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Lex, Lies, and Audiotape

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LEX, LIES, AND AUDIOTAPE

MAY IT PLEASE THE COURT. By PETER IRONS* and STEPHANIE GUITTON** New York: The New Press, W.W. Norton. 1993. Pp. 376, six audiotapes. $75.

REVIEWED BY DAVID R FINE***

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I. INTRODUCTION

"Poor Joshua."[1] Perhaps no other two words more clearly enunciate the value of *May It Please the Court*, a collection of audiotapes of oral arguments before the United States Supreme Court. The words are those of Justice Harry A. Blackmun. He uttered them during argument on *DeShaney v. Winnebago Country Department of Social Services*,[2] a case in which a boy's guardian sued the local social services agency for failing to protect the boy from an abusive father who eventually beat Joshua so badly that he is now severely brain-damaged.[3] Blackmun's lament came not in response to an argument on any legal issue, but as a response to a case in which the facts are so thoroughly lamentable that they transcend the intricacies of the substantive due process arguments the Court sat to resolve.

The Court eventually concluded that the department of social services had no affirmative constitutional duty to protect little Joshua DeShaney,[4] and Justice Blackmun again referred to "Poor Joshua" in his dissent.[5] The written words are eloquent and forceful; the spoken

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1. PETER IRONS & STEPHANIE GUITTON, MAY IT PLEASE THE COURT: TRANSCRIPTS OF 23 LIVE RECORDINGS OF LANDMARK CASES AS ARGUED BEFORE THE SUPREME COURT 46 (1993) [accompanying book of transcripts] [hereinafter "BOOK"] (all references to the transcript book also refer to the accompanying tapes).

2. 489 U.S. 189 (1989).

3. *Id.* at 189.

4. *Id.* at 202 (*per* Rehnquist, C.J.).

5. 489 U.S. at 213 (Blackmun, J., dissenting). Justice Blackmun wrote:

> Poor Joshua! Victim of repeated attacks by an irresponsible, bullying, cowardly, and intemperate father, and abandoned by respondents who placed him in a dangerous predicament and who knew or learned what was going on, and yet did essentially nothing except, as the Court revealingly observes, "dutifully recorded these incidents in [their] files." It is a sad commentary upon American life, and constitutional principles—so full of late of patriotic fervor and proud proclamations about "liberty and justice for all"—that this child, Joshua DeShaney, now is assigned to live out the remainder of his life profoundly retarded.

Professor Ann Althouse cites Blackmun's dissent in *DeShaney* as a rare display of judicial emotion. Ann Althouse, Essay: *Standing, In Fluffy Slippers*, 77 VA. L. REV. 1177, 1196-97 (1991) ("[E]veryone who reads the *DeShaney* case . . . remembers Justice Blackmun's exclamation "Poor Joshua!"). To be fair, Chief Justice William Rehnquist, in his majority opinion, describes the facts as "undeniably tragic." *DeShaney*, 489 U.S. at 191.

words are human and poignant. It is in this ability to infuse constitutional law with the human considerations underlying individual cases that *May It Please the Court* is most successful. It is in its occasional inattention to detail and its sometimes superficial treatment of the most significant cases of the last 35 years that the collection is least successful.

May It Please the Court suffers in another respect. Professor Irons, *et al*, initially aimed their project toward high school and college students.[6] The product, however, has been marketed to a much broader audience.[7] While laymen, students, academicians, and attorneys could all find something of interest in these tapes, they may all ultimately be disappointed—the layman because of impenetrable and often poorly explained constitutional doctrine and the legally educated person because of the scant treatment given to cases deserving of closer scrutiny.

II. COMPILATION OF THE TAPES

In 1955, then-Chief Justice Earl Warren initiated the practice of taping oral arguments.[8] The Court began turning the tapes over to the National Archives in 1969,[9] where they would be available for use by researchers who were willing to sign an agreement that they would use the tapes "for private research and teaching purposes only."[10]

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6. Telephone Interview with Peter Irons (Oct. 6, 1993) [hereinafter "Irons Interview"].

7. Indeed, as I wrote this essay, the Fall/Winter 1993 edition of the *Wireless* catalogue arrived in the mail. On page 8, I learned that I could purchase MAY IT PLEASE THE COURT for only $75. In August, 1993, the History Book Club advertised the collection along with Kermit Hall's THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES as a package deal for just $59.95, trumpeting the pair as "SUPREME SAVINGS!"

8. Kevin J. Hamilton, *The Court Tapes—Publication of Tapes of Famous Arguments Before the Supreme Court Has Stirred Legal Criticism and Has the Justices in a Snit*, THE SEATTLE TIMES, Sept. 3, 1993, at F1.

9. *Id.*

10. Joan Biskupic, *Marketer of Court Tapes Risks Supreme Censure; Oral Arguments of Famous Cases Were Reproduced Despite Agreement With National Archives*, WASH. POST, Aug. 30, 1993, at A6.

