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Empowering the Audience: Television's Role in the Diminishing Respect for the American Judicial System

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I. INTRODUCTION

Although the courtroom first encountered the electronic media over sixty years ago,¹ the 1990's have witnessed both the emergence of "gavel to gavel" television coverage² and the media frenzy that

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¹ See Christo Lassiter, *The Appearance of Justice: TV or Not TV — That Is the Question*, 86 J. CRIM. L. & CRIMINOLOGY 928, 936 (1996) (discussing *State v. Hauptmann*, 180 A. 809 (N.J. 1935), the trial of the alleged kidnapper of Charles Lindbergh's baby). The first interaction between the camera and the courtroom ended abruptly with a judicial ban of all in-court photography after filmed footage was shown in movie theater newsreels, violating the court's instructions. See *id.*

² The growing interest in broadcasting trials from beginning to end is best illustrated by Court TV, a cable television channel that provides twenty-four hour live and taped coverage of "the nation's most important and compelling trials." Anelique M. Paul, Note, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About Real Law?*, 58 OHIO ST. L.J. 655, 658 (1997). At its inception in 1991, less than 4 million American households subscribed to the channel, whereas in 1997, subscribing homes had grown to approximately 27 million. See *id.* at 658 n.14. Court TV's programming consists mainly of state criminal prosecutions. See Lassiter, *supra* note 1, at 928 n.1.

inevitably ensues.³ Louise Woodward,⁴ O.J. Simpson,⁵ and the Menendez brothers⁶ are all “celebrities of the century”⁷ spawned from this collision between the American appetite for courtroom drama and the increasing influence and power of television.⁸

³ The Simpson case is probably the most dramatic example of the intense media response to a televised trial. *See, e.g.*, Lassiter, *supra* note 1, at 930 n.10 (pointing to the media industry’s criticism of its own obsession with covering the Simpson trial as one indicator of the extent of the media furor surrounding the case).

⁴ Louise Woodward, a British au pair, was convicted of second-degree murder of the 8-month-old son of her employer. Her sentence was later reduced to involuntary manslaughter by the trial judge. The trial, which was televised and received obsessive media attention, was watched by people around the world, and yielded some of the highest ratings for Court TV in 1997. *See, e.g.*, Ellen O’Brien, *Verdict Outcry Surprises Many, and Angers Some*, BOSTON GLOBE, Nov. 9, 1997, at A1. The trial was deemed a “national psychodrama [or] ‘televigil’” by one commentator. Don Aucoin, *Stars of the Bar*, BOSTON GLOBE, November 14, 1997, at D1. *See also* Pamela Ferdinand, *Judge Reduces Verdict, Frees Au Pair; Murder Conviction Cut to Manslaughter*, WASH. POST, November 11, 1997, at A1 (noting the intense media attention and the “unprecedented judicial foray into cyberspace” that would have occurred if the judge’s reduction of the sentence was released over the Internet as was planned before a power outage affected the court’s computer system).

⁵ The criminal trial of retired football player O.J. Simpson for the murder of his former wife and her friend, resulting in an acquittal, has been described as “perhaps the most watched event in history.” Lassiter, *supra* note 1, at 930 & n.10.

⁶ Eric and Lyle Menendez were tried twice for the murder of their parents. The first trials resulted in mistrials after both juries were deadlocked. The second jury returned convictions of first-degree murder for both brothers. *See* Paul Pringle, *Menendez Brothers Convicted; Verdict in ‘89 Killings of Parents Ends Drama*, DALLAS MORNING NEWS, March 21, 1996, at 1A. The first trials were televised and “captivated much of the nation,” but the second round was held off-camera and “public interest . . . drastically waned.” *Id.*

⁷ This is a derivation of the catch phrase “trial of the century” often used to describe high-profile cases and the public response they generate, especially the Simpson case. *See, e.g.*, Peter L. Arenella, *Televising High Profile Trials: Are We Better Off Pulling the Plug?*, 37 SANTA CLARA L. REV. 879, 882 (1997).

