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## ARTICLES

### TELEVISIONING HIGH PROFILE TRIALS: ARE WE BETTER OFF PULLING THE PLUG?

Peter L. Arenella\*

*Law is all about human life, yet struggles to keep life at bay. This is especially true of the criminal trial. With the public typically ranking crime our country's most important problem, the criminal trial reflects and ignites large passions. Yet it usually seeks to exclude much of that passion from its stage as the trial proceeds with its structured process of legal proof and judgment.*

*Maintaining the boundary between the courtroom and ordinary life is a central part of what legal process is all about. Distinctive legal rules of procedure and evidence insist upon and define law's autonomous character—indeed, constitute the very basis of a court's authority. The mob may have their faces pressed hard against the courthouse windows, but the achievement of the trial is to keep those forces at bay. . . .*

*But there is always a struggle between this idealized vision of law—which proclaims that law is and must be separate from politics, passion, and public resistance—and the relentless incursion of the tumult of ordinary life.<sup>1</sup>*

Most defenders of the courtroom camera frame the question of access as an all or nothing proposition: should we televise criminal trials or pull the plug in those jurisdictions that permit cameras in the courtroom? Posed this starkly, the question suggests its own answer. The experience of those states that permit their criminal trials to be televised on a

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1. PAUL GEWITZ, *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 135 (Peter Brooks & Paul Gewitz eds., 1996).

regular basis by Court TV or local cable suggests that fears about the camera's impact on witnesses, lawyers, and jurors are largely unfounded. Empirical studies have confirmed what common sense should have suspected: in ordinary criminal prosecutions, the trial's participants soon forget that the camera is present.<sup>2</sup> While gavel to gavel coverage of such trials does not generate riveting television or high ratings, it does give the public access to and information about how our trial system functions.

Starting from this premise, defenders of the courtroom camera have applied the same generic arguments for televising high profile cases. While recognizing differences between ordinary and high profile prosecutions, television advocates insist that these differences provide *additional* reasons for televising high profile cases.

Media lawyers often frame the debate by posing a series of rhetorical questions. Doesn't heightened public interest in a case demonstrate why the television camera is the only realistic way to provide meaningful public access to the trial? Doesn't gavel to gavel televised coverage provide the one medium that can give the public an *accurate* and *unfiltered* view of what is happening in the courtroom? Wouldn't removal of the camera increase public reliance on the media's new storytellers, the legal commentariat? Why eliminate the "antidote" to the tabloid frenzy outside the courtroom that has become so symptomatic of media coverage in these cases? If high profile trials reveal some defects in our adversarial system, doesn't the public need to be educated about the system's warts so that responsible reform can occur? In short, if we only pull the plug in high profile cases, won't we be blaming the camera because we do not like what it reveals?

Defenders of the courtroom camera believe the answers to these questions are obvious and lead inexorably to their favored conclusion: the First Amendment, properly construed, should invalidate any general prohibition against courtroom cameras. If the media wants to televise a high profile case, judges must grant the request unless doing so would impair some compelling and competing state interest.<sup>3</sup>

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2. For citation to state studies, see Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of The Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1543 n.78 (1996).

3. *Id.* at 1520.

Part I will dismiss the primary argument for granting the electronic media a constitutional right to televise criminal trials.<sup>4</sup> Regardless of its merits, few constitutional scholars believe the Supreme Court will acknowledge such a First Amendment right any time soon. For the foreseeable future, trial judges in many of the states that permit courtroom cameras will retain their discretionary authority to grant or deny the media's request to televise a particular trial. An informed exercise of that discretion requires an evaluation of what might be gained and lost by televising high profile

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4. Part I evaluates only whether the public access strand of First Amendment doctrine provides a strong argument for granting a constitutional right to televise criminal trials. Part II considers the costs and benefits of televising high profile cases; an inquiry that judges frequently engage in explicitly or covertly when deciding whether or not to recognize a new constitutional right.

This essay does not address a second strand of First Amendment doctrine that invalidates disparate treatment of different media in the absence of some compelling state interest. Sager and Fredericksen have argued that prohibiting the electronic media from televising a trial constitutes an impermissible discrimination between the electronic and print media "that cannot be justified absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. Not surprisingly, the overwhelming weight of experience and evidence is to the contrary." *Id.* Judicial acceptance of their claim would invalidate all state laws that give judges discretion as to whether to televise a particular trial.

While the Supreme Court rejected the equal protection version of this claim in *Estes v. Texas*, 381 U.S. 532, 540 (1965), changes in technology and in the Justices' own thinking have already led the Court to limit the *Estes* holding to its own facts and cases where the trial was "utterly corrupted by press coverage." See *Chandler v. Florida*, 449 U.S. 560, 573 n.8 (1981) (citations omitted). Courts have been receptive to impermissible discrimination claims when access distinctions have been made between different television news organizations. See, e.g., *American Broad. Co. v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977). Courts have been less sympathetic when television news organizations have claimed impermissible discrimination between them and print organizations because of state laws that prohibit courtroom cameras or give trial judges discretion whether to permit them inside the courtroom. See *Associated Press v. Bost.*, 656 So. 2d 113, 115-18 (Miss. 1995) (state law giving trial judges discretion to decide whether or not to televise a trial does not constitute impermissible discrimination against broadcast media; after finding that strict scrutiny standard did not apply because First Amendment did not give electronic media independent right to televise trials, court found a rational basis for distinction between press and television because of state's interest "in preserving order and decorum, preserving the truth-seeking function of a trial, and the protection of a defendant's rights"). *But cf.* Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, and Due Process*, 1981 SUP. CT. REV. 157, 177 (arguing that constitution should bar electronic media from being treated differently from print media, therefore broadcast media must be given access to courtroom).

cases.<sup>5</sup> My goal in this essay is to offer a more realistic appraisal of what is at stake.

Since this essay addresses only the costs and benefits of televising high profile trials, it must begin with some definition of what trials qualify. I am not referring only to those few cases that achieve *national* media prominence. While "trials of the century" now appear almost annually, my conception of high profile cases includes all criminal trials that have generated intensive and prolonged *local* media attention. For those readers who find this definition too vague, consider my slightly modified version of Professor Gerald Uelmen's tongue in cheek "top ten indicators"<sup>6</sup> of a high profile trial.

10. The cops are filing copies of their investigative reports with local television's version of *Hard Copy*.
9. Potential jurors have already been contacted by the press with requests for post-verdict interviews.
8. The District Attorney issues a press release announcing the case will be handled just like any other case in the office, then assigns five deputies to handle pretrial motions.
7. The defense counsel's voice mail contains an urgent message to contact Gerry Spence.
6. The defense counsel's trash dumpster is emptied on Tuesday even though the trash collector comes on Thursdays.
5. The judge issues a press release announcing that she will try this case like any other case after doing an in-depth interview for the first "profile piece" on her judicial career.
4. The courtroom bailiff is given a free renewal of his local newspaper because of his "sensitivity" to the press attending pretrial hearings.
3. The defense lawyer receives affectionate letters from law school classmates he hasn't seen in twenty years.
2. He also receives less than affectionate messages from the public scrawled in the dirt of his unwashed car.

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5. This essay focuses on the benefits and costs of televising high profile trials. For a brief discussion of how this analysis applies to televising ordinary criminal cases, see *infra* text accompanying notes 58-59.

6. GERALD F. UELMEN, LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON 93-94 (1996).

1. The judge takes all motions under submission so that all of her rulings can be timed for the prime time local newscasts.

I suspect trial judges will have little difficulty determining which of their trials fall under the "high profile" category. Deciding whether to televise such trials, however, will be a much tougher decision if the judge makes a realistic assessment of what might be gained and lost by allowing the camera inside her courtroom.

