effects on jurors or witnesses."<sup>217</sup>

#### IV. ARGUMENTS OPPOSING CAMERAS IN THE COURTROOM

Although the generation following the 1981 Supreme Court decision in *Chandler*<sup>218</sup> has seen the proliferation of televised criminal trials with Court TV, CNN and E! leading the way,<sup>219</sup> there is no

<sup>212</sup> J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, INSIDE LITIG., at 1, 19 (1993).

<sup>213</sup> The Federal Judicial Center used judge and attorney evaluations to monitor the results of that pilot program from July 1, 1991, to June 30, 1993.

<sup>214</sup> See FEDERAL EVALUATION, *supra* note 17, at 7.

<sup>215</sup> See FEDERAL EVALUATION, *supra* note 17, at 7, 38-42.

<sup>216</sup> *Id.*

<sup>217</sup> Although the federal survey only examined judges and attorneys in its evaluations, the Federal Judicial Center also reviewed and considered the many state surveys that have been completed on camera coverage of judicial proceedings, where witnesses and jurors were questioned along with judges and attorneys. The results were the same regardless of whom was being polled: the majority who experience such coverage did not report any negative consequences or concerns.

<sup>218</sup> Recall that in *Chandler*, the Court held that cameras in the courtroom, even over the objection of the defendant, did not violate due process under the Fourteenth Amendment absent a specific showing of prejudice. *Chandler v. Florida*, 449 U.S. 560 (1981).

<sup>219</sup> Eric Mink, *O.J. Coverage: Court TV's Got Dream Team*, N.Y. DAILY NEWS, May 19, 1995, at

constitutional right to introduce cameras in the courtroom.<sup>220</sup> The rise of cameras in the courtroom has seen the federal judiciary,<sup>221</sup> a significant minority of states,<sup>222</sup> and media scholars<sup>223</sup> oppose cameras in the courtroom. Moreover, a growing number of witnesses, jurors, and lawyers have grown weary of the lure of television coverage and more sensitive to its distorting impact on justice.<sup>224</sup>

#### A. SURVEYS ON CAMERAS IN THE COURTROOM LACK RELIABILITY

While subjective surveys invariably report that a majority of those responding indicate that cameras in court had no substantial impact on the proceedings, real cases prove that cameras do have a substantial impact.<sup>225</sup> The studies, which invariably purport to demonstrate that television coverage of trials was innocuous, rely exclusively on the subjective self-report responses of participants in the judicial process. There is one main problem with self-reporting data as compiled by these studies: the very nature of self-reporting creates a bias favoring those who respond, and what they choose to report. Since judges and jurors are supposed to be impartial, lawyers business-like, and witnesses truthful, it is possible that those who believed themselves com-

---

119 (comparing Simpson trial coverage by CNN, E!, and Court TV; Lee Masters, *Different Isn't Wrong*, THE CONNECTICUT L. TRIB., June 26, 1995, at 15 (Masters, president and CEO of E! Entertainment Television, responding to criticism by Stephen Brill, CEO of Court TV, of E!'s coverage of the Simpson trial).

<sup>220</sup> See, e.g., *Nixon v. Warner Comm. Inc.*, 435 U.S. 589, 610 (1978); *Estes v. Texas*, 381 U.S. 532 (1965); *United States v. Kerley*, 753 F.2d 617, 620 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278, 1280-84 (11th Cir. 1983).

<sup>221</sup> See *supra* discussion in Part I.

<sup>222</sup> *Id.*

<sup>223</sup> Opponents include Max Frankel, Richard Heffner, and Paul Thaler.

<sup>224</sup> See *supra* note 14.

<sup>225</sup> Some high visibility cases where the court banned cameras in the court room are discussed *supra* note 12 and accompanying text. Others include: 1) the Katie Beers Kidnapping/Custody Case: the defendant asked the judge to "keep her private life private," John T. McQuiston, *Camera Ban In Courtroom For Child Case*, N.Y. TIMES, Mar. 23, 1993, at B4; 2) the Woody Allen-Mia Farrow Custody Battle, David Kocieniewski, *Judge: No TV for Woody's Latest Role*, NEWSDAY, Jan. 9, 1993, at 3; 3) the Senator Kay Bailey Hutchison campaign fraud trial where there was a concern that an opponent would isolate some taped snippet of testimony and use it to political advantage, *Cameras Banned in Hutchison Trial; Senator Didn't Want Foes Using Pictures in Campaign Ads*, DALLAS MORNING NEWS, Feb. 2, 1994, at 25A; 4) New Jersey Teenage Murder Trial—The Brenda Wiley family killings case, see Adrine, *supra* note 34, at 1. This is just the reverse of what happened in the case of the Menendez brothers' patricide. See, e.g., Alan Abrahamson, *Menendez Brothers' Murder Trial Opens*, L.A. TIMES, June 15, 1993, at B3. Van Nuys Superior Court Trial Judge Stanley Weisberg, recalling his experience with the Rodney King Trial, barred television cameras and crews from the Menendez trial because they would be too distracting to the jury. *Id.* The judge later reversed his ruling. Michael Miller, *Second Menendez Trial Held Without Fuss, Publicity*, Reuters World Service, Nov. 1, 1995; Elizabeth Gleick, *Second Time Around; As the Menendez Brothers Once Again Fight for their Lives, the Prosecution Alters Its Strategy*, TIME, Oct. 23, 1996, at 90.



promised by the improper influence of television coverage might be disinclined to acknowledge their partiality. The possible bias due to non-response is particularly acute when it is recognized that many of the state studies rely on a very small sample. The Virginia study surveyed only fifty-seven respondents,<sup>226</sup> California relied on only fifty-six respondents,<sup>227</sup> Nevada only thirty-one respondents<sup>228</sup> and New Jersey's study noted only a "relatively small number of respondents surveyed."<sup>229</sup> However, even with the bias of self-reporting, each of these studies reveal that a significant minority of jurors, attorneys, and witnesses reported that cameras in the courtroom significantly affected their role in the trial. It seems fairly uncontroversial that a fair trial cannot be held unless all of the participants properly perform their roles.<sup>230</sup>

#### B. CAMERAS ARE DISTINCT FROM THE PRESS

Max Frankel, a lifelong newspaper reporter and editor of the *New York Times* heads the list of responsible journalists who have soured on the basic media position that rights enjoyed by the written press necessarily belong to television cameras. Frankel states:

I am certain now that the camera is not just another incarnation of "press," entitled to the unabridged freedom thereof. It's a different beast that should enter a court by a different door, under different rules. . . . Reporters and spectators must attend trials to guard against a star chamber proceeding. But no camera should come into court without the defendant's consent. I would let a prosecutor and judge object as well. Though there is no proof that television coverage alters the conduct of a case, [because no serious methodological research has been done], the suspicion that it does inevitably grows as the camera magnifies the din and compounds the stakes, in fame and fortune, for every participant. Justice may not often be compromised, but society's sense of it can certainly be demeaned.<sup>231</sup>

The reality seems clear that the use of a camera to record courtroom proceedings transforms the courtroom to a potentially global village that permits nearly instantaneous feedback of a remote public to prejudice the trial. To the same effect, nationally syndicated columnist

<sup>226</sup> See *supra* notes 209-10 and accompanying text.

<sup>227</sup> See *id.*

<sup>228</sup> See *id.*

<sup>229</sup> *Id.*

<sup>230</sup> A defendant in a criminal trial is entitled "to a fair trial, not a perfect one." Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986). Of course, there is rarely such a thing as an error free trial. United States v. Hasting, 461 U.S. 499, 508-09 (1983). However, if "the central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," *Van Arsdall*, 475 U.S. at 681, it is hard to credit a trial process in which a substantial minority of participants are distracted.

<sup>231</sup> Max Frankel, *I Am Not a Camera*, N.Y. TIMES MAG., Oct. 16, 1994, at 28.

Anthony Lewis wrote in an Op-Ed piece:

Television has an emotional power, an immediacy that the written word can hardly match. As a student at Columbia University's Graduate School of Journalism put it to me the other day: "It's harder to filter television, to screen it. With print you have to reason. Television goes right through to your emotions."<sup>232</sup>

### C. PREJUDICIAL IMPACT

Televising trials may negatively affect the performance of many jurors, witnesses, lawyers and judges. On April 13, 1991, the Criminal Justice Section of the New York Bar Association presented a fact sheet which demonstrated that even the New York Office of Court Administration's limited self-reported survey data supported a conclusion that a substantial minority of courtroom participants reported that television cameras had a prejudicial impact on the trial.<sup>233</sup> The New York study, which suffers from the same methodological self-reporting flaws as the other state and federal surveys, nevertheless bears detailed review, because New York remains unsold on a permanent rule authorizing cameras in the courtroom.

The New York study broke down reporting by attorneys, defense attorneys, prosecutors, jurors, and witnesses. In summary form, results were as follows:

#### *Attorneys Reported:*

- \* Thirty-seven percent of attorneys reported that the atmosphere in the courtroom was tense and 35% stated that the atmosphere was uneasy as a result of audio-visual coverage. Thirty-seven percent of the attorney respondents reported that they were more self-conscious as a result of audio-visual coverage.
- \* Thirty-eight percent of attorney respondents stated that the testimony of witnesses was affected by audio-visual coverage. Among those who said that witnesses were affected by audio-visual coverage, 28% of the attorney-respondents stated that witnesses had a reluctance to be identified or broadcasted; 14% said that audio-visual coverage places pressure on the witnesses; 10% believed that witnesses appeared nervous and/or anxious; 7% reported that witnesses appeared to be putting on an act and/or looking for public exposure, and an additional 7% felt that witnesses did not concentrate on the testimony as a result of the presence of the media.
- \* Thirty-four percent of attorney-respondents were concerned that audio-visual coverage would affect the security of their witnesses and clients.

---

<sup>232</sup> Anthony Lewis, *Abroad At Home: On Madison's Grave*, N.Y. TIMES, Nov. 7, 1994, at A19 (Op-Ed Page).

<sup>233</sup> JACK T. LITMAN, MINORITY REPORT OF THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, 16-18 (1994) (quoting Joseph Jaffe, New York State Bar Ass'n, Memorandum (1991), derived from Office of Ct. Admin., Report A-109 to A-125 (Mar. 1991)).

- \* Twenty-three percent of the attorney-respondents found the presence of cameras distracting.
- \* Twenty-seven percent of attorney-respondents believed that the procedures leading to the decision to permit audio-visual coverage did not allow them sufficient time to ascertain the views of their clients or witnesses.
- \* Five percent of the attorneys who had one or more of their witnesses receive audio-visual coverage stated that one or more of their witnesses refused to and did not testify because of audio-visual coverage. Fifteen percent of attorneys whose witnesses experienced audio-visual coverage stated that one or more of their witnesses initially declined to testify because of audio-visual coverage, but nonetheless did testify. Finally 3% of attorneys stated that the court compelled one or more of their witnesses to testify.
- \* Forty-six percent of attorneys believe that audio-visual coverage of arraignments negatively affects fairness.
- \* Forty-four percent of attorneys stated that audio-visual coverage of trials negatively affects fairness.
- \* With regard to suppression hearings and sentencings, 64% and 34%, respectively, believe that audio-visual coverage affects these proceedings negatively.

*Defense Attorneys Reported:*

- \* Fifty-six percent of defense attorneys felt that the fairness of trials was negatively affected by audio-visual coverage.
- \* Sixty-seven percent of defense attorneys felt that the fairness of arraignments was negatively affected by audio-visual coverage.
- \* Eighty percent of defense attorneys felt that the fairness of suppression hearings was negatively affected by audio-visual coverage.
- \* Fifty-four percent of defense attorneys felt that the fairness of sentencings was negatively affected by audio-visual coverage.

*Prosecutors Reported:*

- \* Twenty-six percent of prosecutors felt that the fairness of trials was negatively affected by audio-visual coverage.
- \* Overall, 18% of prosecutors reported being opposed to audio-visual coverage in the courtroom.
- \* Twenty-three percent of prosecutors felt that the fairness of arraignments was negatively affected by audio-visual coverage.
- \* Fifty-three percent of prosecutors felt that the fairness of suppression hearings was negatively affected by audio-visual coverage.
- \* Ten percent of prosecutors felt that the fairness of sentencings was negatively affected by audio-visual coverage.

*Jurors Reported:*

- \* Nineteen percent of the jurors thought that the fairness of trials would be negatively affected.<sup>234</sup>
- \* The presence of cameras made 28% of juror respondents think the

---

<sup>234</sup> When the court eliminates venire persons from the jury pool because *voir dire* demonstrates their inability to ignore cameras, this biases the jury pool against the less modest. Moreover, the venireperson may not know how television coverage might affect him or her until after the trial commences.

proceeding was more important.<sup>235</sup>

*Witnesses Reported:*<sup>236</sup>

- \* In the prior experiment, 27% of witnesses reported feeling either anxious or nervous as a result of the presence of cameras. In the current experiment, 30% of witnesses reported feeling somewhat uneasy, and 39% felt either tense or somewhat tense.<sup>237</sup>
- \* Of the sixty-four witnesses surveyed, twenty-five or 39% reported that the presence of cameras had some effect on them. Of these twenty-five respondents, 39% indicated that they were tense or somewhat tense; 30% felt somewhat uneasy; 44% felt somewhat more self-conscious; 16% felt somewhat insecure; 10% were reluctant to participate; 21% felt that the case was more serious, and 19% of the witnesses reported being distracted.<sup>238</sup>

The courts have long recognized that as society becomes more experienced with cameras in the courtroom, the novelty will wear off and cameras will fade into the background as in other areas (banks, airports, convenience stores, high security areas, sporting events, weddings, etc.).<sup>239</sup> Perhaps the day will come to pass that cameras are too common-place to cause concern, but for now the evidence tends to rebut this notion.<sup>240</sup> While lawyers, judges, jurors, and even witnesses may be loath to admit in a self-reporting survey that the presence of cameras had a detrimental impact on their participation in the trial, the difference is not hidden to court watchers, especially those who seek justice in the proceedings.<sup>241</sup>

---

<sup>235</sup> The presence or absence of cameras might signal to the jury how society through its surrogate, the media, views the importance of the testimony of the televised versus non-televised witness. Cameras also tell the jury that the case is especially notorious.