At the time *May It Please the Court* was published, newspapers reported that the use restriction was promulgated in 1986 by then-Chief Justice Warren Burger, who was allegedly upset by a nationally televised news report on the Pentagon Papers case[11] that included bits of the Court's tape of the oral argument.[12] That tape was included in a report on *The CBS Evening News* prepared by then-CBS law correspondent Fred Graham.[13] In 1981, Graham was preparing both radio and television reports to mark the tenth anniversary of the Pentagon Papers case, and he located a bootleg copy of the oral argument tape.[14] He used the tape in his reports, assuming that its broadcast would encourage the Court to allow greater access to the tapes.[15] He was mistaken:

> The chief went into orbit. Burger blamed the National Archives for the leak; nothing so wicked had happened so long as the recordings had been kept within the Court. After an unsuccessful hunt for the leaker, Burger decreed that no more recordings would go to the Archives—and for the next five years, none went.[16]

In 1986, the Court resumed sending the tapes to the Archives.[17] However, while much of the press has reported that the use restriction first appeared at that time, Court public information officer Toni House claims that, in fact, the 1986 policy was a "liberalization."[18] While earlier requests to copy the tapes had to be presented to the marshal of the Supreme Court for approval, the 1986 policy required only that researchers sign the agreement at issue in the Irons case.[19]

11. New York Times Co. v. United States, 403 U.S. 713 (1971).

12. Linda P. Campbell, *Irate Supreme Court tries to block cassettes*, CHIC. TRIBUNE, Aug. 20, 1993, at 2. *See infra* notes 13-19.

13. FRED GRAHAM, HAPPY TALK: CONFESSIONS OF A TV NEWSMAN (1990).

14. *Id.* at 95-96.

15. *Id.* at 96.

16. *Id.* at 96.

17. Campbell, *supra* note 12.

18. Telephone Interview with Toni House, public information officer, the Supreme Court of the United States (Oct. 6, 1993) [hereinafter "House Interview of Oct. 6, 1993"].

19. *Id.* Certainly, it is questionable whether the change was a "liberalization." In reality, it replaced one unreasonable restriction with another. Irons calls House's description of the history of the use restriction "ridiculous," claiming that there were no restrictions before 1986 in keeping with the original intent of Chief Justice Warren. Irons Interview, *supra*

Irons learned of the tapes and, in 1990, began the project that led to *May It Please the Court.*[20] Before copying the tapes at the Archives, he signed the agreement limiting the ways in which he could use the copies.[21] Irons now argues that he signed the agreement, knowing he would "technically" breach its terms, because it is unenforceable and the greater good he sought was worth a broken promise.[22] Indeed, Irons points to a November 1991 letter he received from the Chief Justice's administrative assistant, Robb Jones, in which Jones wrote, "I applaud the concept and your efforts. I know they will contribute to educators' and the public's understanding of the court's role and the function of oral argument."[23] Reaction from the Court was not always so ambiguous. In April 1991, Supreme Court Marshal Alfred Wong wrote to Irons, citing the Archives agreement and arguing against widespread reproduction of the tapes.[24] On August 3, 1993, the Court's public information officer, Toni House, issued a statement to the press:

> In order to copy tape recordings of oral arguments before the Supreme Court of the United States, researchers in the National Archives must sign an agreement limiting their use of the tapes . . . . Professor Irons signed such an agreement for every oral argument he copied at the National Archives and now features in the product he is selling to the public . . . . In

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note 6. As the issue is largely tangential, I shall simply note the disagreement but not attempt to resolve it.

20. Biskupic, *supra* note 10.

21. Biskupic, *supra* note 10.

22. Irons Interview, *supra* note 6. Irons argues that the agreement violates the First Amendment as a prior restraint. *Id.* It is with considerable irony that I listened to the tapes, hearing at the end of each side a woman's voice explaining that MAY IT PLEASE THE COURT tapes should not be duplicated or broadcast. Professor Irons explains that he did not authorize placement of the warning and that it was done in post-production without his knowledge. *Id.*

23. Biskupic, *supra* note 10. The Supreme Court's public information officer, Toni House, explains that, at the time he wrote the letter, Jones was new to his job and unaware of the limitation on dissemination of the tapes. Telephone Interview with Toni House, Public Information Office, the United States Supreme Court (September 29, 1993) [hereinafter House Interview of Sept. 29, 1993]. House describes the good wishes as the sort of gratuitous conclusion that letter writers often include without meaning to endorse a particular course of action. *Id.*

24. Tony Mauro, *May It Displease The Court*, CONN. L. TRIB., Aug. 23, 1993, at 24.

light of this clear violation of Professor Irons' contractual commitments, the Court is considering what legal remedies may be appropriate.[25]

On August 31, 1993, Marshal Wong notified the National Archives that future copying requests by Professor Irons should be denied.[26]

On November 1, 1993, however, the Court backed away from the controversy and the restrictions—although without explanation. Marshal Wong instructed the National Archives that it could henceforth provide the public with copies of oral argument tapes without restriction.[27]

III. REVIEW OF CASES

The producers of *May It Please the Court* excerpted portions of 23 oral arguments and, make no mistake about it, the arguments are truncated.[28] This is scholarship in the age of the soundbite—quick, dramatic, and, all too often, disjointed. The cases arise largely from the protections of the Bill of Rights, including the First Amendment,[29] the Fourth Amendment,[30] the Fifth Amendment,[31] the Sixth

25. Statement of the Public Information Office of the Supreme Court of the United States, Aug. 3, 1993 (copy on file with *The West Virginia Law Review*).

26. Letter from Alfred Wong to Trudy Peterson, Acting Archivist of the United States, Aug. 31, 1993 (copy on file with *The West Virginia Law Review*).

27. Linda Greenhouse, *Supreme Court Eases Restrictions on Use of Tapes of Its Arguments*, N.Y. TIMES, November 3, 1993, at A22.

28. The total running time of all 23 arguments is less than nine hours. Hence, the average time allotted to a case is about 23 minutes. With Professor Irons' extensive introductions and conclusions, the average is probably less than 20 minutes.

29. Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible reading in public school); Edwards v. Aguillard, 482 U.S. 578 (1987) (teaching of creationism in public school); Wisconsin v. Yoder, 406 U.S. 205 (1972) (mandatory public school attendance in contravention of religious beliefs); Cox v. Louisiana, 379 U.S. 536 (1965) (freedom of assembly and speech); Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969) (freedom of expression in schools); Communist Party of the United States v. Subversive Activities Control Board, 351 U.S. 115 (1956) (freedom of association); Texas v. Johnson, 491 U.S. 397 (1989) (flag burning as expressive conduct); and New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers and prior restraint).

30. Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk).

31. Miranda v. Arizona, 384 U.S. 436 (1966) (right to counsel before questioning).

Amendment,[32] the Eighth Amendment,[33] the Fourteenth Amendment,[34] and the "penumbral"[35] right of privacy.[36] Two cases involve the body of the Constitution, specifically the separation of powers issue involved in executive privilege[37] and the Commerce Clause justification for the application of the Civil Rights Act of 1964[38] to private actors.[39] The producers have chosen a wide range of cases implicating a great many of the significant issues of the latter half of the Twentieth Century.

Before describing the treatment given specific cases, it is worthwhile to make a few general observations. First, Professor Irons, a well-known and self-proclaimed "bleeding heart liberal,"[40] makes little effort to mask his political leanings. The transcript book is dedicated to former Associate Justices William Brennan and Thurgood Marshall. The descriptions of cases in Irons' narration reflect, sometimes subtly, his bias.[41]

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32. Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel in criminal trial).

33. Gregg v. Georgia, 428 U.S. 153 (1976) (death penalty).

34. Baker v. Carr, 369 U.S. 186 (1962) (voting apportionment); DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989) (affirmative duty to protect); Cooper v. Aaron, 358 U.S. 1 (1958) (equal protection in education); Loving v. Virginia, 388 U.S. 1 (1967) (equal protection for interracial marriage); Palmer v. Thompson, 403 U.S. 217 (1971) (equal protection in city pool closing); Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (affirmative action); and San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (poverty as a suspect class).

35. In Griswold v. Connecticut, 381 U.S. 479 (1965), the Court spoke of a penumbra of unenumerated rights emanating from the Bill of Rights.

36. Roe v. Wade, 410 U.S. 113 (1973) (abortion); Bowers v. Hardwick, 478 U.S. 186 (1986) (sodomy).

37. United States v. Nixon, 418 U.S. 683 (1974).

38. 42 U.S.C. §§ 2000(e)-1 to -17 (1988 & Supp. 1991).

39. Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) (constitutionality of Civil Rights Act of 1964).

40. Tony Perry, *It Doesn't Please The Court*, L.A. TIMES, Aug. 29, 1993, at A3.

41. In his conclusion to the excerpt from Loving v. Virginia, 388 U.S. 1 (1967), Irons explains that "[t]hanks to the Supreme Court, Peggy [the Loving's daughter] and her family don't have to worry about Sheriff Brooks any more." BOOK, *supra* note 1, at 286. While the sentiment is one with which most agree, the producers should have resisted the temptation to editorialize. Similarly, in his conclusion to the segment of *Miranda*, Irons describes the subsequent treatment by the Court of the *Miranda* rule and opines that "[o]ver the past quarter-century, police officers have learned to live with the Bill of Rights." BOOK, *supra* note 1, at 222.

Any liberal perspective evident in *May It Please the Court* is simply inappropriate—not because the liberal attorneys, Justices, and decisions are wrong, but because this product purports to be an educational tool.[42] As such, the producers had a duty to avoid tainting the work with their ideology. Impressionable listeners should be left to draw their own conclusions.

Second, *May It Please the Court* has some unfortunate errors of detail. For example, in the edited tape and accompanying transcription of the argument in *Gideon v. Wainwright*,[43] we find the following exchange:

> *Narrator:* Justice Stewart repeated the question he asked Lee Rankin. Justice Thurgood Marshall joined in.
>
> * * *
>
> *Stewart:* Wouldn't Gideon maybe get in trouble for practicing law without a license? (*laughter*)
> *Marshall:* With the local bar association.[44]

Gideon was argued and decided in 1963; Justice Marshall joined the Court in 1967.[45] I grant that it is often difficult to discern which Justice is speaking (especially given that Court transcripts do not name the speaker but indicate only that a question or comment has come from the "Court"[46]), but Thurgood Marshall's voice was among the most readily identifiable on the tapes and, moreover, the authors included a list of when the various Justices joined the Court that correctly notes the year of Marshall's appointment.[47]

There are, however, high points in *May It Please the Court.* The taping of arguments began a year after the Court heard and decided

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42. Irons Interview, *supra* note 6. *See also* Mauro, *supra* note 24. Irons insisted that his project was intended to serve "the public interest." Irons Interview, *supra* note 6. One of his major goals was to provide the tapes for teachers and law professors. After a test in San Diego area high schools, "[t]he teachers went wild over it. For the first time, they could teach about these big cases and let their classes hear them beside." *Id.*

43. 372 U.S. 335 (1963).

44. BOOK, *supra* note 1, at 191-92.

45. BOOK, *supra* note 1, at 376.

46. House Interview of Oct. 6, 1993, *supra* note 18.

47. Irons admits that there are errors, saying "*mea culpa.*" He claims, though, that there are relatively few errors for so large a work. Irons Interview, *supra* note 6.

Brown v. Board of Education,[48] arguably Thurgood Marshall's best moment as an advocate, and so that argument could not, of course, be included. However, the producers of *May It Please the Court* included argument from *Cooper v. Aaron*,[49] a school desegregation case that came in the wake of *Brown*. Thurgood Marshall represented the parents of the black children of Little Rock by stating:

> And therefore, I am not worried about the Negro children at this stage. I don't believe they're in this case as such. I worry about the white children in Little Rock who are told, as young people, that the way to get your rights is to violate the law and defy the lawful authorities. I'm worried about their future. I don't worry about those Negro kids' future. They've been struggling with democracy long enough. They know about it.[50]

The argument in *Cooper* is filled with historical context: Thurgood Marshall worrying about Little Rock's white children; Richard Butler, counsel for the school board, arguing that integration would lead to mob violence and ultimately destroy the schools.[51]

Nine years later, Marshall joined the Court. In the oral argument in *United States v. Nixon*,[52] we hear Justice Marshall questioning President Nixon's attorney, James St. Clair, regarding a fundamental question of separation of powers: if the Court ordered the President to turn over the oval office tapes to the special prosecutor, would the President comply?