Of course, if the electronic media have a constitutional right to televise high profile cases, trial judges will not have to make a tough judgment call. If such a right existed, only a compelling state interest jeopardized by the courtroom camera would justify pulling the plug.<sup>7</sup> While Part II suggests that the courtroom camera is a mixed blessing in high profile cases, none of the costs I describe would satisfy this demanding constitutional standard.

#### PART I: DOES THE MEDIA HAVE A CONSTITUTIONAL RIGHT TO TELEVISION HIGH PROFILE TRIALS?

In *Richmond Newspapers Inc. v. Virginia*,<sup>8</sup> the Supreme Court held that members of the public have a First Amendment right to attend criminal trials. Given the small number of public seats in any courtroom combined with economic constraints that limit the public's ability to personally attend a trial, the Court found that the media have a First Amendment right to attend trials as the public's surrogate inside the courtroom.<sup>9</sup>

Kelli Sager and Karen Frederiksen suggest that *Richmond* could be read to support a constitutional obligation on the government to *maximize* public access to judicial proceedings.<sup>10</sup> While giving the media seats in the courtroom permits them to perform their surrogacy function, "only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance."<sup>11</sup> They conclude that:

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7. See generally Sager & Frederiksen, *supra* note 2.

8. 448 U.S. 555 (1980).

9. *Id.* at 572-73.

10. Sager & Frederiksen, *supra* note 2, at 1533.

11. *Id.* at 1534.

[T]he history of this country's jurisprudence demonstrates that *maximum public access is the accepted ideal*, and the United States Supreme Court has repeatedly reaffirmed this principle in the past fifteen years. Moreover, although the Court has not directly addressed this need for maximum public access in terms of allowing electronic coverage, it cannot be seriously disputed that, in today's society, only electronic coverage can provide realistic access for most segments of the public to most judicial proceedings.<sup>12</sup>

If one grants their normative premise that the First Amendment requires the government to maximize public access to judicial proceedings, it is hard to quarrel with their conclusion. One might point out that most working Americans will not have the time to watch a televised trial so they will only catch a few video sound-bites that their local television news programs select from the day's proceedings. In Part II, I will suggest that the public's reliance on these selective video sound-bites is problematic in several respects including the public's continued dependence on media interpretive filters.<sup>13</sup> But, the absence of a courtroom camera still leaves the public dependent on print and electronic media filters while reducing direct public access to the trial.

*Richmond*, however, never comes close to embracing their normative premise of maximizing public access to judicial proceedings. Maximum public access to criminal trials may well be a laudable social policy "ideal"<sup>14</sup> but it is not a binding constitutional norm. The Supreme Court has never suggested that the constitutional right of public access to criminal trials imposes an affirmative obligation on the

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12. *Id.* at 1533 (emphasis added).

13. See *infra* text accompanying notes 53-55.

14. If the First Amendment did require the government to maximize public access to criminal trials, it would generate some interesting line-drawing problems and provide the basis for some new constitutional rights. Consider how Sager's and Fredericksen's argument for *maximizing* public access might apply to ordinary trials. Televising such trials would certainly increase the trial's audience but it would not maximize public access because most Americans are too busy to watch. One potential response to this problem would be to give radio a constitutional right to broadcast criminal trials. However, listening to testimony is a poor analogue to personal attendance at the trial because the radio audience will not be able to judge the non-verbal conduct and demeanor of witnesses. Those of us who listened to O.J. Simpson's testimony in the media audio room during the civil trial and then watched him testify inside the courtroom can attest to the significance of the difference.

state's part to ensure that *all* members of the public who wish to *watch* or *listen* to a trial can do so now that media technology makes that possible. Indeed, several Justices recognized that: "[T]here may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives."<sup>15</sup> In short, all of the Justices who defended the Court's judgment in *Richmond* appeared to view the presence of print and electronic media inside the courtroom as satisfying the First Amendment's requirement of public access to such trials.

The point is simple but important: nothing in the Court's First Amendment jurisprudence imposes any obligation on the state to conduct trials in a manner that maximizes the number of people who can attend, literally or figuratively. The Court has said that members of the public have a constitutional right "*to attend*" criminal trials. Public seating in the courtroom satisfies that requirement (and, as I shall make clear in the next section, watching a criminal trial on television is not the same thing as "*attending*" a criminal trial). The "public" nature of criminal trials requires media access to the trial: such access is satisfied as long as sufficient seats in the courtroom are delegated to print, radio, and television reporters.<sup>16</sup>

Should the *Richmond* Court have gone further than it did? Would a functional analysis of the First Amendment and fair trial values served by the "public" trial requirement demonstrate that the First Amendment *should* require the government to maximize public access to all criminal trials?

Most of the constitutional values examined by the Justices in *Richmond* would not sustain such a view. This point becomes clear once one realizes that the Court's conception of

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15. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581-82 n.18 (1980).

16. See, e.g., *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 21-24 (2d Cir. 1984) (rejecting CNN's First Amendment argument of a constitutional right to televise General Westmoreland's libel suit against CBS), *cert. denied sub nom. Cable New Network, Inc. v. United States Dist. Court*, 472 U.S. 1017 (1985); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986) (rejecting claim of constitutional right to televise trial of Louisiana Governor charged with fraud and racketeering); *Associated Press v. Bost*, 656 So. 2d 113, 117 (Miss. 1995).



public access was informed by the Justices' account of the First Amendment and fair trial values that would be thwarted or endangered by *closing* all or part of a trial. The constitutional virtues of publicly accessible criminal trials turn out to be how such trials avoid the democratic vices of secret criminal prosecutions.

Consider Chief Justice Burger's reference to the "therapeutic value of open justice."<sup>17</sup> When a shocking crime has outraged the community, public access to the trial provides citizens with a forum for appropriate and controlled expression of their anger and resentment. As Chief Justice Burger observed, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion."<sup>18</sup>

The Chief Justice cited no empirical evidence supporting his contention that open trials actually served this cleansing/purging function. Moreover, it is highly unlikely that a trial's public nature will encourage appropriate community catharsis when the public disagrees with the jury's verdict. If anything, the public visibility of a high profile trial that ends with an unpopular verdict only serves to enhance and prolong public anger and resentment. Consider this country's obsession with the O.J. Simpson saga or the public's vitriolic reaction to the hung juries in the first trials of the Menendez brothers.

But, these concerns do not undermine Burger's real point which was far more modest. Regardless of whether public trials consistently serve this purging function, one thing is certain—closed proceedings destroy their opportunity to do so:

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.<sup>19</sup>

The constitutional evil which publicly accessible trials remedy is the elimination of the *opportunity* for community catharsis. Public trials held in the venue where the crime oc-

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17. *Richmond*, 448 U.S. at 569.

18. *Id.* at 571.