<sup>236</sup> A special defense concern is that prosecution witnesses are police officers and experienced experts, while defense witnesses may be more likely to appear nervous before a camera or to shy away entirely from television publicity.

<sup>237</sup> A typical jury instruction requires the jury to assess the truthfulness of a witness by scrutinizing demeanor. Television publicity may make a witness anxious or nervous and thereby cloud demeanor evidence.

<sup>238</sup> LITMAN, *supra* note 233, at 16-18.

<sup>239</sup> See, e.g., *Estes v. Texas*, 381 U.S. 532, 595 (1965) (Harlan, J., concurring); *United States v. Chandler*, 449 U.S. 560, 585 (1981) (Steward, J., concurring in result).

<sup>240</sup> The Western sense of privacy rebels at such an invasion. See *State v. Thomas*, 642 N.E.2d 240, 247 (Ind. Ct. App. 1994) (finding warrantless video surveillance of a criminal suspect in a public place to violate privacy). The prevalence of video cameras in society calls to mind George Orwell's classic, *1984*, which looks at life where the state, with watching eyes, sees all. Americans with a tradition of individuality and freedom might well find the constant glare of a camera most intrusive.

<sup>241</sup> Jurors might perceive a compulsion to take into account public opinion in making their decision, or might be subjected to commentary and criticism from people who have seen the trial on television. *Estes v. Texas*, 381 U.S. 532 (1965). See also Richard P. Lindsey, *An Assessment of the Use of Cameras in State and Federal Courts*, 18 GA. L. REV. 389 (1984); George J. Cotsirilos & Albert J. Jenner Jr., *Cameras in the Courtroom—An Opposing View*, 5 ILL. TRIAL L.J. 24, 60 (1982). Jurors might be particularly susceptible to conforming their opinion to public expectations when their face becomes part of the public domain due to

## D. DIGNITY AND DECORUM

In the early years of televised trial proceedings, the courts frequently found *inter alia* that the physical presence of cameras could have a prejudicial impact on courtroom decorum and the dignity of the proceedings.<sup>242</sup> However, the advance of technology has mostly overcome the bulky camera problem dating back to the *Hauptmann* case.<sup>243</sup> Moreover, states have adopted many rules aimed at reducing disruptions and distractions caused by cameras in the courtroom.<sup>244</sup> Nevertheless, courts have recognized that the physical presence of camera equipment alone could substantially interfere with dignity and decorum.<sup>245</sup> This is so simply because of the awareness that the proceedings are televised.

With the advent of technology to minimize the physical presence of cameras and the various rules to facilitate courtroom administration, the more refined battleground over televised coverage of trial proceedings on the dignity and decorum front deals with the possible psychological impact on the trial proceedings. While courts which have been asked to examine the impact of television coverage on the

---

television exposure.

Even the mere knowledge that a case is being televised can alter the jury's process of discerning the evidence. As United States District Court Judge Edward F. Harrington of Boston said:

I am disinclined to allow cameras into the courtroom because it lets jurors know this is an unusual, that is, a celebrated case. And when jurors are asked to make a judgment in an ordinary case, that is a heavy responsibility. When they are asked to make a judgment in a celebrated case, I think that puts undue pressure on them. And it might distort the verdict.

Mark A. Cohen, *Bench Conference*, MASS. L. WEEKLY, July 25, 1994, at 40. See Robert L. Kerr, *The Effects of Pretrial Publicity on Jurors*, 78 JUDICATURE 120 (1994). This Article provides an interesting discussion of the empirical research on how pre-trial publicity tends to prejudice the jury against the defendant, despite confidant voices to the contrary among judges, lawyers, jurors and journalists. Kerr argues that reliance on such devices as *voir dire*, jury sequestration and jury instructions at trial to control access may be misplaced. *Id.* See Callahan v. Lash, 381 F. Supp. 827 (N.D. Ind. 1974); see also Bird v. Texas, 527 S.W.2d 891 (Tex. Crim. App. 1975). Jurors themselves have reported that cameras in the courtroom have had a negative affect on the performance of trials. Williams v. State, 461 So. 2d 834 (Ala. Crim. App. 1983) (juror complained that media was filming the jury through courtroom windows); Commonwealth v. Burden, 448 N.E.2d 387 (Mass. App. Ct. 1983) (court found no showing of actual prejudice even though foreman and two other jurors expressed a belief that camera coverage of the trial might affect their ability to concentrate or to remain impartial).

<sup>242</sup> Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Callahan v. Lash, 381 F. Supp. 827 (N.D. Ind. 1974).

<sup>243</sup> See *supra* note 34, 55-57 and accompanying text.

<sup>244</sup> See *In re* Hearings Concerning Canon 35, 296 P.2d 465, 472 (Colo. 1956) (en banc); *In re* Post-Newsweek Stations, Fla., 370 So. 2d 764, 781 (Fla. 1979); State v. McNaught, 713 P.2d 457 (Kan. 1986); *The Minnesota Study*, *supra* note 210, at 11.

<sup>245</sup> See, e.g., State v. Atwood, 832 P.2d 593, 647-48 (Ariz. 1992) (en banc), *cert. denied*, 506 U.S. 1084 (1993).

participants in particular trials have long concluded that such coverage did not have a sufficiently adverse impact on the trial participants to constitute a denial of due process on a per se basis,<sup>246</sup> at least one appellate court has upheld the declination of television coverage of trial proceedings because of the adverse impact on dignity and decorum in the courtroom.<sup>247</sup>

Measuring psychological impact may well require more than simplistic, and perhaps self-serving, surveys. It requires an understanding of how knowledge of cameras broadcasting to a remote public of local, state, national, and even worldwide dimension in some cases may affect the psychology of the participants through subtle and not so subtle nuances. As media scholar Richard D. Heffner said:

I don't like [cameras in the courts]. I don't believe that a free press requires them. And I don't believe that in our best understanding of the phrase, due process can over time tolerate them. For I share the concerns (undocumented to be sure) of many thoughtful professionals that what happens in the view of courtroom cameras will inevitably and increasingly be molded by trial participants' awareness of what will "play" on the 6 or the 11 o'clock news! Can we realistically expect that they alone in American life will resist the Lorelei call of mass media?<sup>248</sup>

The plain truth is that no matter how much the camera blends into the background, and no matter how unobtrusive is the camera operator, the mere knowledge that the courtroom is converted to a world stage changes the dynamic. Change the audience and you change the message.<sup>249</sup>

---

<sup>246</sup> See, e.g., *Bradley v. Texas*, 470 F.2d 785 (5th Cir. 1972); *Bell v. Patterson*, 279 F. Supp. 760, 769 (Colo.), *aff'd*, 402 F.2d 394 (10th Cir. 1968), *cert. denied*, 403 U.S. 955 (1971); *Gonzales v. People*, 438 P.2d 686, 688 (Colo. 1968) (en banc); *In re Hearings Concerning Canon 35*, 296 P.2d at 465 (following demonstrations of camera equipment, court held that prohibition of cameras in the courtroom is no longer required to maintain dignity and decorum).

<sup>247</sup> Some proceedings should not be broadcast because the subject is personal and coverage would threaten preservation of dignity in the courtroom. *In re Arkansas Bar Ass'n*, 609 S.W.2d 28, 29 (Ark. 1980), *modified*, *In re Modification of the Code of Judicial Conduct*, 628 S.W.2d 573 (Ark. 1982).

<sup>248</sup> Richard D. Heffner, *Cameras In the Courtroom: A Bad Idea Whose Time Has Come*, N.Y. L.J., Apr. 17, 1989, at 1, 7.

<sup>249</sup> NPR Morning Edition Radio Broadcast of Interview of George Gerbner, Dean Emeritus, Annenberg School of Communications, *Courtroom TV Makes for Low-Budget Entertainment*, July 12, 1994 (transcript #1387-11).

The purpose of the court is not education or not spectacle or public entertainment, but justice. And, as every student of communication knows, when you change the audience, you change the proceeding. It's very difficult for participants in a courtroom who are speaking to a global audience of tens maybe hundreds of millions of people not to be affected by that.

It makes and breaks reputations, it creates instant celebrities, it encourages what has been called 'trash for cash,' or 'cash for trash' syndrome, which already inhibited and prejudiced [the O.J. Simpson] trial.

## E. ONLY CAMERAS OUTSIDE OF THE COURTROOM EDUCATE

When considering the important, solemn, and personal nature of the work of courtrooms, the trade-off of a lower quality of justice in exchange for a speculative claim to achieving general education seems dubious at best. Court TV makes two educational claims: first, that gavel-to-gavel coverage inspires confidence in the result of the specific trial viewed and; second, that its overall programming helps to educate the American public about the legal process. There are several counterpoints to these arguments. First, the claims made for confidence-inspiring and general education-building can be served without sacrificing courtroom autonomy by providing extensive news coverage, expert commentary, and panel discussions *outside the courtroom*. Indeed Court TV has made an extraordinary, credible effort to educate the public on the law by expert commentary and panel discussions *outside of the courtroom*.<sup>250</sup>

Second, it is by no means certain that actual viewing of courtroom performance gavel-to-gavel has achieved substantial educational or confidence-inspiring results. Experienced legal educators know that high profile cases are of mixed pedagogical worth: they excite student interest, but the student interest fixates on the political lure of the trial and not the legal issue implicated in the discussion. While there remains the potential for learning by watching trials, even those selected by Court TV for commercial appeal, there has yet to surface a study testing viewers to see if their actual knowledge of the legal system has improved as a result of cameras inside the courtroom.<sup>251</sup> It may well be that interest is peaked and viewers may subjectively believe their knowledge is enhanced by hours of television, but like Colin Ferguson, who unsuccessfully defended himself in the New York subway shooting case,<sup>252</sup> must now know, there is more to criminal justice than superficially mimicking legal phrases.

The argument that live in-court camera coverage inspires confidence in the criminal justice system<sup>253</sup> and jury verdicts in particular by showing the public the evidence presented at trial has its greatest

---

<sup>250</sup> See, *id.*, *supra* note 206.

<sup>251</sup> See Charles L. Lindner, *Put Out The Camera's Eye in the Courtroom*, L. A. TIMES, Feb. 19, 1995, at M6. Lindner writes that "television has turned the Simpson trial into a throwback to the Rome Colosseum, a gladiatorial contest surrounded by profiteering charlatans." *Id.* Lindner adds, "TV coverage of the Simpson case has reduced the most powerful education medium in history to an interactive *People's Court*." *Id.*

<sup>252</sup> John McQuiston, *Jury Finds Ferguson Guilty of Slayings on the L.I.R.R.*, N.Y. TIMES, Feb. 18, 1995, at 1; *Conviction of Train Killer Draws Cheers*, CHI. TRIB., Feb. 19, 1995, at C6.

<sup>253</sup> The riots following the trial of the police officers involved in the beating of Rodney King suggest that in-court camera coverage does not necessarily inspire overwhelming public confidence in criminal litigation.

merit from the perspective of the parties.<sup>254</sup> Defendants acquitted at trial have long been heard to complain about tarnished reputations in the press.<sup>255</sup> Gavel-to-gavel coverage explains the trial results to the public. During the O.J. Simpson trial, lead defense counsel Johnnie Cochran, pursuant to his co-counsel's wishes, took the microphone at a spare moment to quell rumors of a possible plea agreement.<sup>256</sup> The perverse impact of the media in the O.J. Simpson case, both from in- as well as out-of-court cameras of panel discussions during breaks in the trial, was that the overall effect tended to persecute Simpson even as his trial found him not guilty. The media instigated and maintained racial overtones to the trial by tracking the racial composition of the jury<sup>257</sup> and the prosecution and defense teams.<sup>258</sup> Despite the acquittal, the media generally pronounced O.J. Simpson guilty.<sup>259</sup>

There are other more general downsides to television attention

<sup>254</sup> Compare William Kennedy Smith (televised) with Mike Tyson (not televised).

<sup>255</sup> The classic sentiment was most memorably put by Former Labor Secretary Raymond Donovan who claimed that he was unjustly tarred in the press. George J. Church, (Reported by Jenny Abdo and Raji Samghabadi), "Give Me Back My Reputation"; *Ex-Labor Secretary Donovan Is Acquitted After A Nine-Month Trial*, TIME, Jun. 8, 1987, at 31.

<sup>256</sup> BRIAN CHRISTIE: It is no secret the Simpson defense team likes to chat with reporters about the case and some would say the defense is using the ever-present microphones to put it's own spin on the trial. Today, defense attorney Johnnie Cochran did some spinning right in the courtroom.

JOHNNIE COCHRAN, Simpson Attorney: There are a number of rumors of—in this case, there are a plethora of rumors that flourish around the case, but this particular one I thought I would take the opportunity to address the court on and set the record straight. There are not now nor have there been nor will there be any plea bargaining discussions in this case. This is a case where there is no plea bargain, will be no plea bargain and I thought I should make the record clear in that regard and we've heard all these rumors and I wanted to put them to rest once and for all.

BRIAN CHRISTIE: Simpson's attorney Robert Shapiro told reporters that Cochran's statement to the court was made specifically on orders from Simpson. A tabloid newspaper has reported a plea bargain for Simpson is now being considered. According to the National Enquirer, Simpson would receive a seven year sentence, to be served at a federal facility likened to a country club.

*O.J. Simpson Trial Wrap-up*, (CNN television broadcast, May 30, 1995) (Transcript # 85), with CNN reporter, Brian Christie.