⁸ *See, e.g.*, Elliot E. Slotnik, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (reporting that most Americans point to television as their main or only source of news and information). There is almost universal access to this source as “[m]ore than 98 percent of U.S. homes contain at least one [television], making TVs more common than indoor plumbing.” Kit Boss, *Poverty, Race, TV — Heavy Viewership Among African Americans Inspires Many Theories, Few Conclusions*, SEATTLE TIMES, April 28, 1991, at L1.

By virtue of the enormous attention such high-profile cases⁹ receive by the media and the public through the media, they strongly influence public opinion of the judicial system.¹⁰ Televising these trials virtually assures that the jury will be the target of any public discontent with the outcome. Because the trial, with its evidence, witnesses, and legal arguments, is broadcast in its entirety, it creates an audience that believes it has all the necessary tools to render its own verdict once closing arguments conclude. This belief is augmented by the vast quantity of information given to the public, through the media, that is not presented in front of the jury. In addition, television coverage of the jury is confined to the suspense-filled moment following the judge's question, "Has the jury reached a verdict?" All deliberations are done off-camera and the verdict is given as a simple conclusion with no delineation of the rationale behind it. If the jury's decision conflicts with that of the community, the public has virtually no sense of how the jury reached its determination. Thus, the dangerous combination of providing the public with comprehensive coverage of

⁹ 'High-profile' cases are those that attract intense media and public attention. They usually involve an "infamous defendant, a celebrity participant, or a particularly heinous crime" Robert A. Pugsley, *The Sound of Silence: Reflections on the Use of the Gag Order*, 17 LOY. L.A. ENT. L.J. 369, 380-81 (1997). Other factors include the "special vulnerability or status of the victims . . . unusual or shocking nature of the crimes [or] presence of 'hot button' social issues." Arenella, *supra* note 7, at 901.

This comment will focus primarily upon high-profile criminal cases due to the heightened constitutional protection of criminal defendants and proceedings. However, much of the analysis and argument presented here could be applicable to civil cases in that the role of the criminal jury does not differ much from that of its civil counterpart. See, e.g., Colleen P. Murphy, *Integrating the Constitutional Authority of Civil and Criminal Juries*, 61 GEO. WASH. L. REV. 724, 729 (1993) ("[T]he history, text, and structure of relevant constitutional provisions suggest that the authority of civil and criminal juries is more shared than divergent").

¹⁰ "It's the big-time case that drive public opinion." Laura Mansnerus, *Under Fire, Jury System Faces Overhaul*, N.Y. TIMES, November 4, 1995, at A9 (quoting Jeffrey Abramson, professor of politics and legal studies at Brandeis University). See also Arenella, *supra* note 7, at 911 (stating that "the public views [high-profile] trials as a test of the system's legitimacy"); Diane M. Hartmus, *Videotrials*, 23 OHIO N.U.L. REV. 1, 1-2 (1996) (attributing decreased respect for the judicial system to the increased public exposure to the legal process).

the trial itself and depriving them of all information about the reasoning behind the disputed verdict puts the jury in an impossible situation that is extremely vulnerable to public attack.

Because the jury is the central and most visible decision-maker in the legal system,¹¹ public skepticism about its abilities and efficacy strongly influence the public's conception of the judicial system as a whole. The jury has always enjoyed a paradoxical existence.¹² On one side, the jury is lauded as "a cultural icon as revered . . . as the flag,"¹³ "the most diverse of our democratic bodies,"¹⁴ and in terms of sustaining democracy, parallels the right to vote.¹⁵ On the other side are those who have begun to question whether the jury is the proper

¹¹ See Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 325 (1995); Lisa Kern Griffin, "The Image We See Is Our Own:" *Defending the Jury's Territory at the Heart of the Democratic Process*, 75 NEB. L. REV. 332, 335 (1996) (describing the jury as "the most visible component of a complex [judicial] system."). The jury is also considered "central to our Bill of Rights [and] distinctive regime of government of the people, by the people, and for the people," Akhil Reed Amar, *Reinventing Juries: Ten Suggested Reforms*, 28 U.C. DAVIS L. REV. 1169, 1169 (1995) [hereinafter Amar, *Reinventing Juries*].