19. *Id.*

curred<sup>20</sup> provide that opportunity regardless of whether the trial is being televised.<sup>21</sup>

The Chief Justice also suggested that the public nature of a criminal trial promotes its primary procedural objective of reliably determining guilt.<sup>22</sup> Trials open to the public can enhance this fair trial value because the facts in dispute might come to the attention of material witnesses unknown to the parties. This possibility increases in high profile trials because of the media's constant focus on the case; regardless of whether the trial is televised.<sup>23</sup>

Publicly accessible trials also serve the First Amendment's "checking" function<sup>24</sup> by deterring governmental officials like the prosecutor and judge from abusing their power. The opportunity for members of the public and the press to attend trials discourages them as well as the other trial's participants (witnesses, defense attorney, and the jury) from engaging in conduct that corrupts the process. Citing both Hale and Blackstone, Burger described how public trials "discouraged perjury, the misconduct of participants, and decisions based on secret bias and partiality."<sup>25</sup>

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20. One cost of removing a trial from the venue where the crime occurred is the loss of this opportunity for community catharsis. Unfortunately, the circumstances that trigger the need for community catharsis may also provide strong reasons for granting a change of venue to preserve the defendant's right to a fair trial. In such a case, closed circuit television of the trial to the family members of the victims provides some opportunity for this community catharsis to begin. Diane Plumberg & Ed Godfrey, *Telecast Draws Some, Repels Others*, DAILY OKLAHOMAN, Apr. 1, 1997, at 1. When the Oklahoma City bombing case was moved to Denver, Congress fashioned this remedy for victims of the crime who could not come to Denver to personally attend the trial. *Id.*

21. See *infra* text accompanying notes 40-44 for a discussion of how televising a trial might interfere with the trial's capacity to provide an appropriate forum for community catharsis.

22. *Richmond*, 448 U.S. at 569 (citations omitted) (citing Hale and Blackstone commentaries that public trials discouraged perjury).

23. While we do not need to televise a high profile trial to secure this benefit, the courtroom camera will bring the disputed facts of the case to the attention of a broader audience. The famous photos of O.J. wearing the infamous Bruno Magli shoes came to light because two professional photographers realized after the criminal trial had ended that they had pictures of O.J. wearing those shoes. On the other hand, some individuals with material information will not want to testify in a high profile televised trial because they do not want the public exposure and media scrutiny that occurs when one's image and words are broadcast to a large public audience. See *infra* text accompanying notes 51-52.

24. See generally Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 523.

25. *Richmond*, 448 U.S. at 569.

The public nature of colonial proceedings might have had these salutary effects on the trial's participants because more members of the local community were likely to have some knowledge about the criminal allegations and "attendance at court was a common mode of 'passing the time.'"<sup>26</sup> In contrast, most modern "public" criminal trials take place with very few, if any, members of the community or media in attendance. But, sparsely attended trials do not undermine Burger's point that the opportunity<sup>27</sup> for public scrutiny might deter misconduct by all of the trial participants. As the Court noted in *Press-Enterprise Co. v. Superior Court*<sup>28</sup> which applied the First Amendment right of public access to jury voir dire:

[T]he 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>29</sup>

Several of the Justices in *Richmond* also focused on the damaging symbolic message that would be sent if the community was denied access to criminal trials. Even if such a closed proceeding was conducted fairly and generated a reliable verdict, why should the public trust the process or its outcome when they were excluded from the trial? As the Chief Justice observed, "[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>30</sup>

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26. *Id.* at 572.

27. Consider a situation where the defense or prosecution believe their adversary or the judge is engaging in misconduct or biased behavior during a criminal trial. They have the power to invite the media into the courtroom in the hope that a reporter's presence might encourage more appropriate behavior. In high profile cases, the media will pack the courtroom. Television cameras are not needed to ensure that the judge will display his or her best and fairest judicial face. And, if lawyers engage in misconduct, they too will pay the price of intense media scrutiny and critique. Courtroom cameras might amplify public reaction but their absence will not stifle it.

28. 464 U.S. 501 (1984).

29. *Id.* at 508.

30. *Richmond*, 448 U.S. at 572.

Our legal system's institutional legitimacy rests ultimately on principles of democratic accountability. Closed criminal trial proceedings violate these tenets. *Richmond's* public accessibility principle helps legitimate the criminal justice system by avoiding the impression that our legal institutions wish to escape public scrutiny and accountability.

Denying public access to a criminal trial not only generates a negative symbolic message about our legal system, it undermines the positive message conveyed by symbolic aspects of trial procedure that show the system's respect for the rule of law. As Justice Brennan emphasized,

One major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration. Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice.<sup>31</sup>

That criminal trials *appear* fair is especially important when their outcome is unexpected and unpopular. While public confidence in the criminal justice system may decrease temporarily when such verdicts come in high profile public trials, "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."<sup>32</sup>

Despite the absence of a majority opinion in *Richmond* and a splintered court, its minimal message is clear: the criminal justice system can not appear just if its trial processes are hidden from view. To work effectively, the criminal process must appear to be fair to all parties and "the appearance of justice can best be provided by allowing people to observe it."<sup>33</sup>

Governmental secrecy is the primary constitutional vice that *Richmond's* public trial requirement combats. It is closure of criminal trials (or portions of the proceedings) that

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31. *Id.* at 594-95 (citations omitted).

32. *Id.* at 571.

33. *Id.* at 572.

create the appearance of unfairness and raise the spectre of government misconduct, tainted testimony and biased decision-making. Secret trials also prevent the public and the media from observing, gathering, and communicating information about vital governmental processes. Without such public scrutiny, the First Amendment can not serve its "checking" or "informing" functions. *Richmond's* public accessibility principle eliminates all of these constitutional evils.

Publicly accessible trials serve these First Amendment and fair trial functions without a courtroom camera. A failure to televise the ordinary criminal trial which is open to the public and the media will not raise the spectre of a legal system with something to hide. In high profile cases, intense media scrutiny of the trial process only serves to enhance the public nature of the proceedings.

While the Supreme Court's First Amendment jurisprudence does not yet go as far as media lawyers want to take it, they can still argue that *Richmond* did not resolve what constitutes *adequate* public access in circumstances where complete or partial closure is not the issue. If the print media were permitted inside the courtroom but were barred from taking notes about what they observed, that governmental restriction would violate a vital First Amendment value: the press' right to gather news about governmental proceedings and report it accurately. Establishing that a courtroom camera ban does not offend *Richmond* still leaves the media free to argue that a First Amendment right to televise criminal trials would *better* serve vital First Amendment values.

Media lawyers maintain that televising high profile cases will improve the process by which the media informs the public about our legal system while simultaneously decreasing the public's dependence on media interpretive filters. Part II considers a series of questions whose answers should inform any careful analysis of this claim. Will courtroom cameras promote more accurate news gathering and reporting by the media? Will the camera simultaneously make the viewing public less dependent on media interpretive filters by giving them an *undistorted* view of courtroom proceedings? Will the trial's television audience have any impact on the behavior of trial participants or the conditions under which the case is tried? Will the camera diminish public respect for the jury system in those cases where the public disagrees with the

jury's verdict? Finally, will the information communicated by the media and the lessons drawn from it by the viewing public promote better understanding of the legal system's strengths and weaknesses?

At first glance, it might seem indisputable that the "viewing public" profits from televised "gavel to gavel" coverage of high profile trials. If the courtroom camera provides the public with more undistorted information, how can one quibble about the camera's educational value without sounding like an arrogant elitist? And, isn't a process that makes the viewing public less dependent on media interpretive filters to be applauded? I shall suggest, however, that the answers to these questions are far from obvious once we realize that the courtroom camera is a media filter and that the "viewing public" is not a monolith but two very different public audiences—the "hard core" daily trial viewers and the far larger public audience that primarily catches video snippets from the trial on evening programming. Once this two-audience distinction is made, it becomes easier to see why many of the benefits of the courtroom camera are realized primarily by daily trial watchers while serious costs result from the second audience's complete and unwitting dependence on television's judgments about which video snippets should be shown. My tentative answers to these questions will therefore paint a picture of modest benefits and significant costs.