<sup>257</sup> *Simpson Jury Is Mix Of Race and Age*, Reuters, Oct. 2, 1995, available in LEXIS, News library, ARCNWS file; Michael Miller, *Race Has Vital Role In Simpson Jury Deliberations*, Reuters, Oct. 2, 1995, available in LEXIS, News library, ARCNWS file; ABC News, *This Week With David Brinkley* Oct. 1, 1995, (Transcript # 727), available in LEXIS, News library, ARCNWS file; *O.J. Lawyers Rebuffed In "Alibi" Bid; Meanwhile, A Ninth Juror May Be Dismissed When Court Reconvenes On Tuesday*, ORLANDO SENTINEL, May 27, 1995, at A14; Susan Sward, *What Harris Told Ito After She Was Bumped Off Jury*, S.F. CHRON., April 30, 1995; Larry Reinstein, *Disorder in the Court*, NEWSWEEK, Apr. 17, 1995, at 26.

<sup>258</sup> *This Week With David Brinkley*, supra note 257. *No Racial Motive To New Simpson Prosecutor D.A.*, Reuters, Nov. 9, 1994, available in LEXIS, News library, ARCNWS file.

<sup>259</sup> See, e.g., *Unreasonable Doubt. O.J. Simpson Acquittal*, NEW REPUBLIC, Oct. 23, 1995 (editorial cover story); ABC News, *This Week With David Brinkley*, Oct. 8, 1995 (Transcript #728, available in LEXIS, News library, ARCNWS file); Linda Chavez, *Race, Not Justice, Wins Out in Verdict*, USA TODAY, Oct. 4, 1995, at 15A; Michael Miller, *Analysts Say Race, Not Evidence Swayed Jury*, Reuters, Oct. 3, 1995, available in LEXIS, News library, ARCNWS file.



to the parties at trial. The need to gain public support while simultaneously trying the case creates concerns for litigation.<sup>260</sup> The concern for appearance dogged the O.J. Simpson trial from the beginning and created one its most bizarre controversies: the *Time* magazine re-touched "mugshot" photograph of O.J. Simpson as the cover feature announcing O.J. Simpson's arrest.<sup>261</sup> Critics charged that the darkened photograph made O.J. Simpson appear more sinister.<sup>262</sup> Because of the bright lighting necessary for television cameras and the shadowy effect over the natural curvature of the face, television too tends to make a face appear somewhat sinister. Perhaps the most famous example of this phenomenon was the first televised presidential debate between a youthful made-up John F. Kennedy, the eventual winner, and the seasoned Richard M. Nixon who due to illness, a lack of make-up, and without a fresh shave appeared sinister and murky.<sup>263</sup> At least one study shows that people more accurately perceive truth from the written word than from the televised word.<sup>264</sup>

In short, the confidence-inspiring aspects of television coverage are speculative. Judge Ito intended to make the O.J. Simpson case a lesson on the criminal justice system for the television public.<sup>265</sup> To

---

<sup>260</sup> Miller, *supra* notes 257, 259. O.J.'s book, aimed at resurrecting his public image, calls his trial "the biggest circus in the country," says allegations that he was a wife-beater are "not fair and untrue," and prints letters of support from his fans, including several which compare his fate to the crucifixion of Christ. David Margolick, *Simpson Asserts Innocence in a Prison Book and Tape*, N.Y. TIMES, Jan. 28, 1995, at 6. The prosecution's biggest challenge is O.J.'s smile. His image as the "world's most genial jock" will make it difficult for jurors to dismiss their old image of him. O.J. has perfected silent communication with the public, grimacing at statements from the prosecutor, mouthing "I didn't do it," and smiling when things go his way. Richard Lacayo, *Scenes from a Bad Marriage*, TIME, Jan. 23, 1995, at 41.

<sup>261</sup> TIME, June 27, 1994.

<sup>262</sup> See TIME's apology in TIME, July 5, 1994, at 4.

<sup>263</sup> See David S. Broder & Thomas B. Edsall, *In the Electricity of Politics, Nixon Was a Transformer; Party and Power Relationships*, WASH. POST, Apr. 24, 1994 at A1 (In addition to appearing in the first televised debate with then Senator John F. Kennedy, as president Richard M. Nixon initiated the first televised "town meetings"); Amy Wallace, *Swaying Voters with Their Looks; The Right Suits or Coifs Can Help Be Used as an Effective Weapon By One's Opponents*, L.A. TIMES, Aug. 5, 1994, at A1; Armando Iannucci, *Politics, Paper Bags, and Nasal Penetration*, GUARDIAN, Jun. 2, 1994, at T15; Donald W. Patterson, *Was 1960 Triad Stop a Turning Point?: Much Debated Question*, NEWS & RECORD (Greensboro, North Carolina), Apr. 24, 1994, at F1. Sam Donaldson, the television news personality wears red ties because he says red shows best on television. Roberta De Boer, *On Television Political Analysis: Still a Man's World*, ATLANTA J. & CONST., Oct. 4, 1993, at B6.

<sup>264</sup> See Richard Wiseman, *The Megalab Truth Test*, 373 NATURE 391 (1995). This article reports a study purporting to demonstrate that the public discerns falsehoods better when receiving news through the printed media versus either radio or television. This study has been criticized for limited sample size. Oliver Braddick, *Distinguishing Truth From Lies*, 374 NATURE 315 (1995).

<sup>265</sup> David Margolick, *In the Trial of His Lifetime, Ito Finds Himself in the Dock*, N.Y. TIMES, Jun. 2, 1995, at A1; Mark Miller & Jeanne Gordon, *The Celebrity On The Bench*, NEWSWEEK,

that end, he allowed lawyers to air lengthy arguments, to comment directly to the public.<sup>266</sup> It may be speculated that Judge Ito even set early adjournment each day (3:00 pm. Pacific Time) so as to not overrun prime time network news beginning on the East Coast at the same time. However, if media reports are reliable, there were few viewers of the O.J. Simpson verdict who did not come away disillusioned.<sup>267</sup> Lawyers,<sup>268</sup> judges, and the press,<sup>269</sup> increasingly embarrassed at the spectacle, began open and stinging criticism of Judge Ito.<sup>270</sup> Even the sequestered O.J. Simpson jury was disillusioned with the trial, evidenced by their refusal to come to the trial one day in a sort of mini-revolt.<sup>271</sup>

---

Nov. 28, 1994, at 35.

<sup>266</sup> The most notable was defense attorney Robert Shapiro's apology for Dennis Fung. See CNN television broadcast, *Simpson Trial Text*, Day 54, Part 14, Apr. 17, 1995 (Transcript #54-14).

<sup>267</sup> See generally Sherry Lee Alexander, *The Impact of California v. Simpson on Cameras in the Courtroom*, 79 JUDICATURE 169 (Jan.-Feb. 1996); Frances Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in Our Justice System*, 79 JUDICATURE 173 (Jan.-Feb. 1996); NBC television broadcast, *Face the Nation: The Impact of the O.J. Simpson Trial*, July 2, 1995; Aaron Epstein, *The Legal System; Trial Prompts Call For Court Changes*, RECORD, Oct. 4, 1995, at A15; *The Simpson Legacy/Los Angeles Times Special Report; Trial & Error: Focus Shifts to a Justice System and Its Flaws*, L.A. TIMES, Oct. 8, 1995, at S5; Tony Mauro, *OJ Trial Could Spell Change to Justice System*, USA TODAY, Oct. 5, 1995, at A7; Jan Crawford Greenburg & Ginger Orr, *The Simpson Verdict: Aftershocks. Experts Predicting Legal Reforms*, CHIC. TRIB., Oct. 4, 1995, at N17.

<sup>268</sup> See Diane Cox, *'Can You Believe . . . : Bar Scaffs at O.J. Trial Pace*, NATIONAL L.J., Apr. 10, 1995, at A7; Sandra Torry, *Simpson Case Puts Criminal Justice System on Trial*, WASH. POST, Apr. 10, 1995, at F7.

<sup>269</sup> See, e.g., Richard K. Shull, *Blame Ito for O.J. Trial Travesty*, INDIANAPOLIS NEWS, Apr. 11, 1995, at A11. Shull noted that Judge Lance Ito is now harvesting the results of his trial demeanor, which allowed the lawyers too much latitude and the jurors too little. *Id.* Judge Ito's loss of control was so obvious that it resulted in a spoof, *The Dancing Itos*, and an insulting imitation from Senator Alphonse D'Amato on a New York radio station. *Id.* On trial days, Judge Ito entertained celebrities in chambers, showed the attorneys videotapes of skits and was generally concerned with his status as a celebrity. Howard Chua-Eoan & Elizabeth Gleick, *Headline: Making the Case; A Behind-the-Scenes Look at the Missteps, Triumphs, Animosities and Egos of the Trial of the Century*, TIME, Oct. 16, 1995, at 48.

<sup>270</sup> Marc Fisher, *A Case That Courts Criticism; Simpson Trial Brings Calls for Legal Reform*, WASH. POST, May 22, 1995, at A1; Ironically, one of the earliest, and perhaps most influential supporters of Judge Lance A. Ito is Court TV founder and President Steven Brill. In a luncheon address to the Southern California chapter of the American Civil Liberties Union, Brill said Ito has been held to "an impossible standard," largely because of the extensive media coverage of the trial. Although he said he believed Judge Ito was too easy on the trials' attorneys in the early stages, Brill said the judge has gotten control of the proceedings. "Let's remember that Judge Ito is the person in charge of the action in the longest-running live television event in history. Imagine yourself being called on to make dozens of decisions, many of them spontaneous and just highly complicated, every day for months before a live audience." Greg Braxton, *The O.J. Simpson Murder Trial; Court TV Head Praises Job by Ito; Trial: Steven Brill Says The Jurist Is Being Held to 'An Impossible Standard' and Has Performed Well. But He Criticizes E! Entertainment's Coverage*, L.A. TIMES, May 25, 1995, at A27.

<sup>271</sup> Jim Newton & Andrea Ford, *Transfer of Deputies Provokes Boycott by 13 Simpson Jurors*,

Third, television seeks its own low level of entertainment.<sup>272</sup> High profile cases seem to be chosen for their salacious detail rather than for a salutary concern to inspire confidence in results or provide legal education in general.<sup>273</sup> Regardless of today's attempts at professionalism, when rating wars for televised trials commence,<sup>274</sup> commercial television<sup>275</sup> inevitably slides toward the tabloid marketing<sup>276</sup> lure of sex, power, and the perverse.<sup>277</sup> As bad as its influence on the re-

---

L.A. TIMES, Apr. 22, 1995, at A1.

<sup>272</sup> David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public? Chapter Three: Tabloid Tornado, Mainstream Mania: "The Godzilla of Tabloid Stories,"* L.A. TIMES, Oct. 9, 1995, at S4; Michael Gartner, *O.J. Circus? Blame TV,* USA TODAY, Oct. 3, 1995, at 11A; *All Things Considered* (NPR radio broadcast), *Commentator Looks at TV's Simpson Trial Coverage Mania* (CNN television broadcast Mar. 24, 1995) (Transcript # 1796-9), available in LEXIS, News library, ARCNWS file; *Simpson Trial May Have Brought Media Closer To Tabloids* (CNN television broadcast, Dec. 19, 1995) (Transcript # 1094-5), available in LEXIS, News library, ARCNWS file; *Off Camera; Cameras Stand Accused of Disorder in the Court,* NEWSDAY, Oct. 10, 1995, at B3; Joanne Ostrow, *Camera Equally Beholds Circus, Serious Media Fulfill Best and Worst Expectations,* THE DENVER POST, Oct. 4, 1995, at A14; Alexandra Marks, *O.J. Simpson Case Puts Courtroom Cameras on Trial,* CHRISTIAN SCI. MONITOR, Sept. 19, 1995, at Media 10, *Nightline: The Media and the Trial,* (ABC television broadcast Oct. 5, 1995) (Transcript # 3749), available in LEXIS, News library, ARCNWS file.

<sup>273</sup> See generally Joyce Millman, *The Year of Living Vicariously; How TV Viewers Across the Nation Have Been Sucked into the O.J. Trial,* S.F. EXAMINER, June 11, 1995, at C15.

<sup>274</sup> "One thing's for sure, O.J. Simpson is a murderer: He killed daytime TV," Grey Advertising executive Jon Mandel told Advertising Age magazine recently. David Beard, *A Year Later: O.J. Circus Going Strong; Pogs, Souvenirs, on Line Services Reign,* SUN-SENTINEL (Fort Lauderdale), June 11, 1995, at 1A. The tabloids say they've never seen a story with such legs. Shows such as *A Current Affair* have evolved—or devolved—toward an all-O.J. format. Live TV coverage by CNN, Court TV and E! Entertainment has chomped away 20% of the audience from daytime offerings of the "Big Three" networks. *Id.*

<sup>275</sup> Edward Helmore, *Making a Mint Out of Murder; OJ Industry/One Year On,* INDEPENDENT (London), June 18, 1995, at 17. Helmore reports that by March, less than three months after opening statements, the *Wall Street Journal* calculated that the "OJ industry" had easily surpassed the gross national product of Grenada. *Id.* The prosecution had already spent \$5.8 million in trying Simpson but however weary the public was (before the case had even begun, 90% of respondents in a poll said they were tired of it) they still watched gavel-to-gavel coverage. In a telling commercial shift, major soap manufacturers have bought ad space on Court TV. CNN, charging \$ 24,000 for a 30-second slot, could make more than \$45 million on the trial. Conversely, the daytime soap opera industry saw a collapse in its ratings. "When you have a choice between a traditional soap opera and a real-life juicy soap opera, people are going to tune into that," says Lynn Leahey, Editor of Soap Opera Digest. *Id.* See Stuart Elliot, *Sponsorship of Television Coverage of the End of the O.J. Simpson Trial Draws a Mixed Verdict,* N.Y. TIMES, Oct. 4, 1995, at D2. While Court TV had not yet released ratings or revenue information, Simpson Trial coverage boosted CNN's ratings and revenues by 50%. Joe Mandese & Jeff Jensen, *"Trial of Century," Break of a Lifetime,* ADVERTISING AGE, Oct. 9, 1995, at 2.