¹² See, Dooley, *supra* note 11, at 329-30 & nn.16-21 (complaining that society displays conflicting opinions about the jury; on one hand the institution is revered, but on the other hand, individual jurors are maligned). This love-hate relationship also extends to lawyers. See Lincoln Caplan, *Why Play-by-Play Coverage Strikes Out For Lawyers*, 82 A.B.A. J. 62 (Jan. 1996) ("Americans cannot get enough of lawyers, yet detest them."). The law itself is not immune either. See Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1599 (1989) (noting that the public "sees law as a bag of tricks, a bottomless pit of artifice and legalism; but it also sees law as a shining sword of justice, a powerful weapon of public purpose").

¹³ Dooley, *supra* note 11, at 325.

¹⁴ *Id.* (referring to the "modern jury").

¹⁵ See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 283 (Francis Bowen trans., Alfred A. Knopf 1976) (1840) ("The jury system as it is understood in America appears to me to be as direct and as extreme a consequence of the sovereignty of the people as universal suffrage. They are two instruments of equal power, which contribute to the supremacy of the majority."). See generally Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203 (1995) (comparing jury service to voting so that it falls within the protection of the voting right amendments, thereby providing a possible solution to discrimination in jury selection).

body for dispensing justice.¹⁶ While the verdict on the jury still may be pending, what is apparent is that the increasing disenchantment with juries¹⁷ is only propelled further by televising high-profile trials.

If the system no longer appears to be fair and just, the moral force from which it draws its authority is severely impaired.¹⁸ Unfortunately, most high-profile cases have ended with strong public opposition towards the jury verdicts,¹⁹ delivering a powerful blow to the

¹⁶ The criminal justice system was "grievously wounded" by the public rage following the verdict in the Rodney King case as was the "cornerstone of that system – faith in the ability of . . . juries to arrive at honest, fair verdicts." Durwood McAlister, *Nation's Faith in the Jury System Faces a Stern Test*, ATLANTA J. AND CONST., May 17, 1992, at G7. One commentator believes that the criticism goes beyond simple disagreement with verdicts. See Kate Stith-Cabranes, *Faults, Fallacies, and the Future of Our Criminal Justice System: The Criminal Jury in Our Time*, 3 VA. J. SOC. POL'Y & L. 133, 134 (1995) ("The jury is often discussed as if it were an incomprehensible and unwieldy vestige of a previous era, a relic of a less worthy past."). But see Mansnerus, *supra* note 10 ("[C]omplaints about the system are . . . inevitable, given the demands on it: Jurors are supposed to be intelligent yet uninformed, the conscience of the community yet devoid of opinion. They are to represent every segment of the community but not to identify with any group.").

¹⁷ See Mansnerus, *supra* note 10 (quoting Charles Calderon, California State Senator and member of the state Judicial Council, as saying "half of the people in this state think[] the jury process doesn't work"); Terry Moran, *Eye the Jury; But Give Them Credit for Prevailing Over Lawyers*, WASH. POST, October 2, 1994, at C1 (reporting a deep "skepticism about the capacity of jurors to do justice").

¹⁸ See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 790 (1993). Accurate public perception is crucial for maintaining the confidence in society's laws and the accountability and legitimacy of the judicial system because "a system consistently seen as unjust will eventually lose the allegiance of its citizens." *Id.* Evidence of the importance of appearance to the legal institution is the myriad of rules and procedures set in place to ensure that proceedings and their participants appear just. See *id.* at 790-95. See also Friedman, *supra* note 12, at 1604-05 (explaining that because the public has a result-oriented view of the law, the legal system is legitimate only if it is perceived as such).