> *Marshall:* You're still leaving it up to this Court to decide it?
> *St. Clair:* Well, yes, in a sense.
> *Marshall:* Well, in *what* sense?
> *St. Clair:* In the sense that this court has an obligation to determine the law. All right? The president also has an obligation to carry out his constitutional functions.
>
> * * *
>
> *Marshall:* Well, do you agree that that's what's before this Court, and you're submitting it to *this* Court for decision?

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48. 347 U.S. 483 (1954).
49. 358 U.S. 1 (1958).
50. BOOK, *supra* note 1, at 254.
51. BOOK, *supra* note 1, at 253.
52. 418 U.S. 683 (1974).

> *St. Clair:* This is being submitted to this Court for its guidance and judgment with respect to the law. The president, on the other hand, has his obligations under the Constitution.[53]

Because of the 20 years that have passed since Watergate was front-page news, it is easy to forget some of the drama of those days; the exchange between Marshall and St. Clair is a vivid reminder of just how basic and important the issues were.[54]

There are other worthwhile snapshots in *May It Please the Court*: a misguided attempt at humor in the argument on *Roe v. Wade*,[55] the unexpected concession of Yale's Alexander Bickel in arguing on behalf of *The New York Times* in the Pentagon Papers case,[56] and the probing interrogation of counsel by Justice Antonin Scalia in *Texas v. Johnson*,[57] among others.

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53. BOOK, *supra* note 1, at 29-30.

54. Indeed, in the end, the Supreme Court unanimously ruled against Nixon and required him to divulge the tapes to the special prosecutor. United States v. Nixon, 418 U.S. at 714. Nixon resigned less than a month later.

55. In beginning his argument, Texas assistant attorney general Jay Floyd regarded his opposing counsel, Sarah Weddington, and her co-counsel and began: "Mr. Chief Justice, may it please the Court. It's an old joke, but when a man argues against two beautiful ladies like this, they're going to have the last word. BOOK, *supra* note 1, at 346. The "joke" fell flat; no one laughed. *Id.* at 347.

56. Bickel argued that the government's attempt at prior restraint violated the First Amendment. Justice Potter Stewart offered a hypothetical:

> *Stewart:* Let us assume that when the members of the Court go back and open up this sealed record, we find something there that absolutely convinces us that its disclosure would result in the sentencing to death of a hundred young men whose only offense has been that they were nineteen years old and had low draft numbers. What should we do? . . . You would say the Constitution requires that it be published and that these men die, is that it?
>
> *Bickel:* No. No, I'm afraid I'd have, I'm afraid that my, the inclinations of humanity overcome the somewhat more abstract devotion to the First Amendment, in a case of that sort.

BOOK, *supra* note 1, at 173.

57. Kathi Alyce Drew, counsel for the State of Texas in the 1989 flag burning case, argued that the state had a number of compelling interests in preventing flag desecration, including preserving the flag as a national symbol.

> *Scalia:* Why does the—why did the defendant's actions here destroy the symbol? His actions would have been useless unless the flag was a very good symbol for what he intended to show contempt for. His action does not make it any less a symbol.

IV. THE SUPREME COURT AND SECRECY

A. *The Brethren*

While the Court remains "a riddle wrapped in a mystery inside an enigma,"[58] *May It Please the Court* is not the first breach of the Court's sanctum sanctorum. In 1979, Bob Woodward and Scott Armstrong published *The Brethren: Inside The Supreme Court*, a detailed description of the cases, deliberations, politics, and personalities of the Court for the seven terms beginning in October, 1969.[59]

The Brethren offers a fascinating glimpse of the personalities of various members of the Court, including their willingness to change their votes in order to increase their own prestige or in order to retain the power to assign which Justice would write the majority opinion.[60]

Woodward and Armstrong's primary sources for *The Brethren* were the Justices' law clerks, a fact made evident in the text. If it is true that the history of war is skewed because it is written by the winners, it is equally true that this history of the Supreme Court is skewed because it relies so heartily upon the recollections of the law

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> *Drew:* Your honor, we believe that if a symbol over a period of time is ignored or abused that it can, in fact, lose its symbolic effect.
>
> *Scalia:* I think not at all . . . . I mean, it seems to me you're running quite a different argument—not that he's destroying its symbolic character, but that he is showing disrespect for it, that you not just want a symbol, but you want a venerated symbol, and you don't make that argument because then you're getting into a sort of content preference. I don't see how you can argue that he's making it any less of a symbol than it was.

BOOK, *supra* note 1, at 153. The tapes reveal Scalia to be a careful interrogator, rather like Justice Felix Frankfurter, another former law professor. *See* Melvin I. Urofsky, *John Marshall and All That*, N.Y. TIMES, Sept. 26, 1993, at 33.

58. In 1939, British Prime Minister Winston Churchill called the Soviet Union "a riddle wrapped in a mystery inside an enigma." *See* Herbert Mitgang, *Books of the Times; A Reporter at the Creation of the New Russia*, N.Y. TIMES, May 26, 1993, at C17.

59. BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979).

60. *Id.* at 66-67.

clerks.[61] The law clerks are the heroes of *The Brethren*.[62] The book is brimming with stories of indecisive Justices being swayed by their law clerks,[63] of law clerks gathering in ersatz conferences to *really* decide cases,[64] and of law clerks taking principled stances on issues when their Justices would not.[65]

While *The Brethren* provides a compelling inside look at the Supreme Court, it also represents a remarkable breach of confidentiality by Court staff. Like practicing attorneys, law clerks have a duty of confidentiality to *their* clients—the judges and Justices they serve.[66] There is a purpose for this confidentiality. A law clerk is a judge's assistant and confidante; indeed, Judge Patricia Wald of the United States Court of Appeals for the D.C. Circuit has written that "[t]he judge-clerk relationship is the most intense and mutually dependent one I know of outside of marriage, parenthood, or a love affair."[67] As

61. Law clerks tend to have strong opinions about the cases on which they assist their judges or Justices and can occasionally forget the two things standing between them and the black robe: nomination by the President and confirmation by the Senate. *See* Randall Kennedy, *Fanfare for an Uncommon Man*, TIME, Feb. 8, 1993, at 32 (former law clerk to Justice Thurgood Marshall recalling the Justice reminding law clerks: "I'm the one who was nominated by President Lyndon B. Johnson and confirmed by the Senate of the United States . . . not you.").

62. *See* Floyd Abrams, *Trivializing the Supreme Court*, FORTUNE, Mar. 10, 1980, at 129 (criticizing THE BRETHREN's focus on law clerks). Another critic of THE BRETHREN wrote: "The clerks, as presented in *The Brethren*—in other words, the clerks as they allowed themselves to be quoted and described—come through as presumptuous and arrogant." George Anastaplo, Comment, *Legal Realism, The New Journalism, and The Brethren*, 1983 DUKE L.J. 1045, 1062.

63. WOODWARD & ARMSTRONG, supra note 59, at 375-76 (describing Justice Potter Stewart's clerks influencing his decision in O'Connor v. Donaldson, 422 U.S. 563 (1975)).

64. WOODWARD & ARMSTRONG, supra note 59, at 180 (describing meeting between clerks of Justice Byron White and Justice Thurgood Marshall in which White's clerk suggested he could "deliver" his Justice's vote in a crucial case).

65. WOODWARD & ARMSTRONG, supra note 59, at 138 n.* (indicating that a concurrence by Justice William O. Douglas retained language that showed it had originally been a dissent because Douglas' clerk refused to work on it after the Justice would not remove an incorrect reference to Black Muslims).

66. *See* Anastaplo, *supra* note 62, at 1058; *see also*, CODE OF CONDUCT FOR LAW CLERKS OF THE UNITED STATES COURTS Canon 3(C) (1981) ("The relationship between judge and law clerk is essentially a confidential one . . . . A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties . . . .").

67. Patricia M. Wald, Essay: *Selecting Law Clerks*, 89 MICH. L. REV. 152, 153

they go about their deliberations, judges must know that they can confide in their law clerks.[68] Indeed, it is likely that publication of *The Brethren* caused some Justices and judges to reevaluate how much they would divulge to their law clerks.

There is a critical distinction between *The Brethren* and *May It Please the Court*, one that points up the untenable position of the Court in denying greater public access to oral argument. The authors of *The Brethren* invaded activities of the Court that are secret by tradition and for good purpose. Discussions between Justices and their law clerks and among the Justices at their private conferences are closed to the public. The oral arguments reproduced in *May It Please the Court* are open to the public, although space constraints in the courtroom limit seating and often allow visitors only a very few minutes' seating.[69] Thus, wide dissemination of the argument tapes is a difference of degree rather than of real substance, a fact apparently now recognized by the Court in allowing the Archives to release the tapes without restriction.

B. Justice Marshall's Notes

The 1993 death of former Justice Thurgood Marshall brought about a breach of the Court's "privacy" similar to that of *The Brethren*. Marshall had given his papers and notes to the Library of Congress and the Library interpreted the donation to allow public access to the documents shortly after Marshall's death.[70] The collection includes 173,700 documents—among them memoranda from all members of the Court, communications with law clerks, and drafts of opinions.[71] The Court and, interestingly, Justice Marshall's family argued to no avail

(1989).

68. *See generally* Alex Kozinski, Essay, *Confessions of a Bad Apple*, 100 YALE L. J. 1707 (1991).

69. Joan Biskupic, *The Court Is Back, With a 'New' Look*, WASH. POST, Oct. 5, 1992, at A17.

70. Neil A. Lewis, *Rare Glimpses of Judicial Chess and Poker*, N.Y. TIMES, May 25, 1993, at A1.

71. *Id.*

that the release of the papers violated Court confidentiality and misinterpreted Marshall's intent.[72]

Like *The Brethren*, the release of Marshall's notes and papers represents a significant intrusion into the deliberations of members of the Court. The discussions and communications revealed by the Library of Congress are confidential of necessity and reveal details about cases from as recent as Marshall's last term on the bench.[73] Coming just six months before the *May It Please the Court* controversy, the Marshall document release may help to explain the Court's exaggerated reaction to the distribution of the oral argument tapes. Still, an examination of *May It Please the Court*, *The Brethren*, and the Marshall papers only serves to highlight the distinction between the public proceedings of the Court and the private ones.