<sup>276</sup> "It's become a form of asbestos. It's in the air and impossible to avoid. . . . Frankly, I'm drowning in it. . . . [It] is the most extraordinary criminal case in our lifetimes, maybe in this century, maybe in history, maybe ever." Trip Gabriel, *Resisting O.J.-itis,* N.Y. TIMES, Nov. 23, 1994, at C1 (describing the media's reaction to the O.J. Simpson trial). The Simpson trial has also been described as "consuming attention of the media." Richard Lacayo, *Questionable Judgment,* TIME, Oct. 3, 1994, at 62.

<sup>277</sup> Sex, lies, and videotape. Television plays what pays. Thus, one reason to exercise

mote public, television has a unique capacity to compound public clamor over lurid details<sup>278</sup> by bringing the public's reaction to these features of the case back into the case it seeks to showcase and to prejudice the result thereby.<sup>279</sup>

## V. EXTENDING THE RIGHT OF THE PRESS TO THE ELECTRONIC MEDIUM: NEW AGE TECHNOLOGY, NEW AGE BIAS

### A. THE COMPREHENSIVE AND INSTANTANEOUS FEEDBACK LOOP BETWEEN THE TELEVISED TRIAL AND THE TELEVISION PUBLIC

Since its inception, a public trial has meant to extend beyond visitors to the courtroom.<sup>280</sup> At the founding of this country, members of the press were welcome to cover trials and to expand the "trial public" beyond those present in the courtroom to include the readership of the press.<sup>281</sup> The vexing question for today, as a matter of

---

caution in opening up the courtroom to television cameras, no matter how moderate and professional the approach, is a fear of what the future will bring. Already television focuses on the sensational. As televising trials becomes more and more financially remunerative, competition for the mass audience will sink to the lowest common denominator. The description of an alleged rape in the front yard in the William Kennedy Smith case and the gruesome details of the cannibalism in the Jeffrey Dahmer case are but two horrific examples of information that might otherwise violate local community standards. *But see* *Winters v. New York*, 333 U.S. 507, 510 (1948):

The line between the informing and the entertaining is too elusive for the protection of that basic right [a free press]. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine. Though we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature. *Cf. Hannegan v. Esquire*, 327 U.S. 146, 153, 158 (1946).

333 U.S. at 510 (1948).

<sup>278</sup> As Bob Levin, *Live, From L.A.*, MACLEAN'S, May 29, 1995, at 22 reports:

Live coverage of the . . . trial has driven up ratings sixfold on CNN, while the twice-a-day 15-minute wrap-ups on CBC's Newsworld have boosted viewership for those periods by nearly half. The case has spawned a growth industry of pop-culture spinoffs, from a movie to The Tonight Show's Dancing Itos to Internet newsgroups devoted to O. J. jokes. . . . Every person who gets on that stand has the opportunity to be made a star by the media, says ABC's Jerry Giordano, who broadcasts the latest to 180 affiliates from a platform in Camp O. J., the jumble of media trucks, trailers and satellite dishes in a parking lot across from the courthouse. "I mean, all of a sudden we're chasing El Salvadoran maids down the street. It's very bizarre, but these people are an integral part of the story."

<sup>279</sup> PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* (1994); Nina Burleigh, *Preliminary Judgements*, 80 ABA J. 55 (1994); Alan Dershowitz, *Court TV: Are We Being Fed a Steady Diet of Tabloid Television? Yes: Its Commercialism Hides Its Potential*, 80 ABA J. 46 (1994); Betsy Streisand, *Can He Get a Fair Trial?*, U.S. NEWS & WORLD REPORT, Oct. 3, 1994, at 56; Gerry Spence, *Justice: The New Commodity*, 78 ABA J. 46 (1992).

<sup>280</sup> See JOHN H. WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS*, VOLS. I-III (1928). This monumental work is, perhaps, the first comparative analysis of legal systems. It explores the structure of legal systems from the ancient Egyptians to the twentieth century.

<sup>281</sup> See Alexander Hamilton, *THE FEDERALIST* No. 83. In this paper, Hamilton argues for public jury trials and seeks to allay fear of this ancient "palladium of free government."

constitutional as well as common sense limitations, is whether the trial public should necessarily be extended by electronic technology to a segment of society which can instantly see and hear court proceedings and a pandemonium of investigative journalism and expert commentary from the comfort of their living room couch. Television is now the dominant means by which the media—the so-called fourth branch of government—exercises power in revealing the workings of the first and second branches, the executive and legislative. The success of cable television in showing congressional debates and network television in showing presidential press conferences presupposes the next step of planting cameras in the courtroom to show the workings of the judicial system as well.

Interestingly, most commentators cited in this Article both in print as well as screen seem to assume that the constitutional provisions protecting the press and the public intended to include the electronic medium and the television public in this protection. This assumption is challenged here. Television did not exist at the writing of the constitution and the extension of eighteenth century constitutional provisions to twentieth century technology should not be conferred lock-step. Rather, it is appropriate to consider the ways in which television and its audience differs from that of the press. Specifically, the new technology of television has a qualitatively unique ability to affect, adversely or otherwise, the story it seeks to show and tell.

Television is certainly not a unique medium for distorting the very message sought to be portrayed. It is merely the latest, the subtlest, and by far the most effective medium for injecting bias into the message delivered. Television media, like other media forms, brings trials into the living room of America and vice versa; it enlarges the community of the courtroom public. Television coverage, especially gavel-to-gavel coverage, presents the exact words in context as well as the speaker's dress and mannerism. How then does the electronic media interject bias in ways not possible for the press? Television technology is qualitatively different from the printing press in that audio-visual reproduction, coupled with interactive data processing, enables the media to convey actual events and background information so comprehensive as to be worthy of the moniker, "the complete picture." And furthermore television presents the complete picture instantaneously. The combination of a comprehensive and instantaneous picture permits the television public to react to the televised events at trial at virtually the same instant as they actually occur.

This comprehensive and instantaneous information feed is a two-way street due to the threefold nature of the public's reaction. First,

reacting to the leads gleaned from the witness or hints from the questioning during the day, later into the night investigative journalism ferrets out additional information and thereby changes the evidentiary landscape. Second, expert commentators from the bench, the bar, and the legal academy share their insights and experiences on all matters of style and substance. Third, through call-in television and television talk shows with audience participation, a national public offers up opinion much like an interactive shadow jury. Most importantly, all of this information is assembled by the television media out of court and plays out in nightly re-caps—all before the court comes to order the next day. In contrast, the print media simply does not operate with this kind of interactive speed or attract so wide and responsive an audience. By virtue of re-broadcast and nightly analysis, the combination of television media in and out of the courtroom provides a feedback loop, which permits the judge, lawyers, witnesses, and jurors at trial to become aware of the public reaction to what goes on at trial—also virtually instantaneously. Paraphrasing Shakespeare's cynic Jacques: it makes the courtroom a world stage and all the men and women merely players.<sup>282</sup> As the uncensored reactions of the in-court public would otherwise affect the trial, if not properly controlled by the court, so too can the remote public affect the trial, in ways for which effective means of control have yet to be developed.

The judicial inquiry into the wisdom of permitting televised coverage of trial proceedings may have begun with speculative concerns about the superficial mystique of technology and audio, visual, and data processing wizardry,<sup>283</sup> but meaningful inquiry as to the wisdom of in-court cameras has long since delved much deeper to look at the new and different ways in which a remote television audience affects the trial process—ways similar to potential distraction by the in-court public.<sup>284</sup> To make this connection, we begin with a logical syllogism to simplify the problem created by cameras in the courtroom instantaneously feeding information to the public and out-of-court cameras comprehensively and instantaneously feeding the reactions of the re-

---

<sup>282</sup> See WILLIAM SHAKESPEARE, *AS YOU LIKE IT*, act 2, sc. 7. Presenting one's self for the public is theater. Changing the medium and the public changes the stage in which one performs and thereby the message.

<sup>283</sup> See *Estes v. Texas*, 381 U.S. 532 (1965), discussed *infra* at section II.A.

<sup>284</sup> Jeremy Campbell, *Where the OJ Facts Meet Fiction*, *EVENING STANDARD*, Sept. 28, 1994, at 25, reports the views of trial behavior consultants who generally assert that the trial participants must bond with the television public to be successful and that heavy TV viewers are unable to disentangle fact from fiction in the programs they watch. See Laura Mecoy, *Drive For Legal Reforms to Follow Simpson Trial?*, *SACRAMENTO BEE*, June 4, 1995, at A1 (noting that *E! Entertainment Television* logged nearly a million telephone calls in the four hours after it asked viewers to vote on O.J. Simpson's guilt or innocence).

mote public back to the trial process in a virtually simultaneous feedback loop, all to the prejudice of the judicial process.

Major premise: the public (in-court or remote), which is assembled free of screening by *voir dire*, which witnesses free of evidentiary privileges and which emotes free of court instruction, reflects all manner of political considerations—the bane of a civilized judicial system.<sup>285</sup> Minor premise: live, in-court camera coverage, by virtue of its comprehensive and instantaneous nature, coupled with out-of-court camera coverage, such as nightly recaps infused by investigative journalism to parse out points raised at trial, creates a comprehensive and instantaneous information feedback loop, informing trial participants of the remote public's reaction to the day's events, providing critiques, and flushing out new witnesses and evidence in time to change the course of the next day's events at trial.<sup>286</sup> Conclusion: unless the court has the ability to exercise the same degree of control over television and its remote public as it does for the in-court public (which it does not), the television viewing public becomes empowered to affect the judicial process with political considerations and in other ways both numerous and destructive to the goals of truth and justice.

The prejudicial effect of a feedback loop operating between trial participants and the remote public is not a concept developed in the nether-world of speculation. Concrete examples of this feedback loop will help to demonstrate the real possibilities for prejudice. The prejudicial impact theoretically advanced by the syllogism describing a comprehensive and instantaneous feedback loop between the public and the trial process is developed factually by reference to some of the O.J. Simpson trial, a trial which eclipses both surveys and speculation to demonstrate the disastrous reality of cameras in the courtroom.

Perhaps the best example of a comprehensive and instantaneous feedback loop creating an interplay between live televised developments in court and the public's reaction out of court in the O.J. Simpson case occurred in revolving door fashion during the testimony of

---

<sup>285</sup> It is axiomatic that the public has no direct role to play *vis-a-vis* court proceedings, e.g., presentation of evidence, rulings from the bench, and especially not in the deliberative process of courts. The public properly plays an indirect role in the court process by bestowing its approval when justice is done. This the court does, Justice Stevens opined, in the context of ineffective assistance of counsel claims, when the trial generates a reliable result, one which (in the criminal context) subjects the prosecution's version of events to the crucible of adversarial testing. *United States v. Cronin*, 466 U.S. 648, 656 (1984).

<sup>286</sup> This it does by virtue of the distraction caused by the psychological impact of the cameras' presence on the court actors. The conventional wisdom is that a change in audience, as well as a change in the medium, necessarily begets a change in the message. See *supra* note 249. To a lesser extent (which is increasingly becoming less and less of an impact as technology makes in-court cameras less obtrusive) the physical presence of audio visual equipment can distract the court process.

Mark Fuhrman—the Los Angeles county police detective who allegedly found a bloody glove at the Simpson estate matching one found at the deceased's estate.<sup>287</sup> The crux of the defense impeachment of Mark Fuhrman was that he is a racist who objected to mixed marriages and may have planted evidence.<sup>288</sup> The first live witness to support this theory came by way of Kathy Bell, a real estate broker, whose office was located in the same building just above the Marine recruiting station where Fuhrman, a former Marine, allegedly sought to join a reserve unit, if one could be found where he did not have to deal with blacks.<sup>289</sup> Fuhrman came to the attention of Kathy Bell through his appearance on television as a prosecution witness during the preliminary hearing.<sup>290</sup> In turn, Fuhrman got a preemptive look at Kathy Bell during her appearance on the Larry King show.<sup>291</sup> Thus, it was the televised court appearance of a key prosecution witness in the courtroom which first generated the impeachment evidence for that witness. And it was through a live television interview of Kathy Bell that Fuhrman became fully aware of the assertions of an impeachment witness in advance of his own testimony and with obvious impact. Somehow impeachment is not quite the same when both the witness and the world know the contradicting testimony in advance. Lawyer-

---

<sup>287</sup> CNN television broadcast, *The Big Story*, Mar. 20, 1995 (Transcript #124).

<sup>288</sup> ABC television broadcast, *Breaking News* with Peter Jennings, *Cochran's Opening Continues After Ito's Sanction*, Jan. 30, 1995 (Transcript # 191-1).

<sup>289</sup> CNN television broadcast, *Larry King Live: Is Mark Fuhrman A Racist*, Jan. 30, 1995 (Transcript #1344-1).

<sup>290</sup> Kathy Bell appeared on the Larry King Show and told *inter alia* how she became a defense witness.

KATHY BELL: Well, actually, I was cleaning my house, and it was really the first opportunity that I had to watch the O.J. thing, because I had been working a lot. And I saw him on the television. I actually heard that they were going to make it a racial issue, and I thought that it was really absurd. And I looked at the television, then I see this man that—and I wouldn't have known his name if I saw him on the street, but I know that he was there. And I know what he said. And that just came out, and I was very nervous. And so, I went right down, right away, and I started on the computer, typing a letter.

LARRY KING: To?

KATHY BELL: To the defense. And I later gave it to the prosecution the next day. And actually, I tried to get all the phone numbers that night, and I couldn't fax it to the prosecution until the next day.