¹⁹ The public backlash against jury verdicts has been the most extreme in the trials of Louise Woodward, O.J. Simpson, Lyle and Eric Menendez, and the Los Angeles police officers accused of beating Rodney King. See *supra* notes 1-3; O'Brien, *supra* note 4 (reporting that of the 35,000 people who responded to a television station poll regarding the Woodward verdict, only 12 percent agreed with

appearance of justice and diminishing the public's confidence in the judiciary.

This comment discusses the precarious position in which the jury is placed by the media's televised coverage of high-profile criminal trials. Part II explains how this predicament is created and perpetuated. Part III begins by advocating two rather extreme remedies for rescuing the jury: pulling the plug from the courtroom camera on one end of the spectrum²⁰ and plugging in the juryroom monitor on the other end.²¹ These extremities are then counterbalanced by a more intermediate or moderate solution: allowing the jury to support its verdict with its own 'opinion.'²²

II. PUSHING THE JURY OUT ONTO THE LEDGE: THE MEDIA'S ROLE IN THE EROSION OF PUBLIC RESPECT FOR THE JURY

Because few Americans have had direct experience with the justice system,²³ the public relies heavily upon the media's portrayal of juries and judicial proceedings to provide its only insight into the system.²⁴ These portrayals include news coverage, entertainment programs, and the hybrid of these, "docudramas" or "infotainment."²⁵ The latest and

the jury); Pringle, *supra* note 6 (discussing the public backlash against the Menendez mistrial and stating that "most Americans disagreed with the verdicts in the Simpson case"); Nina Bernstein, *Bitter Division in Jury Room; How 12 Ordinary Citizens Met for 7 Days to Produce Verdict that Shook L.A.*, *NEWSDAY*, May 14, 1992, at 5 (stating that the jury acquittal of the LAPD officers accused of beating Rodney King was met with "a firestorm of outrage and condemnation").

²⁰ See *infra* Part III.A.1.

²¹ See *infra* Part III.A.2.

²² See *infra* Part III.B.

²³ See Harris, *supra* note 18, at 788-89.

²⁴ See *id.* at 786; Paul, *supra* note 2, at 655 ("[T]he portrayal of justice on television is extremely important . . . to the continued viability of the legal system."). U.S. Supreme Court Justice Felix Frankfurter believed that the portrayal of the legal system by the media forms the basis of the public's perception of the system, which, in turn, determines the level of confidence in the judiciary. See Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 *TEX. L. REV.* 1053, 1087 & n.187 (1993).

²⁵ Harris, *supra* note 18, at 808. The author criticizes all forms of the extraneous coverage of televised trials. Newscasts are incomplete and oversimplified; due to time pressures, "even top news stories on television seldom get more than 'tiny bites'

possibly most effective, yet potentially dangerous, entry to the field is broadcasting high-profile trials in their entirety.²⁶ One of the unfortunate effects of the exhaustive television coverage of such "sensational stories [is to] undermine the legitimacy of jury verdicts,"²⁷ especially in those cases where the public disagrees with the jury's decision.²⁸

The broadcast of high-profile trials and concealment of the reasoning behind the jury's verdict facilitates rampant public criticism and scorn for the verdict, as well as for the jury that rendered it. The role of the public is expanded due to this media coverage,²⁹ allowing the public to presume that it is empowered to pronounce its own verdict. However, this decision is erroneously based on information filtered from the media's coverage of the case. Moreover, if the public's verdict conflicts with the jury's decision, there is no mechanism by which to mediate the public's dissatisfaction because the jury's verdict is determined off-camera and announced without

of air time." *Id.* at 811. Entertainment programs suffer from inaccuracies and often give unrealistic accounts of legal proceedings and the participants. *See id.* at 808-10. "Infotainment" purports to stress its informative value, but the events they cover "undergo careful editing and filtering" to achieve the necessary entertainment element. *Id.* at 811-12. All of these portrayals negatively affect the public perception of the justice system. *See id.* at 812-15.