## PART II

*Television has achieved the status of "meta-medium" — an instrument that directs not only our knowledge of the world but our knowledge of ways of knowing as well. . . . We do not doubt the reality of what we see on television, are largely unaware of the special angle of vision it affords . . . . Twenty years ago, the question, Does television shape culture or merely reflect it? held considerable interest for many scholars and social critics. The question has largely disappeared as television has gradually become our culture . . . . This in turn, means that its epistemology goes largely unnoticed . . . television's way of knowing is unpromising hostile to [print medium's model of reasoned analytical discourse] . . . television's conversations promote incoherence and triviality . . . [it] speaks in only one persistent voice — the voice of entertainment . . . to enter the great television conversation, one American cultural insti-*

*tution after another is learning to speak its terms. Television, in other words, is transforming our culture into one vast arena for show business.*<sup>34</sup>

*The television camera seduces us into thinking we can be unseen observers, but it subtly transforms the events it transmits. Our courtrooms are among the last refuges for rational discourse in a world drowning in hype. "Once we convert the courtroom to a 'set,' we transform the lawyers, witnesses, and judges into 'performers.'"*<sup>35</sup>

A. *Does the Courtroom Camera Improve the Media's News Gathering Function? Yes.*

Many in the media who want to attend a high profile trial cannot do so because of the courtroom's limited seating capacity. Listening to an audio feed of the testimony in another room is not an adequate substitute. Reporters in the audio room will miss all of the trial's visual information including the witnesses' demeanor and the jurors' reactions to the evidence. Televising the trial gives these reporters immediate access to some of this information. As Sager and Fredericksen observe,

for reporters who are not able to be present in court, electronic media coverage—at least to the extent that it is broadcast simultaneously with the proceedings—provides the most accurate possible information about the proceedings—an audio and video record of the proceedings themselves. Articles and analyses can be prepared as the proceedings unfold, and reporters need not face the inherent time pressure of waiting to receive information from the "pool" reporters (inside the courtroom). Furthermore, in-court events, including quotations, can be verified simply by playing back a videotape of the day's proceedings.<sup>36</sup>

Having worked with print and television reporters during the Simpson criminal trial, I can attest to the value of having instant and recorded video access to a trial. I saw countless examples where reporters who were not in the courtroom profited by their televised access to the case. If the reporter was quoting something said by one of the trial's par-

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34. NEIL POSTMAN, *AMUSING OURSELVES TO DEATH, PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS* 78-80 (Penguin Books) (1986).

35. UELMEN, *supra* note 6, at 92 (citations omitted).

36. Sager & Fredericksen, *supra* note 2, at 1542.

ticipants, she could always check the videotape to ensure both accuracy and appropriate context. If there was some confusion about a complicated bench ruling by the judge, re-hearing exactly what he said sometimes brought better clarity and understanding.

B. *Does the Courtroom Camera Bypass Media Interpretive Filters by Giving Its Viewing Audience a Complete and Undistorted View of Courtroom Proceedings? No.*

Media lawyers frequently claim that the courtroom camera permits members of the public who cannot attend the trial to do so figuratively. The courtroom camera gives the television viewer "visually oriented information that is critical to a complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants . . . ." <sup>37</sup> The television audience need not depend on reporters' accounts of courtroom events because viewers can watch for themselves.

This claim about bypassing media filters presupposes that the camera acts like a mirror that simply reflects the objective reality of the trial back to the viewer. Watching a trial on television, however, does not give the viewer a figurative seat in the courtroom because the camera misses some of what transpires in the courtroom and transforms what it depicts in several critical respects.

Consider how the camera depicts "the atmosphere of the courtroom." One of the First Amendment values fostered by the constitutional right to *attend* criminal trials is that courtroom observers can experience and appreciate the trial's symbolic rituals which convey respect for the rule of law. When the judge enters the courtroom at the beginning of each trial session, a quiet hush usually spreads quickly through the audience. When the jurors enter the jury box, their physical separation from the other trial participants and the courtroom audience reminds everyone of their power and responsibility. Very little of this somber and august emotional atmosphere is captured by a single courtroom camera which focuses primarily on the witness stand.

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37. *Id.*



More importantly, the courtroom camera can affect the television viewer's judgment about a witness' credibility. I watched most of the morning sessions of the Simpson criminal trial at a television studio where I worked as an analyst. I sat in the courtroom during the afternoon sessions whenever I could get a seat. The trial I watched and analyzed on television was remarkably different from the one I attended.<sup>38</sup>

Detective Mark Furhman appeared far more credible on television than he did in person. His cool and calm demeanor during most of his cross-examination by F. Lee Bailey worked well on television. The subtle and occasional cracks in his demeanor were more apparent inside the courtroom.<sup>39</sup> Conversely, some witnesses were more credible in person than they appeared on television. The point is simple but difficult to convey to someone who has not experienced it.<sup>40</sup> The camera is kinder to some than others.

Because television is a visual medium, it often lends undue importance to legally insignificant events that have dramatic visual appeal. Heated exchanges between members of the prosecution and defense team during the Simpson trial, which occurred outside the jury's presence, frequently triggered extensive media commentary on days where important

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38. I watched the first month of the trial almost exclusively on a television monitor. During this time, members of the defense team complained that the trial described by the media was not the trial they were attending. Initially, I thought they were referring to how frequently television news programs focused on legally insignificant but visually dramatic events in their trial coverage. Barry Sheck urged me to attend the trial on a regular basis because he realized I would not fully understand his point about how the courtroom camera transforms what it depicts until I experienced the differences first hand. He was right.

39. I have written elsewhere about how a juror's race and social experience affects her evaluation of a police officer's credibility. See Peter Arenella, *Simms Memorial Lecture Series Explaining the Unexplainable: Analyzing The Simpson Verdict*, 26 N.M. L. REV. 349 (1996)[hereinafter *Simms Memorial Lecture*]. My courtroom evaluation of Furhman's credibility was influenced by how some of the black jurors reacted to specific portions of his testimony. The television audience could not see the jurors' reactions because Judge Ito barred camera coverage of the jury. I was also influenced by Furhman's body language in the courtroom which did not come across as clearly on the television monitor. Most of the reporters I knew who had watched Furhman's testimony on television concluded he had done very well. Experienced courtroom reporters who attended every session of the trial offered far more cautious and mixed appraisals of Furhman's credibility.

40. See *supra* comments in note 38.

but subtle points in testimony before the jury escaped scrutiny.

Television's capacity to exaggerate the insignificant while trivializing what it is important also affected how the television audience reacted to some of the individuals involved in the case. Consider the Kato Kaelin phenomenon during the Simpson criminal trial. Inside the courtroom, he was perceived for what he was: a man-child, "Hollywood Wannabe," and a reluctant prosecution witness who wasn't eager to say things that might anger the man who had given him free housing. He was very uncomfortable with his role, Marcia Clark's demeanor towards him, and the artificial structure of courtroom testimony.

On television, he became a major "character" who seemed to tickle the viewing audience's fancy. Why? By its nature, a visual medium focuses our attention more on image, personality and emotion than print or audio mediums that engage our analytical thought processes to focus on the substance of what is being communicated. Kato's looks, physical mannerisms, and style of speaking elicited a visceral reaction from the television audience: viewers were either charmed or disgusted by Kato's image.

The courtroom camera made him a celebrity; a character whose activities outside the courtroom triggered media attention. I received hundreds of letters and faxes from "hard-core" daily viewers who offered their own complicated stories about Kato's real role in the killings. For many viewers, Kato became something far larger than the sum of his parts; including his part in the trial. He became a major character in the O.J. soap opera.

Conversely and perversely, the pain and grief of the victims' family members became a major source of irritation to some of the daily viewers. Fred Goldman's angry press conferences where he denounced the defense for suggesting a police conspiracy triggered hundreds of intemperate faxes from viewers; including those who believed in Simpson's guilt. Apparently, Goldman's grief and fury were too intense. Perhaps, such emotions interfered with the viewers' enjoyment of the saga.