CNN television broadcast, *Larry King Live: Is Mark Fuhrman A Racist*, Jan. 30, 1995 (Transcript #1344-1). See CNN television broadcast, *Larry King Live: Kathleen Bell's Lawyer Defends Her Integrity*, Mar. 15, 1995 (Transcript # 1382-2) (Interview of Taylor Daigneault, Kathy Bell's Attorney). While it is certainly true that in the absence of Fuhrman's televised appearance, Kathy Bell might have eventually seen Fuhrman through other sources, the fact remains that she did see him because of his television appearance and may not have seen about him otherwise.

<sup>291</sup> During his cross-examination, Fuhrman admitted that the prosecution had instructed him to watch Kathy Bell's appearance on the *Larry King Show*. Courtroom Television Network, *Live Trial Coverage: CA v. Simpson—Day 32—Part 13*, Mar. 13, 1995 (Transcript # 32-13).



ing is different when the first interview that either party obtains from a witness appears on television. The problem of investigative television journalism getting out in front of the O.J. Simpson trial seriously compromised efforts of the defense team.

During F. Lee Bailey's cross-examination of Fuhrman, the lead prosecutor, Marcia Clark, strenuously objected to a line of defense questioning designed to elicit testimony from Fuhrman relevant to his alleged racial bias.<sup>292</sup> In a proffer of testimony, defense attorney F. Lee Bailey announced to Judge Ito *inter alia* that a black former Marine named Maximo Cordoba was ready to testify that Fuhrman had called him a "n——."<sup>293</sup> Prosecutor Marcia Clark challenged the defense, contending that Cordoba would evaporate. F. Lee Bailey then elaborated, offering a proffer of testimony:

"I have spoken to him [Cordoba] on the phone, Marine to Marine, and I haven't the slightest doubt that he'll march up to that witness stand and tell the world what Mark Fuhrman said to him."<sup>294</sup>

That night the TV newsmagazine, *Dateline NBC* aired a segment in which Cordoba initially claimed never to have spoken to Bailey.<sup>295</sup> To add to the confusion, the next night *Dateline NBC* obtained a fresh interview with Cordoba, in which he remembered he had talked with Pat McKenna, Bailey's assistant, and briefly with Bailey himself.<sup>296</sup> Then *Dateline NBC* aired the second half of the first interview, with Cordoba stated that Fuhrman had called him a "n——," a memory he had previously repressed. Thus, as with Kathy Bell, live in-court camera coverage helped the trial process by increasing the number of witnesses coming forth. However in a sort of technological magnanimity, out-of-court cameras, by way of investigative television journalism, impeached the impeachment witnesses by airing their story to the world in advance of defense preparation and well in advance of the natural flow of the trial. Thus the interplay between cameras in and out of court undermined witnesses who might otherwise have offered devastating support for the defense theory of a racist, rogue cop; embarrassed defense counsels; and prolonged the trial with numerous sidebars and exchanges out of the presence of the jury.

That television in and out of the courtroom scooped the pursuit of advocacy and altered the trial evidence and developments in the

<sup>292</sup> See Courtroom Television Network, *Live Trial Coverage: CA v. Simpson—Day 34—Part I*, Mar. 15, 1995 (Transcript # 34-1).

<sup>293</sup> Elizabeth Gleick, et al., *Past Meets Present; F. Lee Bailey Tries to Regain a Former Glory, While Mark Fuhrman May Have Got A Raw Deal*, TIME, Mar. 27, 1995, at 65.

<sup>294</sup> *Id.*

<sup>295</sup> ABC television broadcast, *Nightline*, Mar. 15, 1995 (Transcript #3603).

<sup>296</sup> See Courtroom Television Network, *Live Trial Coverage: CA v. Simpson—Day 34—Part I*, Mar. 15, 1995 (Transcript # 34-1).

process is nothing short of a complete role reversal where news reporters control the dynamic flow of information and thus make the news.<sup>297</sup> Consider: the defense produces the name of its witness, Max Cordoba, solely as a proffer of good faith to support its right to question Mark Fuhrman about his views on racial matters. In the ordinary course of events, the witness Max Cordoba, after appropriate preparation, might then appear much later in the defense case-in-chief, appropriately orchestrated to build a case in which racism played a part in the police investigation. Instead, the media stampeded the trial process. Due to excellent investigative journalism, the world first heard Max Cordoba, without the benefit of standard witness preparation, in the medium of tabloid television and well in advance of his expected testimony at trial. The process so damaged Cordoba's credibility that the defense never called him as a witness.

The instantaneous feedback loop in the cases of Kathy Bell and Max Cordoba began when television journalism outside the courtroom seized upon a development occurring on live television inside the courtroom.<sup>298</sup> In both cases, investigative television journalism took witnesses named solely as part of a proffer of testimony, and going beyond mere reporting, they actually developed their testimony to produce information beyond that possessed by either party at trial. In so doing, television altered the integrity of the witnesses, defense counsel, and the flow of the trial proceedings to the prejudice of the defendant and his defense lawyer. The *Dateline NBC* interview of Cordoba in advance of routine defense preparation and well in advance of his appearance at trial not only damaged the credibility Cordoba, but that of defense attorney F. Lee Bailey as well. The loop was complete when the next day in court Marcia Clark began an acrimonious exchange, showing portions of Cordoba's interview from *Dateline NBC* and hurling recriminations at F. Lee Bailey, whose response was volatile; the charges and explanations took up the entire morning while the jury cooled its heels.<sup>299</sup>

There are several ways in which a court exercises control over the public within the courtroom to maintain the dignity, decorum, and

---

<sup>297</sup> Examples of this phenomenon in the context of military operations include the network television cameras providing live coverage of the Marine landing in Somalia. See Jim Lobe, *Somalia: U.S. Television Networks Not Far Behind Troops*, INT'L PRESS SERVICE, Dec. 4, 1992; *Marines Go Ashore in Somalia*, L.A. TIMES, Dec. 9, 1992, at A1.

<sup>298</sup> Even Court TV discussed these implications in its nightly review of the O.J. Simpson Trial. Courtroom Television Network, *Live Trial Coverage—CA v. Simpson—Day 34—Part 4*, Mar. 15, 1995 (Transcript # 344).

<sup>299</sup> See Courtroom Television Network, *Live Trial Coverage: CA v. Simpson—Day 34—Part 1*, Mar. 15, 1995 (Transcript # 341). CNN television broadcast, *Simpson Trial—Text—Day 33, Part 3*, Mar. 14, 1995 (Transcript # 33-3).

objectivity of the proceedings. For example, under the Federal Rules of Evidence, a judge may exercise control over the manner in which witnesses are interrogated so as to be sure that the interrogation is effective, expeditious, and without harassment.<sup>300</sup> Judges may sequester witnesses or issue an order excluding them from hearing other evidence which may affect their testimony.<sup>301</sup> In addition, the judge has the power to hold courtroom participants in contempt of court for any inappropriate behavior which is seen by the judge and takes place in the actual presence of the court.<sup>302</sup> Recalcitrant witnesses may be ordered to confinement for refusal to comply with court orders.<sup>303</sup>

Judges also have great latitude in protecting the jury from prejudicial influences.<sup>304</sup> The device most frequently used to empanel an impartial jury is *voir dire*,<sup>305</sup> and juries are instructed not to discuss the case among themselves (prior to formal deliberation) or with others, and not to read, listen, or watch media reports about the case. One draconian step, infrequently used to maintain the integrity of the admissible evidence prior to television media coverage, but which may become a more necessary option, is sequestration of jurors.<sup>306</sup> Sequestration is, however, a tremendous burden and tends to impact the fairness of court proceedings by decreasing the number of potential jurors who can accommodate sequestration. This may adversely affect deliberations because it may motivate jurors to hurried deliberations

---

<sup>300</sup> FED. R. EVID. 611.

<sup>301</sup> FED. R. EVID. 615.

<sup>302</sup> FED. R. CRIM. P. 42.

<sup>303</sup> 18 U.S.C. §1826 (1994).

<sup>304</sup> Options range from limiting the admissible evidence, FED. R. EVID. 403, to sequestering the jury, and in extreme cases to closing the courtroom to the public or the press. See *Waller v. Georgia*, 467 U.S. 39 (1984); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

<sup>305</sup> FED. R. CRIM. P. 24.

<sup>306</sup> Through the common law, jury sequestration has developed as a means of ensuring a fair trial. See *Estes v. Texas*, 381 U.S. 532 (1965); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). First, televised trials would necessarily mandate sequestration, more so than otherwise, since television publicity is capable of having a much greater impact than newspapers. The costs of sequestration are often quite exorbitant: they include the stress faced by the jury, the hotel bills and the cost of monitoring and the possibility that at any given moment, even an inadvertent leak could be grounds for mistrial. Second sequestration would have to be extraordinarily comprehensive given the tendency for fictionalized television to compete with live television. In the O.J. Simpson case as with other recent highly publicized trials such as the Menendez brothers and Amy Fisher, network television executives rush fictionalized accounts onto the screen. This too can create bias in population from which the jury is culled. In the past, made-for-television shows based on real life appeared on the tube within months of the trial. This was true in the Amy Fisher adultery case and the Menendez Brothers case as well. It is also true in the O.J. Simpson case, only this time the television shows are already beginning to air *before* the trial. As fictionalized television must increasingly come to compete with live television, the "made for TV" accounts may continue to be aired in advance of the real thing.

merely to escape sequestration. The constant contact between sequestered jurors also leads to friction and feuds between jurors which may harm deliberations.<sup>307</sup> Sequestration is a glorified prison. Every contact to the outside world is censored. Everything the sequestered jury reads, hears, and sees is monitored.<sup>308</sup> Newspapers have articles relating to the case cut out—allowing jurors to figure how much coverage the trial received on each particular day. Sequestration of the O.J. Simpson jurors involved denial of televisions, radios, and telephones.<sup>309</sup> The court restricted family visits to Wednesdays and weekends, and ordered continuous monitoring of the visits by marshals.<sup>310</sup> Both the severity and the length of the sequestration in the O.J. Simpson trial has prompted reform or doing away with sequestration entirely.<sup>311</sup>

Due to the censorship and isolation, sequestration may also raise concerns about the First Amendment rights of jurors. Sequestration is also quite costly. Prior to the O.J. Simpson trial, the State of California has sequestered only four trials in the last twenty-five years: Charles Manson, the Rodney King beating trial, Reginald Denny, and Randy Steven Kraft.<sup>312</sup> Only two of these (Manson and Kraft) were due to prejudicial media attention. The others were for security reasons.<sup>313</sup> The sequestration of Simpson jurors cost \$2,985,052.<sup>314</sup> Of course, taxpayers, not the media, pay for jury sequestering and for new trials, in the case of taint.

Much has been written on, and many are, the rules dealing with control over the in-court public.<sup>315</sup> However, despite the possibility of

---

<sup>307</sup> Erwin Chemerinsky, *Judges Aren't Sequestered; Why Juries?*, L.A. TIMES, Oct. 10, 1994, at B7; Stephanie Simon & Ralph Frammolino, *Despite Perks, Sequestration Is a Gilded Cage, Jurors Say*, L.A. TIMES, Jan. 15, 1995, at A1. Tensions develop among jurors, sometimes leading to screaming matches. Little things of no importance take on great meaning because they have so little to do or to talk about. Jurors who have been sequestered for long periods report feeling trapped, frustrated, irritable, fed up, stressed out, and exhausted. *Id.*

<sup>308</sup> Gale Holland, *Jury Told To Pack For Long Trial/"It Won't Be A Picnic," Ito Warns*, USA TODAY, Jan. 10, 1995, at 3A.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Laura Mecoy, *Simpson Trial Raises Juror-Rights Issue; Defendant Is Entitled To More Freedom Than Sequestered Panel Members Are*, FRESNO BEE, Apr. 23, 1995, at A4.

<sup>312</sup> Simon & Frammolino, *supra* note 307.

<sup>313</sup> *Id.*

<sup>314</sup> *Simpson Trial Record*, USA TODAY, Oct. 4, 1995, at 1A.

<sup>315</sup> See Annotation, *Exclusion of Public During Criminal Trial*, 48 A.L.R.2d 1436 (1956 & Supp. 1992); D.J. Penofsky, Annotation, *Right of Person Accused of Crime to Exclude Public From Preliminary Hearing or Examination*, 31 A.L.R.3d 816 (1995); Ferdinand S. Tinio, Annotation, *Validity and Construction of Constitution or Statute Authorizing Exclusion of Public in Sex Offense Cases*, 39 A.L.R.3d 852 (1995); Jack W. Shaw, Jr., Annotation, *Right of Accused to Have Press or Other Media Representatives Excluded from Criminal Trial*, 49 A.L.R.3d 1007 (1970 and Supp. 1995); Stewart J. Oberman, Annotation, *Propriety of Exclusion of Press or Other Media*

jury sequestration and jury instruction, there has been no real development of tools analogous to those dealing with the in-court public to neutralize the remote public and to prevent it from influencing the trial to the extent developed with respect to the in-court public.

B. OLD PREJUDICES BY NEW TECHNOLOGY: HOW TELEVISION CAMERAS CAUSE POLITICAL CORRUPTION OF THE TRIAL PROCESS

In general, television coverage including the interplay of cameras in the courtroom (live gavel-to-gavel) with cameras out of the courtroom (investigative journalism ferreting out new evidence, expert commentary, and reactions from the public) conspire to infect the trial process with a form of technological tampering which prejudicially impacts the job performance of the lawyers, judge and jury and taints evidence and witness testimony.