²⁶ This practice was popularized by Court TV and reached new heights when the Simpson trial was "simultaneously broadcast nationwide on all major stations." Mercy Hermida, *Trial by Tabloid*, 7 ST. THOMAS L. REV. 197, 202 n.38 (1994). *See also supra* notes 1-3, 6-8 and accompanying text.

²⁷ Griffin, *supra* note 11, at 333. *See also* Moran, *supra* note 17 ("[T]he ferocity directed at our fellow citizens who sit in the jury box in high-profile trials stems less from their work than from the media coverage of it.").

²⁸ Although the public has agreed with some verdicts of highly publicized trials, such as the Rodney King federal trial and the trial of Timothy McVeigh in the Oklahoma City bombing, this has not been the case in most of the high-profile cases that have been televised. However, even if a televised case results in such acceptance, concerns about television coverage undermining the jury's authority are not rendered moot because it is likely that the cases that engender the greatest degree of public outcry will remain in the public's consciousness longer. Such an permanent imprint will continue to erode respect for the jury.

²⁹ *See* Paul Gewirtz, *Victims and Voyeurs at the Criminal Trial*, 90 NW. U.L. REV. 863, 884-85 (1996).

including the reasoning behind it. As the public audience becomes a more active trial participant,³⁰ the flawed basis for its decision-making³¹ and complete lack of information regarding the rationale for the actual jury verdict³² combine. The result of this interaction is that the jury becomes more exposed to public attack and is left with no ammunition with which it can defend itself.

A. *The Television Audience as Trial Participant*

Within the universe of the criminal trial, the traditional position of the public was either as the audience,³³ the voice of community condemnation,³⁴ or the embodiment of the faith in its legal system and government.³⁵ However, due to the increased intensity and immediate availability of the media's coverage of high-profile trials,³⁶ the public's role as the audience has expanded.³⁷ As television cameras move into the courtroom, the community has assumed the part of trial participant, designating itself as the ultimate arbiter through which the jury's verdict must be validated.³⁸

30 See *infra* Part II.A.

31 See *infra* Part II.B.

32 See *infra* Part II.C.

33 This watchdog position served as both the guardian against government corruption or injustice as well as the target of the trial's message of deterrence. See Gewirtz, *supra* note 29, at 883-84.

34 Because criminal trials seek to sanction those who have violated the norms of the community, their ultimate pronouncements are often an "expression of public morality" or a "channel of the [public's] retributive desires." *Id.* at 884.

35 See *id.*

36 Other factors that may have influenced the expansion of the public's role within the criminal trial include the "broader cultural interest in law" (extending from law-related entertainment such as movies and novels to the "real-life increase in litigiousness") and public apprehension about escalating crime. Gewirtz, *supra* note 29, at 884.

37 The media coverage has allowed the public to become more deeply absorbed and consumed by high-profile cases. See *id.*

38 See *Juror Decries "Crazy" Talk About the Verdict*, PROVIDENCE JOURNAL-BULLETIN, Nov. 2, 1997, at A15 (reporting that a source close the Woodward defense attorneys hoped that public outrage over the jury's verdict would "help push [the trial judge] to throw out the conviction."); Ferdinand, *supra* note 4 (discussing that in the Woodward case some believe that the judge's decision to reduce the

Television coverage splinters the trial into two separate exhibitions, “eroding the boundary between the trial courtroom and the ‘court of public opinion.’”³⁹ One presentation is to the jury and the other is a performance enacted for the benefit of the public audience.⁴⁰ The trial participants see this latter audience as an important entity in itself and alter their behavior and strategy in order to sway the public opinion.⁴¹