C. *Removing the Shroud*

1. Irons' Method of Acquisition

Before discussing in any further detail the central theme of this essay, I must address a threshhold issue. Professor Irons' actions in signing the Archives' agreement and then knowingly violating it was deceitful and unethical. A person who claims such high causes as educating the masses about the majesty of the law should not begin his effort by lying—and, make no mistake about it, Peter Irons lied when he signed the Archives' agreement because he fully intended to break it.[74] Assuming that the tapes should be given wider dissemination, there were better—and more honest—ways to do it. Certainly, Irons could have made an appeal to the Court or to the Archives, which he

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72. *Id.* Chief Justice Rehnquist may have had another reason. The collection apparently includes a draft of an opinion written by Rehnquist and circulated to Marshall; Marshall critiqued it succinctly: "Unadulterated BS!" *See* Lionel Van Deerlin, *A little light on the black robes and black moods*, SAN DIEGO UNION-TRIB., Sept. 3, 1993, at B5.

73. *Id.*

74. Irons told one reporter that he believed his educational goals were not in conflict with the agreement he signed. Mauro, *supra* note 24. The comment is difficult to comprehend as the agreement also explicitly forbids reproduction of the tapes—something Irons intended to do from the inception of his project.

admits he did not do. "It would be an exercise in futility," he explains.[75] Although there are times when civil disobedience is laudable—witness the Montgomery bus boycott—this is not one of those times.

2. Arguments Against Dissemination

The Court has now settled the tapes issue in favor of allowing greater access. There remains, however, the issue of allowing broadcast coverage of the Court's proceedings. The tapes will be released publicly several weeks after the oral arguments;[76] thus, they will be of limited use to reporters and others who have immediate need for access to the arguments. In the context of the tapes debate, two arguments have been offered against wide dissemination of the tapes that apply with equal vigor to broadcast coverage of the Court. The Court's public information officer, Toni House, suggests that the Justices might be concerned that the broadcast media would reduce complex arguments to unintelligible and unflattering soundbites.[77] Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit argues that "[o]ral arguments are high pressure situations, for both the judges and the lawyers . . . . Judges may be hesitant to ask questions if they know that every stutter will be on the evening news."[78]

Neither rationale has merit. While there is an unfortunate tendency on television and radio to reduce the world to soundbites, there is no less a proclivity for newspaper reporters and editors to extract compelling and dramatic quotes. Print reporters, of course, are allowed to take

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75. Irons Interview, *supra* note 6. Irons asks if he was ethically required to expend thousands of dollars in litigation expenses only to inevitably be told "no." *Id.* The answer is "yes," particularly because Irons himself is receiving royalties for the project (the promotional materials depict this as a non-profit enterprise. The New Press is non-profit, but Peter Irons' participation is not). *Id.* Economists often speak of "opportunity costs." Indeed, as of early October 1993, the product was in its fifth printing, having sold more than 60,000 copies nationwide. Tony Mauro, *Ginsburg's Second Welcome—Without Cameras, Of Course*, TEX. LAWYER, Oct. 4, 1993, at 24.

76. Tony Perry, *Curbs on Use of High Court Tapes Lifted*, L.A. TIMES, Nov. 3, 1993, at A36.

77. House Interview of Sept. 29, 1993, *supra* note 23.

78. Hamilton, *supra* note 8.

notes at oral argument.[79] Indeed, the Court has itself recognized that,

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79. The different treatment afforded the different media may have something to do with the perceived intrusiveness of radio and television equipment. This is a false distinction. Technology is such that cameras and microphones could be installed in the courtroom so that no one present would even be aware of them (indeed, Professor Irons reports that several of the attorneys heard arguing before the Court in MAY IT PLEASE THE COURT were unaware that they were being taped. *See* Mauro, *supra* note 24). The Court is aware of the potential for unobtrusive coverage. In 1988, Washington, D.C., attorney Timothy Dyk, representing 13 media organizations, offered a demonstration of broadcast technology in the courtroom—with Chief Justice William Rehnquist and Associate Justice Anthony Kennedy present.

> The simulation used the existing courtroom lighting and audio system and it employed two small cameras—one tucked into an alcove to focus on the Justices and the second placed under the Justices' bench to focus on the podium from which lawyers argue their cases.
>
> The Justices reportedly asked about lighting, editing, and the anticipated amount of exposure the Court's arguments would receive. In response, they were told that C-SPAN had committed itself to broadcast all 150 oral arguments in full, and that commercial news organizations might cover twelve to fifteen hearings per year.
>
> Late the following year, however, Chief Justice Rehnquist informed Mr. Dyk that the Court declined to change its policy against broadcast coverage.

Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1056-57 (1993), *citing Cameras in the Supreme Court: A Dry-Run for the Justices*, BROADCASTING, Nov. 28, 1988, at 57; and Eleanor Randolph, *Justices Continue Ban on Courtroom Cameras: Video's Trial Run Proves Unpersuasive*, WASH. POST, Nov. 1, 1989, at A23.

In addition, House's argument also presumes, unrealistically, that producers of broadcast newscasts—in which video is edited into soundbites—would consider the Supreme Court's arguments to be frequently newsworthy. Television is a medium that relies heavily on pictures. Seven men and two women sitting at a bench listening to two lawyers discuss often arcane legal doctrines is rarely the stuff of *World News Tonight*, *NBC Nightly News*, or *The CBS Evening News*. Outlets such as C-SPAN and Court TV might elect to provide unedited coverage, in which event the soundbite concern is inapplicable.

Further, regardless of whether cameras make their way into the Supreme Court, the Court will always be subject to soundbite journalism when the networks choose to cover it. Broadcast reporters frequently include sketches of Justices in their stories, with portions of the dialogue "chyroned" on the screen (Chyron is a trade name for a character-generation system. The word is often used in broadcasting as a generic term for any writing on the screen).