1. *Technological Witness Tampering*

There are several major forms of technological witness tampering. The first occurs when the glare of television during the witness examination effects a witness's willingness to testify.<sup>316</sup> The second form of technological witness tampering occurs when a witness is permitted to view related testimony or evidence during televised proceedings, which may then shape the witnesses' memory, recollection, sympathies, and willingness to testify.<sup>317</sup>

---

*Representatives from Civil Trial*, 79 A.L.R.3d 401 (1995); Thomas M. Fleming, Annotation, *Exclusion of Public from State Criminal Trial in Order to Avoid Intimidation of Witness*, 55 A.L.R.4th 1196 (1994); Thomas M. Fleming, Annotation, *Exclusion of Public From State Criminal Trial in Order to Prevent Disturbance by Spectators or Defendant*, 55 A.L.R.4th 1170 (1994); Thomas M. Fleming, Annotation, *Exclusion of Public from State Criminal Trial in Order to Preserve Confidentiality of Undercover Witness*, 54 A.L.R.4th 1156 (1994); William J. Appel, Annotation, *Exclusion of Public from State Criminal Trial by Conducting Trial or Part Thereof at Other than Regular Place or Time*, 70 A.L.R.4th 632 (1994); Susan L. Thomas, Annotation, *Exclusion of Public and Media from Voir Dire Examination of Prospective Jurors in State Criminal Case*, 16 A.L.R.5th 152 (1995); George V. Burke, Annotation, *Federal Constitutional Right to Public Trial in Criminal Case—Federal Cases*, 61 L. Ed.2d 1018 (1995); LAFAYE & ISRAEL, *supra* note 26 at §§ 23.1, 23.3.

<sup>316</sup> See *State v. Palm Beach Newspapers, Inc.*, 395 So. 2d 544 (Fla. 1981) (court prohibited coverage of witnesses' testimony after they expressed fear for their safety and refused to testify "on television" even upon threat of contempt); see also Memorandum from the New York State Defenders Assoc. Inc., Concerning S.496 and A.664 (1995) (on file with author); Criminal Justice Section, ABA, *Reducing Victim/Witness Intimidation: A Package 2* (1981).

<sup>317</sup> But see *State v. Gregory M.*, 22 Media L. Rep. (BNA) 2252, 2254 (N.Y. Fam. Ct. July 17, 1994); Memorandum from the New York State Defenders Assoc. Inc., Concerning S.496 and A.664 (1995) (on file with author); Gregory K. McCall, *Cameras in the Criminal Courtroom: A Sixth Amendment Analysis*, 85 COLUM. L. REV. 1546, 1552-54 (1985); cf. J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, 7 INSIDE LITG. 1 (1993) (quoting Seth P. Waxman of Miller, Cassidy, Larroca & Lewis and Roy E. Black of Black

The best example of this second type of technological witness tampering (originated in a televised congressional trial hearings rather than in a judicial trial) occurred in the high profile trial of Lieutenant Colonel Oliver L. North, the Iran-Contra case. In that case, technological witness tampering was cause to successfully appeal Oliver North's conviction.<sup>318</sup> Prior to his prosecution for related matters, Congress, in full anticipation of North's future prosecution, granted North "derived use" immunity<sup>319</sup> to testify regarding his role in the Iran-Contra scandal. Network television and radio carried the testimony live to a riveted national audience.<sup>320</sup> The Independent Counsel who brought the case against North took care to avoid exposure to the testimony and did not use the immunized testimony at trial. However, many of the Independent Counsel's witnesses had seen the testimony on their own.<sup>321</sup> Upon conviction, defense counsel Brenden Sullivan appealed, arguing that the Independent Counsel violated North's grant of "derived use" immunity when the prosecution relied on a witness whose testimony was shaped, directly or indirectly, by compelled testimony, regardless of how or by whom he was exposed to that compelled testimony. The court agreed. Even if the prosecution did not see the televised testimony of North, the prosecution's witnesses did and may have been tainted by the exposure.

The majority in the *North* court appeared to have a genuine concern that the memory of the witness would be impermissibly refreshed by his exposure to the immunized testimony, which might serve to enhance the credibility of that testimony at trial.<sup>322</sup> The effect of wit-

---

and Furci, P.A., counsel to William Kennedy Smith). Shartel cites to test studies showing that no more than one-fifth of participants were distracted by extended media coverage. *Study by Prof. Eugene Borgida, Prof. Kenneth G. DeBono, & Prof. Lee A. Buckman*, 14 LAW & HUM. BEHAV. 489 (1990) (found that camera coverage affected presentation but not content of testimony in laboratory study). *But see* THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS, REPLY TO THE MINORITY REPORT, N.Y. (1995) (camera coverage does not adversely affect the overwhelming majority of participants).

<sup>318</sup> *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam). *See First North, Now Poindexter*, WASH. POST, Nov. 17, 1991, at C6.

<sup>319</sup> In *Kastigar v. United States*, 406 U.S. 441 (1972), the Court held that "derived use immunity" was sufficient in scope to exempt a witness from harm flowing from court-ordered testimony in violation of the Fifth Amendment guarantee against compelled self-incrimination.

<sup>320</sup> *See, e.g.*, Bob Secter & Wendy Leopold, *Television Viewers Swamp Media with Calls, Letters*, L.A. TIMES, July 15, 1987, at 13.

<sup>321</sup> The impact of televised hearings prior to the trial also raised issues of tainting the jury as well as witnesses. *See* Ann Pelhman, *North Jury Search Raises Question of 'Triability'*, LEGAL TIMES, Feb. 6, 1989, at 6. Minutes after receiving the jury questionnaires in the Oliver North case, U.S. District Judge Gerhard Gesell bluntly summed up the difficulty of finding jurors not exposed to North's testimony on Capitol Hill in July 1987: "It seems to me a situation relating to the triability of the case." *Id.*

<sup>322</sup> In the absence of immunity, the court *sua sponte* or at the request of either party at a

ness exposure to the televised evidence of other witnesses describes a sort of "derived influence" corruption of the truth seeking function of a trial. The influence entails the risk that witnesses who are exposed to the testimony of others may have enhanced credibility whether they testify in conformity of what they have heard elsewhere or in contradicting previous testimony, since they will have the benefit of a preview in styling their remarks.<sup>323</sup>

The third and most recurring form of technological witness tampering is witness marketing.<sup>324</sup> Witness marketing occurs when witnesses take into account the market value of their information in

---

trial, may exclude a witness so he cannot hear the testimony of other witnesses. See FED. R. EVID. 615. Witness refreshing which called into question a breach of a grant of immunity under *Kastigar* is of constitutional dimension, while a breach of an evidentiary rule is of lesser significance. However, the concern for altered testimony and enhanced credibility is identical. Therefore, unless the prosecution builds a "Chinese wall" around its witnesses as well as its staff, or the trial judge is prepared to sequester the prosecution's witnesses along with the jury, televised coverage can lead to altered testimony of later appearing witnesses. One California public defender has already challenged, albeit unsuccessfully, the use of television publicity because it would influence the victim's in-court identification. Geoffrey Mohan, *Bail Set at \$2-million in Rape Case*, L.A. TIMES, Oct. 26, 1993, at B4. (The public defender objected that publicity would influence the victim's ability to identify his client in connection with the attacks).

<sup>323</sup> In seeking to comply with the judge's order, some witnesses seeking to avoid television coverage of the O.J. Simpson case went to extraordinary lengths. American Airlines, which routinely airs CNN on its airplanes, had grounded its airline stewardess whom defense lawyers included on their witness list as a demeanor witnesses. Jim Newton, *The O.J. Simpson Trial; Lawyers Clear Witnesses For Takeoff*, L.A. TIMES, May 11, 1995, at A26 (Judge Ito ultimately granted his approval of the stewardess returning to duty, with an assurance that she would not watch the in-flight television). Former California Superior Court Judge, Wendy Putnam Park, the mother of Allan Park, the limousine driver who took O.J. Simpson to the airport the night of the killings, told listeners of the Larry King show that she told her son to sit up straight and "don't drink carbonated beverages," but that he could not discuss his testimony with her. CNN television broadcast, *Larry King Live*, Mar. 30, 1995 (Transcript # 1395).

<sup>324</sup> The interplay between investigative journalism and evidence gathering is a long standing issue with broad implications. Recently, ABC News reported on a situation where the police in Kansas City first found out about a murder in their city when viewing a television newscast, captured on video by a tourist and sold to television station, WDAF-TV. The station agreed to provide police with a copy of the footage aired on the newscast, but refused even after service of a warrant to turn over either the original or a copy of the complete video recording. Station vice president Mike McDonald argued that the unused video was analogous to reporter's notes and that seizure could not be compelled. The prosecutor ultimately took the original, which she claimed was necessary to establish the probable cause to hold the suspect. The Kansas City Star wrote an editorial calling the separation of journalism from law enforcement an important First Amendment right necessary to protect the integrity and independence of reporters. The television station sued the police department and the prosecutor and won a partial victory when the federal judge ruled that the police seizure of the tape was improper. The judge also fined the prosecutor \$1,000. The television station said it would donate the money to a journalism school. ABC television broadcast, *Nightline*, Feb. 3, 1995.

advance of a court appearance.<sup>325</sup> The publicity associated with a live television event may make a witness too eager to testify by raising the marketing consciousness of that witness.<sup>326</sup> The testimony of a witness<sup>327</sup> who knows he will appear on television may suddenly become, in his mind, valuable less for what it may mean for justice and more for its entertainment value (cash value to the witness).<sup>328</sup> The instantaneous, mass marketing opportunity presented by a television audience far exceeds that of the most widely read press, whose time-sensitive deadlines make it difficult to keep pace with the fast moving terrain of public consciousness.<sup>329</sup> Checkbook journalism has always

---

<sup>325</sup> The mere fact that a court participant may sell a story to television is grounds to impeach the credibility of the story. The trial defense attorney in the William Kennedy Smith date rape trial successfully impeached the credibility of a close friend of the alleged victim because she sold her account about the accuser to a tabloid television show. See *Sexy Willie's Social Whirl*, *NEWSDAY*, Jan. 31, 1992, at 4. One of Alan Dershowitz's (unsuccessful) grounds for appeal of the Mike Tyson conviction was a claim that his accuser had hired an attorney to negotiate rights to her story. *Tyson's Accuser Tells of a Failed Feeling*, *WASH. POST*, Jan. 27, 1993, at C2.

<sup>326</sup> The taint of marketing is by no means limited to witnesses, but extends to every person connected with the trial who garners a share of the spotlight, including members of the media themselves. For example, the Oliver North Iran-Contra hearings secured national recognition for talented women broadcast journalists, such as Cokie Roberts, Elizabeth Drew, and Judy Woodruff. See Arthur Unger, *Women of the 'Hour': PBS Team Covers Hearings As History*, *CHRISTIAN SCI. MONITOR*, July 28, 1987, at 1.

<sup>327</sup> In the preliminary hearing involving the O.J. Simpson case, during cross examination, defense attorney Robert Shapiro sought to blunt the direct testimony of Jose Camacho, who had said that O.J. Simpson bought a 12 inch knife which he wanted sharpened.

ROBERT SHAPIRO, Defense Attorney: When Channel 4 came to talk to you, did they offer you any money?

MR. CAMACHO: No, sir.

MR. SHAPIRO: What about Channel 5?

MR. CAMACHO: No, sir.

MR. SHAPIRO: What about the other television stations? They offer you any money?

MR. CAMACHO: [unintelligible]

MR. SHAPIRO: How much did they offer you?

MR. CAMACHO: Some peanuts. [laughter] [laughter in courtroom]

MR. SHAPIRO: So, you really were like a businessman and you wanted to sell your story to the highest bidder, right?

MR. CAMACHO: Sure.

Lou Waters, CNN television broadcast, *The Simpson Murder Mystery, Pt. 5—People v. Simpson*, Oct. 23, 1995 (Transcript # 406-5).

<sup>328</sup> Books and other marketing deals by witnesses or potential witnesses cashing in on the O.J. Simpson trial prior to the case going to the jury number in the dozens. The book list is too long to recount here. The trial has generated to date at least thirty books. Jennifer Seter et al., *Simpson Trial and Trivia*, *U.S. NEWS & WORLD REP.*, Oct. 16, 1995, at 42. For a manageable review of the best O.J. books see Patricia Holt, *Best Of A Bad Bunch of O.J.-Related Books*, *S.F. CHRON.*, Jun. 9, 1995, at C9.

<sup>329</sup> A person who may have relevant information does not get "15 minutes of fame." Personal prejudices, private vendettas, and the like are the traditional stuff of impeachment. Impeaching court participants on the possible basis of marketing their own role is not new, but the enormous profits of television quite possibly makes this kind of impeachment a significantly more likely development at highly publicized trials. Far more than newspapers, the dramatic appeal of television corrupts as it portrays by fostering commer-



been with us,<sup>330</sup> but television journalism moves faster, more broadly, and with considerably larger sums than does the print media.<sup>331</sup>

Witness marketing blurs the distinction between justice and entertainment and may tempt witnesses to embellish their testimony to appeal to the paying media.<sup>332</sup> Nor is the commercial appeal of a

cial cynicism in a solemn forum purposed to find the truth.

<sup>330</sup> Other recent examples of the corrosive effect of checkbook journalism tainting witness testimony include Anne Mercer, the confidant of the rape prosecutrix in the William Kennedy Smith trial who sold her story to *A Current Affair* for \$40,000. On cross-examination, defense attorney Roy Black used this transgression to tarnish Mercer's reputation.