Finally, one cannot analyze "gavel to gavel" televised coverage of a trial by a commercial television station without examining how television packages its coverage. When testi-

mony grinds to a halt because of an objection necessitating a side-bar conference, television must fill the silence with something besides commercials. Enter the legal pundit.

Regardless of the pundit's ethics and competency, he soon realizes that television commentary must resemble television news: quick, snappy sound-bites, good humor, and a pleasing presence to the eye. Pausing to actually consider one's answer to an anchor's question violates television's aesthetic which abhors silence. Thinking silently to oneself works poorly in a visual medium. The pundit is there to educate, to explain legal principles and procedures in a common sense fashion that avoids legal jargon, but he better do it in an entertaining manner or go back to his day job.

Verbal nuance and complexity don't play well on television. Since anchors worry that the audience will get impatient with protracted, complicated answers that offer no sharp resolution, they often ask questions that impose their own sense of clarity and closure—"who is winning and who is losing? is the defense acting like the 'dream team' in the courtroom today?" Commercial television's coverage of trials mimics its coverage of political campaigns; questions focus more on strategy than substance. And questions of substance must be answered in a manner that does not offend current conceptions of political correctness. If the anchor asks the pundit, "will the race card strategy work?" an answer that suggests the question itself is misleading and unhelpful<sup>41</sup> is not an option. Such a response will undermine the anchor's credibility with her viewers.

All of these problems have a common theme: television transforms what it shows into an entertainment for the viewing audience. As Neil Postman observed,

the problem is not that television presents us with entertaining subject matter but that all subject matter is presented as entertaining. Entertainment is the supra-ideology of all discourse on television. No matter what is depicted or from what point of view, the overarching presumption is that it is there for our amusement and pleasure.<sup>42</sup>

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41. For a critique of how the media mishandled issues of race and racism by lumping them together under the rubric "race card," see Peter Arenella, *Foreword: O.J. Lessons*, 69 S. CAL. L. REV. 1233, 1258-63 (1996).

42. POSTMAN, *supra* note 34, at 87.

Judges who oppose courtroom cameras often express the fear that the camera's presence is inconsistent with the integrity of the court and the decorum of the courtroom. Images of lawyers mugging to the camera, judges facing reelection offering campaign speeches under the guise of legal rulings, and witnesses offering halting testimony because of stage fright come to mind. Media lawyers correctly respond that empirical studies of televised trials provide no support for such fears.<sup>43</sup> The real problem is quite different: the dignity and decorum of the courtroom that is experienced by those in attendance is an inter-subjective experience that is poorly conveyed by a single camera.<sup>44</sup> What does come through loud and clear is the message that the trial is something to be enjoyed if television is doing its job well.

There is nothing wrong with a trial having entertainment value. In an earlier era, many Americans would attend criminal trials in part for their dramatic appeal. A trial can provide a form of public theatre that all of us can afford. The problem arises when the entertainment value of a trial becomes the dominant way of thinking and talking about it.

Certainly, the opportunity for appropriate community catharsis diminishes when the television audience forgets the reality of the human tragedy it is witnessing. While fictionalized legal dramas often treat the problem of the "forgotten victim" as an inherent feature of our criminal trial's preoccupation with "the defendant's rights", the truth is more mundane. Competent prosecutors make sure the jury does not forget the victim by a variety of techniques including the introduction of horrible crime scene pictures that show the jury what the defendant allegedly did. The victim's family members often attend the trial to remind the jury of the victim's rights and their own loss.

When one sits in the courtroom a few feet away from the victims' family members, it is difficult to ignore their loss or forget the human tragedy that permeates the courtroom's atmosphere. Watching the trial on television in the comfort of

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43. See Sager & Frederiksen, *supra* note 2, at 1544.

44. I am not arguing that the electronic media are incapable of conveying the dignity of the courtroom to viewers. Fictionalized television legal dramas and movies can convey this sense of dignity quite powerfully by the number of cameras used and by telling their story from the perspective of someone who is "experiencing" or reacting to the courtroom's authority.

one's home, it is far easier to treat the trial like everything else one watches on television—something that should be entertaining if it is to hold our attention.

The courtroom camera may still, however, capture some part of the tragedy by showing the television audience the very evidence the prosecutor uses to convey it: the crime scene photos. But, putting these pictures on television invades the privacy of the victims and their loved ones.

Judge Ito barred the camera from showing the crime scene and autopsy photos in Simpson's criminal trial. Of course, television commentators were quick to describe the family members' grief and the reaction of the trial jurors (not shown on camera to protect the jurors' privacy and to deter jury tampering) to such gruesome evidence. Pundits explained the strategic purpose served by such evidence and commented on how the defense could counteract its powerful emotional message. None of this "strategy" chatter is likely to trigger in the television audience the emotional response and empathetic understanding of the family's pain that most spectators in the courtroom experienced.

It is one thing to know at a cognitive level that jurors were "upset" when the pictures were shown, it is quite another to see their pain and experience it yourself when you look at such gruesome evidence. I was in the courtroom when some of the crime scene pictures were shown in the Simpson criminal case. I was shocked and upset by them despite having seen many gruesome photos when I practiced as a criminal defense attorney. Pictures of mutilated bodies often leave the viewer with no sense of the humanity of the victim. Some of the pictures of Nicole Brown Simpson, however, were powerful because they left you with a sense of her character and vitality despite their grimness. No one in the courtroom, including the jurors, escaped the emotional impact of those photos.

Do these differences between attending the trial and watching it on television matter? Consider how a considerable segment of the public explained Simpson's acquittal—the jury ignored overwhelming evidence of Simpson's guilt to do what Cochrane asked them to do in his closing argument—send a message to the LAPD that police racism would not be tolerated. Cochrane's rhetoric, the speed of the jury's deliberations, and the racially divided reactions to the verdicts pro-

vided support for this view in the minds of many Americans.<sup>45</sup> I suspect, however, that the jury nullification story was easy to embrace because no one outside the courtroom saw the crime scene pictures or how the jurors reacted to them.

Jury nullification in a murder case—deliberately acquitting someone that all of the jurors believe beyond a reasonable doubt is the killer—is very unusual and extremely unlikely in cases where the jurors recognize the humanity of the killer's victims. The jurors' reactions to the crime scene photos and to the victims' family members suggests the Simpson jurors did recognize all too well the humanity of Ronald Goldman and Nicole Brown Simpson. Would the jury nullification story have been as plausible if the public had seen the jurors' reactions to the crime scene photos? If members of the public had believed in their gut that the jurors were horrified by the brutality of the crimes and empathized with the victims' family members, would they have been more willing to accept on face value the post-verdict statements of the jurors that they acquitted because they had a reasonable doubt about Simpson's guilt?<sup>46</sup>

To summarize; the courtroom camera does not give the television viewer a seat in the courtroom or an experience that closely approximates it. The camera does not convey a "complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants."<sup>47</sup> The camera does not offer an undistorted view of the trial free of media interpretive filters because it is a media filter.

Many of us have apparently forgotten this point because we have become so used to viewing our world and acquiring knowledge of it through television. This is what Neil Postman means when he describes television as having achieved

the status of "meta-medium"—an instrument that directs not only our knowledge of the world but our knowledge of *ways of knowing* as well . . . . We do not doubt the reality

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45. See *infra* text accompanying notes 54-55 for further analysis of how televising the Simpson trial made it easier for the electronic media to support the jury nullification story by its selective use of sound-bites from the defense's closing arguments.