Indeed, there is ample evidence that Justices realize that their opinions will be digested in the press. For example, Justice Blackmun, in Webster v. Reproductive Health Services, et al., 492 U.S. 490 (1989), wrote in dissent: "For today, at least, the law of abortion stands undisturbed. For today, the women of this Nation still retain the liberty to control their destinies. But the signs are evident and very ominous, and a chill wind blows." *Id.* at 560 (Blackmun, J., dissenting).

in the pursuit of the free press mandated by the First Amendment, government should not seek to regulate editorial policy.[80]

Kozinski's concern about pressure on advocates and Justices is likewise unfounded. For the lawyers, arguing before the Court is undoubtedly traumatic—but it is likely (and desirable) that their concerns about the merits of their cases would overcome their "stage fright." Further, it is common for counsel to leave the courtroom and emerge from the Supreme Court building eagerly to wade into a gaggle of microphones and cameras. Many, if not most, cases brought before the Court are matters of considerable public interest; attorneys who argue have undoubtedly dealt with press coverage long before oral argument. As for the Justices, if the presence of a camera or a microphone would make them shy and unable to function properly, we should wonder whether they should have been nominated in the first place; pressure is inherent in judging. Indeed, in some respects, it is likely that television and radio coverage would encourage the Justices to be more conversant with cases before argument and then to focus more intently on counsel during argument.[81]

3. Arguments in Favor of Wide Distribution and Broadcast

In many ways, the United States Supreme Court and the subordinate federal courts are behind the times with respect to broadcasting. Currently, forty-seven states allow broadcast coverage of at least portions of trials in the state courts.[82] While there has been criticism of

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It is altogether likely that Blackmun wrote his concluding paragraph for the press. *See, e.g.*, David Dahl, *Justices allow states to limit some abortions*, ST. PETERSBURG TIMES, July 4, 1989, at 1A; Ellen Goodman, *Abortion: By Pill . . .* , WASH. POST, July 29, 1989, at A17; Ann McDaniel, *The Future of Abortion*, NEWSWEEK, July 17, 1989, at 14; *Parts of Pennsylvania Abortion Law Ruled Out*, ORLANDO SENTINEL TRIB., Aug. 25, 1990, at A3.

80. *See* Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241, 256 (1974) (noting that "[a] responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated."). While the circumstances of *Tornillo* are significantly distinct from the issue of public distribution or broadcast of Supreme Court oral arguments, the point remains that the Court has, in the past, condemned government regulation of editorial content.

81. *See* Piccus, *supra* note 79.

82. Piccus, *supra* note 79, at 1064.

"cameras in the courtroom," the experiences of those states that have allowed broadcast access has largely been positive—so much so that many states have concluded experimental programs and opted to make permanent allowance for cameras in their courtrooms.[83] Indeed, although at times grudgingly, many of the lower federal courts have begun to allow broadcast coverage of proceedings.[84]

The general success of broadcast coverage of trials makes the Supreme Court's adamant stance against broadcast of oral arguments all the more curious. If cameras and microphones were harmful to the administration of justice, the harm would be more pronounced at the trial level than at the appellate level. A television camera in a trial courtroom could, hypothetically, frighten recalcitrant witnesses, distract bored jurors, or highlight crime victims who would prefer anonymity. None of these concerns accompanies coverage of oral arguments before an appellate court. Further, there is a fundamental distinction between the functions and importance of oral argument and trial. Precise conduct of a trial is crucial for it is there that the factual record of a case is assembled; oral argument is merely a supplement to the already constructed record and the briefs of counsel.[85] Thus, if few problems

83. *See* Action, *Cameras in the Federal Courts*, N.Y. TIMES, Sept. 4, 1990, at A16; *see also*, Kent Shuart, *One "Yes" Vote for Cameras in the Court*, (letter to the editor) THE RECORDER, Aug. 2, 1993, at 12 (citing California study that showed that cameras in the courtroom did not disrupt proceedings or affect the performances of witnesses or counsel). New York Supreme Court Justice Harold Rothwax told a national radio news program that he now supports media coverage of trials.

> Well, originally I was opposed to cameras in the courtroom because I thought they'd be distracting, and I thought they'd be disruptive. And after presiding over the [Joel] Steinberg case for about three and a half, four months, I simply found from my experience that that was not the case—that the lawyers did not play to the camera, that very quickly the camera simply became part of the furniture, quite unobtrusive.

All Things Considered (NPR radio broadcast, April 6, 1993).

84. In July, 1991, the United States Judicial Conference began an experiment to test broadcast coverage. Piccus, *supra* note 79. Currently, two courts of appeals and six district courts are participating. *Id.*

85. Justices Oliver Wendell Holmes and William O. Douglas thought so little of oral argument that they would often sit at the bench reading their mail. *See* Urofsky, *supra* note 57. That, of course, again brings to light another worthwhile attribute of broadcast coverage of the Court: Justices would have greater incentive to be well-prepared for oral argument and less inclination to focus on other activities.

have attended the presence of broadcast equipment in trial courtrooms, it is unlikely that similar coverage of Supreme Court argument would foster problems.[86]

Across Capitol Hill from the Supreme Court building, cameras and microphones have become commonplace in the chambers and committee-rooms of Congress. In the last decade and a half, both Houses of Congress have allowed their proceedings to be broadcast.[87] While the decision to televise the House of Representatives and the Senate received considerable criticism from the start, few would now complain that the presence of cameras in the chambers has caused any harm.[88] Indeed, millions of Americans watch Congress every day on C-SPAN (covering the House) and C-SPAN II (covering the Senate)—something unimaginable 20 years ago.[89] As with trial courts, it would seem more likely that broadcast coverage of the Congress would cause trouble than coverage of the Supreme Court; legislators worry about re-election and might feel inclined to "grandstand" for audiences in their districts or states. However, there is no indication that broadcast coverage has engendered any such problems.[90]

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86. There is a small body of case law dealing with cameras in the courtroom, but as those cases are only marginally related to the theme of this essay—public access to tapes and broadcasts of Supreme Court proceedings—they will not be addressed here. *See* Estes v. Texas, 381 U.S. 532 (1965) (reversing a conviction in part because of broadcast coverage of trial); Chandler v. Florida, 449 U.S. 560, 573 (1981) (holding that "*Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances."). The *Estes* Court held that broadcasters enjoy no First Amendment right of access to courtrooms. 381 U.S. at 539.