<sup>331</sup> Jill Shively became a potentially key witness for the prosecution in the O. J. Simpson case when she told police investigators that she saw a person resembling Simpson fleeing from the crime scene. But she accepted money for telling her story to the tabloid television program *Hard Copy* and did not appear at the preliminary hearing, nor in the prosecution's case on the merits. Jim Newton & Rebecca Trounson, *Ex-Wife's Father Raises Doubt on Simpson Alibi; Court: He Sets Phone Call Earlier than Coroner Did. Prosecutors Also Face Hurdle—They Lack Murder Weapon*, L.A. TIMES, Jun. 28, 1994, at A1. In addition, small claims court records in Burbank reveal that she was ordered on June 28, 1993, to pay \$2,000 in a court action after she was accused of peddling a script that she did not own. *Id.* The prosecution dropped Jill Shively from its case during grand jury proceedings. Henry Weinstein & Jim Newton, *Transcripts Reveal New Details in Simpson Case; Investigation: Ex-Boyfriend of Nicole Simpson Told Grand Jury of Defendant's Intimidating Behavior*, L.A. TIMES, Jul. 31, 1994, at A1; CNN television broadcast, *Many Potential Witnesses in Simpson Case Discredited*, Mar. 17, 1995 (Transcript #26-3) reported that lead prosecutor Marcia Clark was "outraged when she learned Shively had misled prosecutors by not disclosing that she had sold her story to a tabloid television show before testifying. Clark told the grand jury: 'I could not allow her to be a part of this case at this time, now that she has proven to be untruthful as to any aspect of her statement. Please completely disregard the testimony of Jill Shively.'"

<sup>332</sup> The biggest media sensation among the witnesses of the O.J. Simpson trial was Kato Kaelin, the enigmatic houseguest of Nicole Brown Simpson and later of O.J. Simpson. The very appearance of Kato Kaelin is now considered an "event." See generally Jeanne Stein, *Is He Ready For His Close-Up?; Kato Kaelin Moves From the Hot Seat in the O.J. Simpson Trial to the Court of Public Opinion. With Publicist, Attorney and Agent Behind Him, He's Looking to Leap From Being the Butt of Jokes to Star*, L.A. TIMES, Apr. 16, 1995, at 8; Tom Knotts, *All Dressed Up With Too Many Places to Go*, WASH. TIMES, Mar. 23, 1995, at C2 writes with open contempt that before the murder trial Kato Kaelin was a nobody. He was

just another California dreamer going nowhere, an out-of-work actor, a kind of hanger-on to the beautiful people. . . . Now look at him. He has hit the big time. He was all dressed up, in a Christian Dior tuxedo, at the Radio and Television Correspondents Association dinner last week in the District. He was there as the guest of CNN. He was said to be the hit of the dinner. People wanted to rub elbows with him, check him out, perhaps even bum a \$20 bill off him. No, he couldn't talk about the Simpson trial. You understand. But he could discuss his entertainment projects. He has that TV series next month, called *The Watcher*. It could be a huge hit. Just you watch. He also is the voice of Kato Kitten on the Fox Children's Network. Right. Kato Kitten. Cute. He has had a bit part in a movie and hosted a talk show. . . . It's unfortunate that CNN, in its small way, contributed to Mr. Kaelin's celebrity. Journalists, particularly the ones on the tube, always are asking themselves:

"Why does the public see us as jokes, or worse?"

Now there is a new answer for this old question:

"Because, dummy, you invited Kato Kaelin to a fancy Washington dinner and then showed him off like a trophy, although one in a Christian Dior tuxedo."

*Id.* See also Jeremy Campbell, *The Sinner America Treats Like A Saint*, EVENING STANDARD (London), Mar. 24, 1995, at 9. Campbell writes with equal disgust about America's often

high profile trial lost on members of the bar or judges at trial.<sup>333</sup> Television is a godsend for lawyers competing for business<sup>334</sup> and for judges seeking to get re-elected.<sup>335</sup>

## 2. *Technological Interference With Counsel*

Technological interference with counsel occurs when television "so affects the attorney's performance as to deny the defendant a fair trial."<sup>336</sup> Ineffective assistance of counsel constitutes reversible error when counsel's performance is deemed to yield unreliable trial results, i.e., the trial was not an effective "crucible of meaningful adversarial testing"<sup>337</sup> of the competing claims on the truth. Error

perverse obsession with fame, "the sinner" referred to in the title is Mike Tyson, the Heavyweight Boxing Champion, convicted of rape. Turning to Kato Kaelin, Campbell describes a Washington dinner in which Donna Shalala, Secretary of Health and Human Services, took to chasing Kato around the tables at a Washington dinner party, pleading for an autograph on behalf of an openly gay aide, who thinks Kato is "a hunk." Kato Kaelin made the circuit from comedy fodder for late night television to TV talks shows (even scoring an invitation to Larry King's wedding) to a string of tepid television credits. Kato Kaelin had a cameo appearance on Comedy Central's "Politically Incorrect," United Paramount Network's "The Watcher." Kato Kaelin even has his own fan club and a disputed book deal. Andrea Higbie, *What Fans These Mortals Be*, N.Y. TIMES, Jun. 25, 1995, at 39. Kaelin allegedly received a \$500,000 advance for the book, KATO KAE LIN: THE WHOLE TRUTH (with St. Martin's Press). Apparently, the book deal was to be a joint effort with writer Marc Eliot. However, the two split and Eliot wrote the book alone allegedly based on taped discussions with Kato Kaelin. The only thing Charles Lindbergh had on Kato was a New York parade.

<sup>333</sup> In the Jeffrey Dahmer cannibalism case, when the mother of one of the victims learned that the judge had authorized a screenplay based on the judge's own accounts, she asked the Wisconsin Judicial Commission to investigate a possible conflict of interest fearing that the judge might have issued prejudiced rulings, such as ordering exclusive confessions from Dahmer, knowing that he was later to capitalize on his experiences. *Film Clips: A Look Inside Hollywood and the Movies, True Stories; This One We Can Wait For*, L.A. TIMES, Sept. 13, 1992, at 23.

<sup>334</sup> See, e.g., Phil Reeves, *OJ Trial Wins World Audience for Lawyer as Superstar*, INDEPENDENT, Jan. 22, 1995, at 14; Steve Hall, *Attorneys Invade the Talk Shows*, INDIANAPOLIS STAR, July 13, 1995, at C5; Ron Miller, *Trial Coverage Turns Legal Beagles into Stars*, TAMPA TRIBUNE, Aug. 6, 1995, at 22; *The Simpson Legacy: Twist of Fate/How the Case Changed the Lives of Those It Touched; Legal Eagles; Careers Take Flight for Analysts*, L. A. TIMES, Oct. 11, 1995, at S8. "CBS executives confirmed they're developing a new dramatic series on legal forensics involving Simpson defense attorney Barry Scheck and defense DNA expert Peter Neufeld." Mandese & Jensen, *supra* note 275, at 2.

<sup>335</sup> Defense attorney Leslie Abramson (Menendez case) and *Nightline* commentator for the O.J. Simpson trial quoted Judge Ito as having two rules for handling high publicity cases. Rule number one: The lure of being on CNN is like the lure of the sirens to the sailors, and usually has the same result. Rule number two: Reread rule number one. *Nightline* (ABC News broadcast, Nov. 14, 1994). By giving a personal television interview to a local Los Angeles reporter during the preliminary stages of the O.J. Simpson trial, Judge Ito broke at least one, and possibly both of his own rules.

<sup>336</sup> Fellmeth, *supra* note 11. Lawyers exposed themselves to the limelight and took advantage of it to show themselves off. Bill Boyarsky, *The O.J. Simpson Murder Trial; We May Not Know Why, But We're Going Along For the Ride*, L.A. TIMES, Jan. 23, 1995, at A10.

<sup>337</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

assignments posing interference with counsel claims organize into two main categories. The first category consists of cases where the interference by the government (direct or circumstantial) with counsel's role is so intrusive as to presumptively suggest an inability of counsel to perform effectively.<sup>338</sup> The second category consists of cases where the defendant attempts to show the actual effects of prejudice on appeal.<sup>339</sup>

The Supreme Court reversed the convictions of Billie Sol Estes<sup>340</sup> for adverse television coverage inside the courtroom, and John Shepard<sup>341</sup> for adverse pretrial television coverage in the court house. However, in the Court TV era of live television coverage, electronic databased searches have yet to uncover any reported cases reversed on

---

<sup>338</sup> The lead case setting out the analysis of presumed prejudice is *United States v. Cronin*, 466 U.S. 648 (1984). Leading cases in which the Supreme Court found the interference so intrusive as to support the presumption of prejudice include *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (joint representation of accused constituted a conflict of interest, which on the facts was denial of effective assistance of counsel); *Geders v. United States*, 425 U.S. 80 (1976) (bar on attorney-client consultation during overnight recess for fear of coaching infringed a Sixth Amendment right of counsel); *Herring v. New York*, 422 U.S. 853 (1975) (court power to deny final summation in a bench trial was a denial of Sixth Amendment right of counsel); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (requirement that defendant be first witness violates due process); and *Ferguson v. Georgia*, 365 U.S. 570, 593-596 (1961) (bar on direct examination of defendant).

Leading cases where the court declined to accept the presumption of prejudice include *United States v. Cronin*, 466 U.S. 648 (1984) (short lead time for appointment of counsel, lack of experience and expertise alone are not dispositive of an ineffective assistance of counsel claim; *Caplin & Drysdale v. United States*, 491 U.S. 617, 625 (1989) (Federal forfeiture law permitting confiscation of drug proceeds in advance of trial was not a denial of Sixth Amendment right to counsel as the right to retain a counsel of one's own choosing does not go beyond the "individual's right to spend his own money to obtain the advice and assistance of counsel. . ." (citation omitted)); and *Morris v. Slappy*, 461 U.S. 1 (1983). In *Morris* the Court denied a Sixth Amendment violation where defendant claimed a last minute substitution denied defendant a "meaningful attorney-client relationship." The Court held that "rapport" is not a Sixth Amendment guarantee.

<sup>339</sup> The lead case in this category is *Strickland v. Washington*, 466 U.S. 668 (1984). *Strickland v. Washington* held that a convicted defendant's claim that counsel's assistance was so defective as to mandate reversal of a conviction or death sentence, required a two prong showing. First, that the counsel's performance was deficient. This requires a showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed defendant by the Sixth Amendment. To be deficient, counsel's representation must fall below an objective standard of reasonableness. The proper measure of attorney performance remains simply reasonableness under prevailing professional norms. Second, that counsel's deficient performance actually prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable because the prosecution's version of events was subjected to the crucible of adversarial testing. In effect, the defendant must show that there is a reasonable probability that, *but for* counsel's unprofessional errors, the result of the probability would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

<sup>340</sup> Discussed *supra* at Section II.A.

<sup>341</sup> See *supra* note 60.

appeal due to in-court camera coverage.<sup>342</sup> Although the television media has learned from past mistakes, live television can still directly affect attorney performance to the prejudice of the accused.

For example, in the rape trial of William Kennedy Smith, defense attorney Roy Black admitted that he tiptoed around his tough cross-examination of Patricia Bowman, the alleged rape victim:

I could not do anything but handle her with kid gloves. On national television—with my mother watching—I had to get her to explain the mechanics of sexual intercourse on the Kennedy lawn at three o'clock in the morning.<sup>343</sup>

If the jury had found William Kennedy Smith guilty, obviously he would have appealed on the ground *inter alia* that his lawyer sacrificed effectiveness of a crucial cross-examination so as to not appear insensitive on national television.

One of the more obvious effects of in-court cameras is the need to shield the camera from certain matters, which delays the trial process. The slow down is due in part to an attorney's playing to the television audience, and conversely, in part to avoid the television audience. One reason for the slow pace of the O.J. Simpson trial may similarly be attributed to the need to avoid the television audience.<sup>344</sup> In the O.J. Simpson trial the sidebars were numerous and lengthy. Their occurrence may well be attributed to a desire to keep certain matters out of the sight and hearing of television as well as of the jury.<sup>345</sup> In-court camera coverage of trial proceedings also raises concerns about the potential impact camera coverage of preliminary

---

<sup>342</sup> One explanation for this is that the bedlam generated by live television coverage, like distraction, in general, works against the party with the burden of proof, namely the prosecutor, and thus may have contributed to acquittals, which are not appealable.

<sup>343</sup> *Sexy Willie's Social Whirl*, *supra* note 325, at 4.

<sup>344</sup> San Francisco attorney Dennis Riordan, one of California's better known appellate lawyers, commenting on the reasons for the length of the O.J. Simpson trial, pointed the finger at cameras in the court room in suggesting an explanation for the unusual number of sidebars in the O.J. Simpson trial as well as the exhaustive examination of witnesses. "The sidebars in this case are held not only to deal with certain things outside the jury's presence, but also outside the media's presence. The media's all-pervasive presence definitely slows the process in other ways too. For example, the lawyers feel the case is going to the jury every day. Examinations are being lengthened because there's a sense that the cumulative effect of the commentators will seep through the process, and winning those daily reviews matters." Henry Weinstein & Tim Rutten, *TV, Legal Wrangling Bog Down Simpson Trial; Courts: More Than 430 Sidebars, Being on Television Stage, Large Contingent of Lawyers Are Cited by Experts*, L.A. TIMES, Apr. 16, 1995, at A1. Defense attorney Gerald L. Chaleff, who represented Angelo Buono in the Hillside Strangler case, widely reported in the press, but before the days of cameras in the courtroom, added that "[e]verybody involved in this trial knows that everything they do or say is being seen or heard by millions and millions of people." *Id.*

<sup>345</sup> *Id.*

hearings and motions would have on the jurors.<sup>346</sup> Exposure to prejudicial information may taint the pool of venirepersons and lengthen voir dire.<sup>347</sup>

A troublesome aspect of cameras outside the courtroom is the number of television legal commentators, and equally important, lay persons who provide their reactions to trial strategy, the credibility of witnesses, and lawyers, and the efforts of the opposing side. Although the reviews constitute valuable feedback, trial lawyers must necessarily conform to the expectations of legal commentators because television legal commentators shape the expectation of present and future jurors. The expert commentary goes beyond questions of style and extend to advice on how better to make a point or deal with contingencies at trial.<sup>348</sup> Following popular wisdom deprives the client of the unique insights and independent judgment which the lawyer brings to the case.