46. See generally *Simms Memorial Lecture*, *supra* note 39.

47. Sager & Frederiksen, *supra* note 2, at 1542.

of what we see on television, are largely unaware of the special angle of vision it affords.<sup>48</sup>

The television viewer's "angle of vision" is not as good as the person sitting in the courtroom. To which the media may well respond with a resounding "SO WHAT!" Why should this difference justify a failure to offer interested members of the public who cannot attend a high profile trial a "second best" form of access? Having some visual information, even if it is less than and somewhat different from what would be gained by being in the courtroom, is surely better than having none. Having access to trial testimony is certainly better than listening to selective sound-bites chosen by the media. Doesn't "gavel to gavel" television better inform the viewing public than any of the remaining alternatives about how our legal system functions? In short, media lawyers will insist that their opponents must do more than establish that attending a trial is better than watching it on television.

The appeal of this "some 'direct' access to trial testimony is better than none" argument rests in part on how it misstates the critique of televised trials just offered. I have suggested that the differences between attending a trial and watching it on television generate social costs. If televising a trial triggers misunderstandings about the strength of the evidence and the appropriate meaning of the jury's verdict, these social costs must be balanced against the social costs that arise when a trial is not televised.

Moreover, the power of the media's "better than no gavel to gavel access" claim rests in part on the argument's monolithic treatment of those who watch the trial on television: the "hard core" viewers who watch the trial daily and the far larger public audience that watches *selected* video snippets from the trial on evening television programs.

The media's "better than the alternative" argument clearly applies to the daily hard core audience. Surely, they are better off than they would be without television. This hard core audience will not get a figurative seat in the courtroom and will not see all of the trial because of restrictions on what the camera can and should show. They are, however, less dependent on reporters' interpretive judgments than they would have been without the camera.

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48. POSTMAN, *supra* note 34.

But, the far larger public audience that sees selected video snippets from the trial is in a very different position than the hard core viewers.<sup>49</sup> This second viewing audience gets no “gavel to gavel” access and is completely dependent on television’s interpretive judgments about what video sound-bites from the trial should be shown on evening programming. Without the courtroom camera, they would remain totally dependent on the media’s interpretive judgments but they would not see any video snippets from the trial. I shall argue in the next section that the electronic media’s interpretive power is actually enhanced when its reporters can select video snippets to persuade viewers that their account of what is significant is “objectively” true because the viewers can “see it for themselves”.

How does one weigh these competing costs and benefits? First Amendment theorists may argue that the benefits of increased public access and education secured by the hard core daily viewers outweighs the social costs that I have described. After all, the benefits are beyond dispute and the costs described depend in part on how the media does its job and how the public interprets the meaning of the information communicated to it. Media lawyers will ask for evidence that the courtroom camera impairs the trial process itself and claim there is none.<sup>50</sup> The next section takes up the media’s challenge to show how televising a high profile trial can impair the integrity of the trial’s process.

C. *Will the Courtroom Camera and its Television Audiences Have Any Impact on the Behavior of the Trial’s Participants and the Conditions Under Which the Case is Tried? Yes.*

Consider some of the factors that explain why a case elicits a strong visceral public reaction that transforms it into a “high profile” trial—the notoriety of the defendant (Delorean, O.J.), the special vulnerability or status of the victims (McMartin, Susan Smith, Jean Benet Ramsey, Hinckley), the unusual or shocking nature of the crimes (Smith, Menendez, Bobbitt, Dahmer, Unabomber, Oklahoma City), the presence of “hot button” social issues like child abuse, domestic vio-

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49. See *infra* text accompanying note 55 for a more comprehensive analysis of the differences between the two viewing audiences.

50. Sager & Frederiksen, *supra* note 2, at 1543-48.



lence, police brutality, and race relations. All of them pose a threat to the law's promise of autonomy from the passions and politics of life outside the courtroom. As Professor Paul Gerwitz observes,

maintaining the boundary between the courtroom and ordinary life is a central part of what the legal process is all about . . . . But there is always a struggle between this idealized vision of the law—which proclaims that law is and must be separate from politics, passion, and public resistance—and the relentless incursion of the tumult of ordinary life.<sup>51</sup>

Televising these trials makes it even harder for the law to resist the “tumult of ordinary life” by eroding the boundary between the trial courtroom and the “court of public opinion.”

Does the courtroom camera and its two audiences have any impact on the trial's participants; the witnesses, the trial attorneys, the judge, and jury? Sager and Frederiksen cite empirical studies showing that the “impact of electronic media coverage of courtroom proceedings—whether civil or criminal—is virtually nil.”<sup>52</sup> But these studies focused primarily on two issues: did the cameras distract witnesses, attorneys, and jurors by making them so self-conscious that they would perform their roles less competently and would the presence of the camera make witnesses and jurors less willing to participate in the process. Left unasked was the critical question of whether televising high profile cases provides incentives for all of the trial's participants to view their own roles somewhat differently with consequent changes in their behavior and decision-making.

What effect will televising a high profile trial have on an individual's decision to come forward as a witness? Televising legal proceedings certainly increases the potential witness pool because many more members of the public will have knowledge about the facts in dispute and some of them will conclude they have information relevant to those disputed facts. But will they come forward or be deterred from doing so because the trial is being televised? Some research suggests that everyone in the courtroom, including witnesses, soon forget the camera's presence. But, the issue is not witness nervousness on the stand but whether individuals who

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51. See GERWITZ, *supra* note 1.

52. Sager & Frederiksen, *supra* note 2, at 1544.

think they have material information will be willing to identify themselves as potential witnesses for either side in a high profile case being watched by thousands in their community.

Put yourself in a potential witness's situation. Will the fact that what you say on the witness stand will be scrutinized by talk show guests, legal pundits, and ordinary citizens glued to their sets be of concern to you? Will the possibility that your identification on a witness list might trigger media investigations into your character and past offend your sense of privacy? Regardless of whether a high profile trial is televised, its notoriety will provide an incentive for some and a disincentive for others to come forward. But, the courtroom camera increases the stakes exponentially for those who crave recognition or anonymity. Those craving recognition frequently delude themselves into thinking they have relevant information. While a careful witness "vetting" process will winnow out the unreliable "wannabes," the process is time consuming for the lawyers involved. Those putative witnesses who do not come forward to protect their privacy are less likely to have deluded themselves about having material information. Indeed, they have the incentive to discount the importance of their information; if only to feel better about their decision not to volunteer it. Televising the trial might very well end up generating new and relevant witness information but it is not a costless process. What is beyond dispute is what media lawyers deny: televising the trial has an impact on the decision-making process of potential witnesses.

The courtroom camera also destroys the value of a very common trial procedure designed to enhance the reliability of the fact-finding process: sequestering witnesses from the trial so that their testimony is not affected by hearing other witnesses testify. Keeping future witnesses outside the courtroom is useless because the trial is no longer confined to the courtroom's physical space. Judges can order prospective witnesses not to watch the trial on television but policing such commands is impossible.

Will televising the trial alter the lawyers' conduct and decision-making process? A negative answer would suggest their incompetence. In some high profile cases involving defendants who are public figures, both sides might justifiably be concerned about influencing the court of public opinion as well as the trial jury. In cases where both sides believe there

might be a hung jury necessitating a second trial, influencing the local court of public opinion will affect the jury pool from which the second jury will be drawn. In short, the courtroom camera gives them the opportunity to argue to the court of public opinion and their trial strategy often creates incentives to exploit that opportunity.