87. On March 19, 1979, then-Representative Albert Gore, Jr., made the first live televised speech on the floor of the House of Representatives. *See* Michael D. Shear, *10 Years of C-SPAN Coverage—And the House Still Stands*, L.A. TIMES, April 5, 1989, at 1. Seven years later, the Senate followed suit. *See TV in the Senate: one year later*, BROADCASTING, June 1, 1987.

88. In 1989, Senator John Danforth, originally an opponent of broadcast coverage of the Senate, admitted that "the playing to the cameras and the galleries that I expected just didn't occur." Shear, *supra* note 87. Another initial opponent, Senator Robert Byrd, explained that "I think it has worked well. Some of the fears that I and others had have not materialized. I think Senate TV has been a success." BROADCASTING, *supra* note 87.

89. *See* Ken Hoover, *Legislators ponder televising sessions*, UNITED PRESS INT'L, Aug. 27, 1989 (discussing California legislature's consideration of allowing broadcast coverage). In 1988, 22 million Americans regularly watched one or the other C-SPAN channel. *Id.*

90. *See supra* note 85 and accompanying text.

In essence, then, both the courts and the legislatures that have allowed broadcast coverage initially feared problems but learned that their concerns were unfounded. Likewise, there is simply no reason to believe proper functioning of the U.S. Supreme Court would be imperiled by similar coverage.[91]

There is another, rather more ethereal issue: the justice system in this country—police, lawyers, judges—has become too far removed from the everyday lives of Americans.[92] This distance is perhaps accountable for problems large and small—from the Los Angeles riots that followed 1992's state-court acquittal of four police officers accused of beating Rodney King[93] to the long-term poor standing of lawyers in the eyes of the public.[94] In such a time, the nation's highest court should seek to make its workings accessible and understandable rather than shrouded and cryptic. While oral arguments on tax, ERISA,[95] antitrust, and other complex areas of the law might be difficult for many people to follow, arguments on First Amendment rights, abortion, criminal procedure, and many other issues might be engrossing (especially if covered in full with educated commentary as is now done on Court TV). Many Americans might gain a new appreciation for the Constitution and laws of the United States.[96]

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91. In March, 1993, the Canadian Supreme Court allowed television and radio coverage of an argument as part of an experiment to consider whether to permit permanent broadcast access. David Vienneau, *Jury's out on the future of TV in high court*, TORONTO STAR, Mar .3, 1993, at A2. One lawyer told reporters, "I think it will demystify the process. I think the more the Canadian public learns about our court process and our court systems, the better off we'll be." *Id.* Chief Justice Antonio Lamer explained that the time was ripe for the experiment in that none of the current nine justices had strong objections. *Id.*

92. *See* Elizabeth Ross, *Legal Educators Say Courts Need Demystifying*, CHRISTIAN SCIENCE MON., June 9, 1992, at 12 (citing an American Bar Association survey showing that a third of all Americans are unaware that the Bill of Rights encompasses the first ten amendments to the Constitution).

93. *See, e.g.*, Rachel Kretser, *The Need for a Representative Judiciary*, N.Y.L.J., June 29, 1992, at 2.

94. *See* Randall Samborn, *Tracking Trends*, NAT'L L. J., Aug. 9, 1993, at 20 (noting that, in a 1993 poll, 41 per cent of those surveyed believed lawyers to have "low" or "very low" honesty and ethical standards).

95. The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 (1988 & Supp. 1992).

96. It should be noted that one disadvantage would be that Justices, now largely anon-

V. CONCLUSION

May It Please the Court, while subject to some well-warranted criticism, did serve as a lightning rod to attract attention to the archaic restrictions the Supreme Court has placed on distribution of oral argument tapes and on broadcast coverage. In that sense, Peter Irons and his colleagues may have accomplished a great deal, particularly to the extent that the attention directed to *May It Please the Court* pushed the Court to remove the tape distribution restriction. That Irons, *et al*, did so in flagrant violation of a signed agreement is unfortunate, but the deception *does* serve to highlight the lengths to which the Supreme Court is willing to go to retain its shroud of secrecy—even for proceedings that are clearly public.[97]

Law is fraught with sometimes unexplainable traditions—the black robe, the excessive use of Latin, even the opening "May it please the Court," when what follows very well may not—but at the core, the Supreme Court derives its authority from the Constitution and the respect of the American people for the laws and the courts, not from the Court's centuries-old mystique.

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ymous in public, would become recognizable. While the invasion of privacy is regrettable, such is the lot of those who choose to be in the public eye.

97. While the Court clearly considered the publication of MAY IT PLEASE THE COURT a serious transgression, Court personnel did not lose their senses of humor: public information officer Toni House referred callers to the opinion in United States v. Shipp, 215 U.S. 580 (1909). In that case, a Tennessee sheriff and others were cited for contempt by the Court when they allowed a prisoner whose appeal was pending before the Court to be lynched. United States v. Shipp, 214 U.S. 386 (1909) (describing the circumstances). On June 1, 1909, the defendants were called to the bar of the Supreme Court and Chief Justice Melville Weston Fuller imposed sentences of two months for some and three months for others. 215 U.S. at 582.