Many trial lawyers already make extensive use of jury consultants to mold their case to its most palatable form. Jury consultants employ a potpourri of sociology, psychology, and statistics to help lawyers select jurors who may be predisposed to side with their version of the case.<sup>349</sup> But the work of jury consultants neither starts, nor stops, at

---

<sup>346</sup> Harold R. Fitzer, *Cameras in the Courtroom: The Kansas Opposition*, 18 WASHBURN L.J. 230, 241 (1979).

<sup>347</sup> In *Rideau v. Louisiana*, 373 U.S. 723 (1963), the Supreme Court heard an appeal where the defendant, flanked by law enforcement officers, orally confessed on television two months before trial. The Supreme Court reversed the conviction arguing that in light of the excessive publicity, the televised confessions amounted to Rideau's real trial. Therefore, the Court held, due process required "a trial before a jury drawn from a community who had not seen and heard Rideau's televised 'interview.'" *Id.* Generally, the Supreme Court and lower courts have been reluctant to expand on *Rideau*, instead holding that pretrial publicity alone does not prejudicially taint the jury as long as jurors are able to put aside extrajudicial statements and judge the matter impartially based on the evidence admitted in court. See *supra* discussion at section II.C.2.

<sup>348</sup> Legal commentary is a nightly feature of Court TV and revitalized Geraldo Rivera on CNN.

<sup>349</sup> A firm of consultants known as "Litigation Sciences Incorporated" claims 95 percent accuracy in predicting which way a jury will vote, promising to weed out 'dangerous' jurors and help attorneys tune their message to the idiosyncracies of the dozen men and women who will deliver a verdict. Litigation Science uses a complete 12-person shadow jury which watches the trial on television, holding "people meters" to register instant reaction to the behavior of the trial attorneys, who alter their strategy accordingly. Jeremy Campbell, *This Weekend the DA Prosecuting O.J. Simpson for the Brutal Knifing of his Ex-Wife and Her Boyfriend Decided Not to Ask for the Death Penalty*, EVENING STANDARD, Sept. 12, 1994, at 12. In the O.J. Simpson case, both the defense and prosecution used professional jury consultants using sociology, psychology, statistics, opinion polls et cetera, to help them select the actual jury. ABC television broadcast, *Nightline*, Sept. 27, 1994. In the O.J. Simpson case, both sides jockeyed for favoritism based on such issues as interracial marriages, spousal abuse, credibility of the police, the celebrity of O.J. Simpson, pretrial publicity, and football patronage. *Id.* Following jury selection but prior to the actual trial, jury consultants provided a mock

jury selection; consulting services employ mock juries to stage a trial run to calculate what plays, and they watch the jury during the trial-run to evaluate the impact of the evidence and lawyer posturing on a daily basis. And because the dynamics of a trial change the evidentiary landscape during the course of the trial, jury consultants also offer a service known as shadow juries<sup>350</sup> to try out various methods of developing the case and to fine tune strategy as the trial progresses. Thus, coaching is not new to television. Lawyers simply exploit the interplay between live in-court camera coverage and out-of-court nightly recaps to augment existing coaching techniques by getting feedback from the television public and expert commentators. In effect, television coverage serves as an interactive shadow jury. As such, technological coaching has an incredibly large impact on trials because it displays the universe of talent and opinion for lawyers, judges, jurors, and witnesses to see and hear instantaneously.

In sum, if done directly, witness tampering, tainting of evidence, coaching lawyers, and interfering with lawyers would be grounds for objection, and if particularly egregious, might constitute grounds for mistrial or appeal. That these influences are done indirectly by technology does not lessen their prejudicial impact on the justice system.<sup>351</sup>

## VI. CONCLUSION

TV or not TV. That is the question.

Whether 't is nobler in the mind to suffer  
The slings and arrows of outrageous fortune  
Or to take arms against a sea of troubles,  
And by opposing end them?<sup>352</sup>

Whether it is nobler in the mind to suffer the slings and arrows of the outrageous fortune—television coverage—or to take arms against a

---

jury consisting of mock jurors from a temporary employment agency, but employing a real judge performing in a mock role to judge the credibility of their case. Jury consultants garner over \$400 million annually; there are over 400 jury consultant firms, whose services run as high as \$100,000 per case. *Id.* See also *DA Getting Free Advice On Simpson Prosecution*, DALLAS MORNING NEWS, Oct. 10, 1994, at 4A; Marc Davis & Ken Davis, *Star Rising For Simpson Jury Consultant: Social Science and Luck Helped Jo-Ellan Dimitrius Choose Sympathetic Panel*, 81 A.B.A. J. 14 (1995).

<sup>350</sup> Shadow juries are one party's paid court watchers, selected by mimicking the demographic pool of the real jury, who debrief the party's lawyers nightly on which points made strong connections and which points were weak.

<sup>351</sup> An interesting and thoughtful commentary arguing that these very same influences also help the judicial process is found in Floyd Abrams, *Performance of The Press*, AM. LAW., June 1995, at 83.

<sup>352</sup> WILLIAM SHAKESPEARE, *HAMLET, PRINCE OF DENMARK*, act III, scene 1 (Soliloquy of Prince Hamlet).

sea of troubles—the excess of electronics—and by opposing end them is not a question lightly put.

Any debate that arguably limits public access to courtrooms, whether by television cameras or otherwise, involves the First and Sixth Amendments guarantees. Such limits must be viewed in a historical context. The debate on the interplay between the press and the government goes back to the founding fathers, when the press, not television, was the dominant means of publicity. The Framers of the Constitution were especially sensitive to the fundamental importance of the press in checking secretive deals and thereby bringing about good governance in democratic societies. As James Madison wrote in 1822:

A popular Government without popular information or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own Governors must arm themselves with the power which knowledge gives.<sup>353</sup>

History has borne out the truth of Madison's words. Because government secrecy shrouds corruption and engenders public distrust in government and its officials, the importance of a free press cannot be overstated. It may be well argued that anything "a government of the people, by the people and for the people"<sup>354</sup> cannot do openly should not be done at all. Indeed, few would deny the salutary effect of the glare of television in increasing the government's accountability to the public.

Even so, perhaps the observation made by the French historian Alexis de Tocqueville in his classic study, *Democracy In America*, first published in 1848, remains the most astute:

I admit that I do not feel toward freedom of the press that complete and instantaneous love which one accords to things by their nature supremely good. I love it more from considering the evils it prevents than on account of the good it does.<sup>355</sup>

Judicial neutrality is the ideal in the crucible of adversarial testing. The existence of cameras in the courtroom creates extra-judicial drama and distracted advocacy, which invades the judicial process and upsets detached neutrality. Even without conscious manipulation, the telling of a story necessarily entails advocacy *vis-a-vis* the story.

Long before the existence of television technology and its accompanying distortion, the needs of public interest in criminal trials were

---

<sup>353</sup> Letter to W.T. Barry (Aug. 4, 1822), in 9 WRITINGS OF JAMES MADISON 571 (G. Hunt ed. 1977).

<sup>354</sup> U.S. CONST., pmbl.

<sup>355</sup> ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 180 (J.P. Mayer ed., 1969).

ably met by the print media. The print media informs the public, but with less of a capability to distract the court and sensationalize the process than T.V. Thus, the best way to frame the question presented in this Article presupposes the ban on broadcast media to be an incremental one. Hence, the question presented is whether both the print media *and* broadcast media are constitutionally necessary to a public trial and, furthermore, whether television coverage, with its greater capacity to distort the proceeding, is even a sensible exercise of publicity, given both the constitutional requirement of providing a fair trial to the accused and the notion that justice generally prevails to uphold public faith in the judicial process. The question is one of drawing the line. Given the concerns about the broadcast media's capacity to distort even as it innocently seeks to portray court proceedings, the proper balance is struck under the various constitutional guarantees by allowing the print media in the courtroom, but drawing the line at still and moving picture cameras.

The print media adequately satisfies the public's right to know without television. Because of television's uniquely distorting bias and its tremendous potential for corrupting the very story it seeks to portray, in-court cameras cross the line of a salutary spotlight to distorting glare. The public's right to know beyond the limitations of the print media must be balanced against the inevitable problems which television brings to the courtroom:<sup>356</sup> the distraction of instant publicity, the distortion of an extra-judicial forum to try a case, and finally the bias of the very person holding the camera in choosing what to show, at what angle, and for how long.<sup>357</sup> Mr. Justice Brandeis, in his often cited dissent *Olmstead v. United States*,<sup>358</sup> best captured its essence many years ago:

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect that right every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment.<sup>359</sup>

---

<sup>356</sup> Donald E. Lively, *Modern Media and that First Amendment: Rediscovering Freedom of the Press*, 67 WASH. L. REV. 599, 605-06 (1992).

<sup>357</sup> DAVID L. PALETZ & ROBERT M. ENTMAN, *MEDIA POWER POLITICS* 5 (1981).

<sup>358</sup> 277 U.S. 438 (1932).

<sup>359</sup> *Id.* at 478 (Brandeis, J., dissenting) (upholding a warrantless wiretap without the consent of either party), *overturned by Katz v. United States*, 389 U.S. 347 (1967).



The public's right to know, so persuasively argued with respect to the executive and legislative branches, has less sway when applied to the judicial branch for two very important reasons. First, unlike the other branches of government, courtroom work deals with personal lives rather than matters of intrinsic public concern. Courts routinely order disclosure of the most intimate details of individual lives, businesses, and personal pursuits. A fair trial requires intense scrutiny of these facts, which is why dignity and decorum are so important to the courtroom. The invasive in-court camera graphically exposes private matters. Space limitations and editorial judgment limit the ability of the press to publicize personal details. But the unblinking lens of the camera exercises no discretion, nor even a modicum of modesty.

Second, a fair trial depends on detached neutrality. The remote public, by virtue of television, corrupts detached neutrality. The bias of television may coalesce around politics, culture, and the like. However, the biggest bias is self-interest, political and financial, but mainly commercial. The media is business. Big business. Thus one final question to ask is whose story is it anyway? The humiliation of parading an alleged rape victim's undergarments in a courtroom as occurred in the William Kennedy Smith trial is a necessary part of the judicial process. Further humiliation by making such evidence the fare of national television may make for fair commercial television, but does it make for a fair trial?<sup>360</sup>

Thus though there is much potential good from in-court cameras, there is too much actual bad. Given the existence of an independent press corps covering the trial beat, there is no need to take the extra step of in-court cameras. Cameras should be banned from the courtrooms because they politicize trials in ways heavy-handed and subtle. The subtle change is that cameras in the courtroom change the trial audience, and following a fundamental principle of communication, changing the audience changes the message. Because cameras make the courtroom a global village, it constitutes technological tampering, which occurs when lawyers, witnesses, judges, and jurors heed the siren call of television to seek fame and fortune, but not justice. Television plays what pays.

The heavy-handed change is the injection of public bias in the legal system, which results from cameras in and outside the courtroom. Television technology enables the broadcast media to simultaneously convey live events with accompanying news, analysis, and commentary in a manner so comprehensive as to be worthy of the

---

<sup>360</sup> See generally Marijo A. Ford & Paul A. Nembach, *The Victim's Right to Privacy: Imperfect Protection from the Criminal Justice System*, 8 ST. JOHN'S J. LEGAL COMMENT 205 (1992).

moniker, "the complete picture." The instantaneous character of television coverage essentially makes its reporting of live events an interactive activity. Key here is that cameras in the courtroom set into motion an information feedback loop which instantaneously and comprehensively makes trial proceedings accessible to the television public outside the courtroom and simultaneously makes the public's reaction accessible to those inside the courtroom. This means the machinery amassed in Anglo-American legal tradition to control the in-court public in an attempt to elevate courts above the morass of public clamor, political crassness, personal bias, and petty idiosyncracies all comes to naught since public reaction of this ilk is fed back to the lawyers, witnesses, judges, and jurors who come to court each day with nightly coverage of the preceding day's events fresh on their minds, perhaps more so than the actual events themselves.

The influence of cameras outside of the courtroom on participants inside the courtroom heightens political reaction in the trial proceedings. Television pursues a commercial agenda, not justice. By appealing to the segment of the public to which it caters, television helps to create the news it wishes to report—a form of journalistic activism not unlike judicial activism in pernicious effect, which polarizes the public along the lines deemed politically correct for the intended audience. Thus segments of the television public outside of the jury box may be ill prepared to receive the verdict from the public inside of the jury box.

The comprehensive and instantaneous feedback loop between trial action and voyeuristic, public reaction, resulting from the tandem of in-court/out-of-court television coverage politicizes the judicial process in three ways. First, in the public's perception, the trial operates on a larger social theme than the legal reality. Second, the trial focuses less on the crucible of adversarial testing and more on the political context of the larger social issues, which the media trumpets. Third, television publicity sacrifices justice for disfavored minorities to advance political causes. In short, politicizing of trials erodes the rule of law with mob rule.

Since its inception, the public trial has meant to extend beyond visitors to the courtroom to include the readership of the press. The First Amendment guarantees the public's right to know what goes on in a courtroom. The Sixth Amendment guarantees a criminal defendant a public trial as a check against the abuses of secret process. In addition, television arguably helps instill public confidence in the judicial branch by educating the public about the legal process and by helping the public gain an informed belief about the fairness of the result in the reported case. The question is where to draw the line.

The extension of eighteenth century constitutional provisions to twentieth century technology does not follow lock-step. The press' difference from television in capability, but not in motivation, is decisive. The press operates with neither the speed nor financial resources of television. And because the eye of the press is one-to-one and face-to-face, it is less invasive and disruptive than the unblinking eye of the camera. The Constitutional balance between the virtue and abuse of publicity weighs in favor of the press. Not so with cameras in the courtroom. Cameras in the courtroom cross the line from a salutary spotlight to distorting glare. Putting the lens cap back on the camera in the courtroom is at once the minimal as well as necessary step to reduce the comprehensive and instantaneous feedback loop of television to the manageable speed of a printing press.