Why can't the trial judge cut lawyers off when they stray from legally relevant arguments to make such public appeals? She can and should but doing so too frequently in a televised trial raises another issue: should the trial judge concern herself with the possibility that cutting off one side or the other might create the appearance of judicial favoritism? Judge Ito was roundly criticized by the media for giving the lawyers far too much latitude in their conduct outside the jury's presence. Judge Fujasaki was praised during the civil trial which was not televised for running a tight ship. But, if the civil trial had been televised, Fujasaki's demeanor towards the defense team combined with his impatience might have generated its own public relations nightmare in some segments of the community.

And, what should a judge do in a televised trial when he knows that he is about to make a legal ruling that will trigger public outrage. Ideally, the judge should ignore the expected public reaction to his rulings. In practice, the judge might use the courtroom camera to appeal to the public for understanding. When the Fuhrman tapes were discovered by the defense, there was a heated courtroom battle over their admissibility. Judge Ito only permitted a few offensive comments on the tapes to be played to the jury. But, outside the jury's presence, he let the television audience listen to portions of the tape that he had already ruled were inadmissible evidence. Why? He was concerned that some segments of the community would mistakenly think the court was trying to suppress the truth from the public. Playing those tapes had nothing to do with the trial and everything to do with the court of public opinion.

The courtroom camera permits the judge and the trial lawyers to interact with the public in a manner that undermines the law's promise of autonomy from public sentiments. The interaction goes both ways because television permits almost instant feedback from those watching the trial to the trial's participants. On many occasions during the Simpson

criminal trial, the resolution of a heated legal argument turned on what was the "best" interpretation of a particular case. On one occasion, an "on air" legal analyst offered a better interpretation of a case's holding than that offered by the prosecutor in the courtroom who was relying on the case to win his argument. The District Attorney's office taped this analyst's comments and then reported them to the prosecutor during a court recess. Immediately after the recess, the prosecutor informed the Court that a "law professor" had "called the office" and offered information that made it clear that the prosecutor, and not the defense, was interpreting the case correctly. Regardless of whether the professor was right, the interaction between the television pundit and the parties to the case illustrates how television erodes the boundary between the courtroom and events transpiring outside it.

D. *Will the Courtroom Camera Diminish Public Respect for the Jury System in High Profile Cases Where the Public Disagrees with the Jury's Verdict? Yes.*

The last section suggested that the courtroom camera weakens the boundary between the courtroom and the world outside it. The interaction between the two will have an impact on the criminal trial and its participants; sometimes for the better and many times for the worse. But, the jury in the televised trial and the jury system in general will pay the largest price when high profile trials are televised.

While sequestration of the jury during a trial is a remedy of last resort<sup>53</sup> because of its expense to the state and the hardship it creates for the jury, televising the trial will put pressure on the trial judge to consider it. How else can the judge ensure that the jury will not be contaminated by the nightly analysis of legal pundits or the perusal of trial segments that had taken place outside the jury's presence to contest questions concerning the admissibility of evidence? While most jurors can be trusted to follow the judge's admoni-

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53. The law needs to reconsider both the necessity as well as the manner of sequestering juries in high profile cases. Jurors should not be treated like prisoners of the state. If sequestration is necessary, thought should be given to a proposal that would permit jurors and alternates to return home after each day's proceedings with a deputy who could ensure that jurors did not have access to the media. Eliminating "pillow talk" is impossible regardless of whether jurors have conjugal visits in their hotel rooms or spend evenings at home with their loved ones.

tions, the recent history of jury misconduct in high profile trials suggests unsequestered juries will be ripe for post-verdict attacks based on allegations of contamination. The "appearance of justice" might not flourish in such an atmosphere even if the trial jurors honored the judge's restrictions.

More significantly, televising a high profile case increases the risk that the American public will feel *entitled and empowered* to come to their own resolution of the case. The "viewing" public sees itself as the 13th juror because it has considered the "same evidence" as the real jurors. The media feeds the public's sense of entitlement by polling them to determine whether their verdict coincides with the trial jury's decision. The jury is supposed to represent the community but televising the trial makes the actual jurors unnecessary surrogates for direct democracy in action.

Of course, the public frequently disagrees with the jury's verdict in high profile cases regardless of whether they are televised. Most Americans who watched the Rodney King videotape believed the officers' guilt was self-evident: they repudiated the Simi Valley jury's acquittal even though they did not watch the trial. Americans who watched the videotape of Hinckley shooting President Reagan on their nightly news programs rejected the jury's not guilty by reason of insanity verdict even though most of them had little understanding of the psychiatric battle of experts that took place at the trial.

Media lawyers might well ask why the courtroom camera should be blamed for a phenomenon that occurs regardless of whether the case is televised. Indeed, they might suggest that televising the trial gives the public the necessary information to make an informed decision about whether to accept the jury's verdict. And therein lies the dilemma.

Televising high profile cases will not inevitably increase the probability of the public rejecting the jury's verdict. Instead, televising the trial gives the viewing audience the sense that they are in the same privileged position as the jurors and therefore are entitled to condemn the jury for disagreeing with the viewers' verdict. The possibility that the actual trial jurors acted in good faith, followed their legal instructions, deliberated with each other, and came to a unanimous consensus that the prosecution had not proven its case beyond a reasonable doubt hardly gets lip service. Instead,

the media and the public look for more sinister explanations—jury nullification, racism, hidden agendas, stupidity, sleazy defense lawyers fabricating defenses—for how the trial jurors could have made such an obvious mistake.

Consider the public hostility expressed when one Simpson criminal juror acknowledged that she and other jurors did not attribute great weight to the prosecution's domestic violence evidence. With condescension, many suggested that the jury just "didn't get it". Perhaps the public didn't get it. They were exposed to far more information about domestic abuse than the jury, including evidence of stalking behavior which the prosecution promised to present but never did.

Examine how the media and a considerable segment of public opinion jumped on the jury nullification explanation for the Simpson acquittal. After all, everyone who watched their television news saw the same sound-bite from Cochran's closing argument where he implored the jury to "send a message." Everyone saw the contrasting reactions of whites and blacks to the announcement of the jury's verdict, whites weeping and blacks rejoicing. Seeing is believing and many Americans believe they saw enough of the trial to know with certainty that the acquittal reflected the success of the defense's "race card" strategy.

Unfortunately, the network news programs did not show a later sound-bite from Cochran's closing argument when he connected his "send a message" theme to problems with the reliability of some of the state's evidence. Nor did these programs show any excerpts from Barry Sheck's masterful closing argument in which he outlined all of the questionable evidence. Nor did television pundits offer explanations for the differing racial reactions to the verdicts that would have put them in a context suggesting something a little more complex than racial solidarity. The racially divided reactions to the verdict was news but those pictures required significant explanation and analysis, not fifteen second sound-bites about the court of public opinion displaying its vote as the thirteenth juror.<sup>54</sup>

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54. I am referring to my own comment on ABC News right after the verdict. I was making a descriptive point about the court of public opinion, not a normative one concerning the desirability of the public acting like the 13th juror. If given more time, I would have made this distinction clear and tried to put those pictures of angry whites and happy African-Americans in a context that did not

Can we blame the courtroom camera itself for these social costs? No. Indeed, I suspect that the daily "hard core" television audience that watched the trial gavel to gavel were less likely to embrace the jury nullification explanation for the verdict than the far larger public audience that viewed video snippets from the trial.<sup>55</sup> If we could ignore this far larger viewing audience and concentrate solely on the far smaller "hard core" audience, the social costs of televising high profile trials would not be as daunting as they are. But, if the question is whether, all things considered, we are better off or worse off by televising high profile trials, we would be foolish to ignore the impact of the camera on the larger viewing audience that only sees snippets of the trial.

We also cannot blame the courtroom camera for a general trend in our culture to prefer direct democracy over representative democracy. The notion that a member of the legislative branch should exercise independent judgment about what laws to pass instead of following his district's polling data appears to be going out of style. Indeed, as our technology improves, it becomes far easier and faster to determine what the majority want or like at any given moment. Jury bashing in high profile trials will occur whenever the verdict frustrates the majority's preferences. But televising the trial gives the public the false impression that there is no reason to defer to or trust the jury as the community's representative because the trial now speaks directly to the community.

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aggravate racial tensions. However, those of us who worked for the media bear ultimate responsibility for how our comments are used even when we lack control over how much time we have to tell our story. After all, we know the ground-rules including how little time we have to make any point, much less a subtle one.

Several points should have been made about those pictures. To list a few: some whites understood that there were major problems with the evidence; not all African-Americans believed in Simpson's innocence but many had "reasonable doubts" because of the police misconduct that occurred in this case; and others who believed Simpson was guilty were still gratified to see that a *racially diverse* jury shared their mistrust of the police.

55. Even though the hard core audience did not see the crime scene photos or the jurors' reactions to them, this audience did see that two police officers lied to the jury as well as other significant problems that tainted some of the physical evidence. The daily viewer need not agree with the trial jurors about whether these problems generated "reasonable doubt" to understand why the jurors might have thought so.

E. *Will the Information Communicated by Television and the Lessons Drawn From it by the Public Promote Better Understanding of the Legal System's Strengths and Weaknesses?*

I have suggested that televising high profile trials generates significant social costs. Some may conclude I have given short shrift to a primary benefit of increased public access generated by the courtroom camera: enhancing the public's understanding about our legal system.

Seventy million Americans watched O.J. Simpson's preliminary hearing on television.<sup>56</sup> I assume that the millions who watched this hearing or the criminal trial gavel to gavel benefited from their exposure. Despite the differences between watching and attending a judicial proceeding that I have described, watching any legal proceeding gavel to gavel will surely increase the average viewer's understanding of the process regardless of how well the media and pundits perform their function.

But most trials that become "high profile" either at the local or national level because of prolonged and intensive media attention will not attract anything close to such a large gavel to gavel audience. Since most adults are too busy during the day to watch any of these trials, how will they benefit from televised coverage of a high profile trial?

Once again, the "two audiences" problem emerges. Any comprehensive analysis of public benefits secured by televising high profile trials must examine how, if at all, this far larger public audience benefits from the courtroom camera.

A simultaneous video broadcast of the trial enhances the media's news gathering and reporting function. Thus, this large secondary public audience will benefit from more accurate reporting of witness testimony and judicial rulings.<sup>57</sup> Televising the trial also permits local and national television evening news programs to use dramatic video clips from the trial instead of a courtroom artist's drawings. The availability of these dramatic video clips make such trials more suitable subjects for local and national "news" magazine coverage.

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56. See Laurie L. Levenson, *Media Madness or Civics 101?*, 26 U. WEST L.A. L. REV. 57, 58 & n.5 (1995).

57. See *supra* Part II.A.



The courtroom camera does not eliminate the media as a filter for this second public audience, it accentuates the media's interpretive power. Access to trial video footage enhances the power of commercial television to shape public perceptions about what meaning to attribute to these trials because the media choose what sound-bites to use and which to discard.

This second, far larger public audience can still learn a great deal about a variety of legal and social issues. Consider the majority of working Americans who only saw selected video clips from Simpson's criminal prosecution. Didn't this audience learn about the function of preliminary hearings and how the Fourth Amendment's warrant requirement protects values they could appreciate like the privacy of our homes. Whites learned that police perjury occurs and that racism still infects law enforcement. Many saw that the quality of justice a defendant gets in an adversarial system depends to some degree on how much justice he can afford. And so on.

I confess to considerable skepticism about how well the media educates the nightly television audience about our legal system through its coverage of high profile cases. I have written elsewhere about how the media, and especially television, distorts public discourse and understanding about the criminal justice system; resulting in many Americans drawing the wrong lessons from these high profile cases.<sup>58</sup> For purposes of this essay, however, I am willing to assume that television's night time coverage of high profile trials at least motivates many people to talk with each other about issues like domestic violence and race that merit our attention. Even if the media does little to elevate the terms of the conversation, having conversations about some of these issues is a start.

But even these "benefits" have costs. There is a danger in using a high profile criminal trial as a vehicle to teach the public about important social issues meriting our attention like domestic violence or racism. We are encouraged to look at our criminal trials as public forums that should raise our consciousness about important societal problems and provide

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58. Peter Arenella, *Demystifying the Abuse Excuse: Is There One?* 19 HARV. J.L. & PUB. POL'Y 703 (1996); Peter Arenella, *Foreword: O.J. Lessons*, *supra* note 41; *Simms Memorial Lecture*, *supra* note 39.

appropriate resolutions of them. We lose sight of the trial's main function of deciding guilt and innocence. We begin to criticize the trial's participants for not being more "sensitive" to the social costs of their behavior even when their behavior is dictated by their legal roles. And we expect these trials to do something they cannot do; provide an appropriate remedy for everything that ails us.

Even the public's legal education is problematic. High profile trials are by definition aberrations. Watching video clips from these trials does not teach the television audience how our criminal justice system usually functions. Yet, the public views these trials as a test of the system's legitimacy; a test which the system flunks whenever the verdict does not coincide with the majority's preference.

#### CONCLUSION

For the foreseeable future, trial judges in many states will have to power to say yes or no when the media wants to televise a state criminal trial. How should they exercise their discretion?

Televising the ordinary criminal trial that has not generated prolonged and intensive media scrutiny will give the public the opportunity for access and education without feeding our culture's seemingly insatiable appetite for lurid sensationalism. Watching such trials on Court TV or on a public access cable channel may not be great theatre, but the lessons one learns have far greater relevance for intelligent and responsible reform of the system. Televising such trials will not generate a large "gavel to gavel" audience; far fewer will be educated but they will get a better education.

Televising ordinary criminal trials avoids the social costs implicated by the "two audience" problem because there will be no significant second audience watching video clips from these trials. Most of the social costs of televising ordinary trials are those that flow from the difference between attending a trial in person and watching one on television. In this context, the media is right to argue that some access is better than none. Moreover, if the television audience acts like the thirteenth juror and rejects the jury's resolution of the case, its small size combined with the absence of sustained media interest will limit the damage done to the jury system. There

will be no general "court of public opinion" that appears more important than the jury itself.

Should trial judges always say no when the media wants to televise a high profile trial? No. While my definition of what constitutes a high profile trial ultimately means that the media itself determines which cases qualify, the reasons for why such trials generate sustained public interest vary. Not every high profile trial excites prolonged media scrutiny solely because of its lurid and sensational aspects.

Some of these cases allege criminal conduct by public officials or abuse of power by governmental actors. When the benefits of maximizing public access are tied to principles about the democratic accountability of public officials and institutions charged with criminal offenses, televising the trial might make great sense despite the potential social costs involved. Televising high profile trials where private actors are charged with economic crimes that have caused wide-spread public damage might educate the viewing audience about unknown perils as well as providing an opportunity for community catharsis.

The purpose of this essay is not to persuade trial judges that they should always say no when public interest is high. Nor can I offer these judges guidelines<sup>59</sup> that will make their job any easier. My goal has been more modest. I have tried to present a realistic assessment of what might be gained and lost when we televise high profile trials so that trial judges can make an informed exercise of their discretion when the media calls.

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59. Any *explicit* guidelines that made distinctions about which high profile trials to televise based on the content of what would be communicated (*e.g.*, televise trials where the alleged criminal conduct involves governmental wrongdoing) could be subject to constitutional challenge. It is beyond the scope of this paper to evaluate the merits of such a challenge.