verdict was influenced by the extreme public outrage at the jury’s verdict); *Justice Revised, and Served*, TIMES UNION (Albany, NY), Nov. 11, 1997, at A10 (asking whether the reduction of the Woodward jury verdict would have occurred “had there been no public outcry over the initial verdict”). The concern for the public’s acceptance and sanction of jury verdicts has even reached the California State Senate. Senator Quentin Kopp proposed a measure that would change the wording of verdicts from guilty/not guilty to guilty/not proven in order to demonstrate to an outraged community that a not guilty verdict does not necessarily mean that the jury thinks the defendant is innocent. The overarching purpose was to “defuse any public outrage in future controversial court cases.” Jon Matthews, *We the Jury Render a Verdict of— ‘Not Proven’?*, SACRAMENTO BEE, Jan. 24, 1996, at A3. However, this measure was not successful, as the Senate Criminal Procedure Committee failed to approve it. See Pamela Martineau, *Senate Panel Approves Measure Aimed at Limiting Reach of Three-Strikes Law to Serious Felonies*, METROPOLITAN NEWS-ENTERPRISE, Ap. 24, 1996, at 11.

³⁹ Arenella, *supra* note 7, at 902. This erosion weakens the promise that the law will be independent of public sentiment, making it difficult for the court to put the proceeding above the “tumult of ordinary life.” *Id.* (quoting PAUL GEWIRTZ, *LAW’S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 135 (Peter Brooks & Paul Gewirtz eds., 1996)).

⁴⁰ See Gewirtz, *supra* note 29, at 888 (“The trial becomes a mass political event, not a legal process . . . for the public audience it is one thing, and for the jury audience it is another.”).

⁴¹ See *id.* at 888-90 (pointing specifically to the Simpson trial judge’s exclusion of “certain odious evidence of police racism from jury consideration as irrelevant” while still allowing the evidence to be revealed in open court, “apparently for the very purpose of having it be heard by the general public”). See also David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?; Chapter One: The Shaping and Spinning of the Story that Hijacked America*, L.A. TIMES, Oct. 9, 1995, at S1 [hereinafter Shaw, *Chapter One*] (discussing how the Simpson defense attorneys masterfully manipulated the public through the media); Lassiter, *supra* note 1, at 972 n.249 (“[W]hen you change the audience, you change the proceeding. It’s very difficult for participants in a courtroom who are speaking to a global audience of tens maybe hundreds of millions of people not to be affected by that.”) (quoting NPR Morning Edition Radio Broadcast of Interview of George

Courting public opinion risks validating and elevating it above the actual verdict,⁴² thereby de-emphasizing the validity of the jury's decision. The media perpetuates this by transmitting this separate trial aimed at the community for its entertainment value⁴³ and corresponding financial gain.⁴⁴

Before televised trials, the jury's role was to represent the community in the courtroom.⁴⁵ However, the populace now seems to want more direct representation.⁴⁶ This is in part due to the general decline in America's "belief in representative democracy."⁴⁷ One

Gerbner, Dean Emeritus, Annenberg School of Communications, Courtroom TV Makes for Low-Budget Entertainment (July 12, 1994) (transcript #1387-11)); Michael Rezendes, *What's Law Got to Do With It? Lawyers Have Always Used Showmanship. Now They're Using Show Biz, Too*, BOSTON GLOBE, Mar. 26, 1995, at 73 (quoting New York criminal defense attorney Jack Litman as saying "Lawyers are acting differently. Witnesses are acting differently. The judge is acting differently. And it's all because they're on national television.").

⁴² "The public nature of the trial may account for the apparent willingness of so many Americans to value the verdict of public opinion over the verdict rendered by the jurors." Gerald F. Uelmen, *It's Public Perception That's Skewed*, L.A. TIMES, Oct. 10, 1995, at B9 (discussing public opinion of the Simpson verdict).

⁴³ See Lassiter, *supra* note 1, at 977.

⁴⁴ See *id.* at 978 n.277 ("Television plays what pays."); Gewirtz, *supra* note 29, at 891-92 ("The media's and public's incursion into the courts [was advanced by] the media's financial motivation.").

⁴⁵ See, e.g., Griffin, *supra* note 11, at 333 (identifying the jury's contribution to the legal system as allowing "community input within the framework of the rule of law, and . . . linking the public to the institution of the courts.").

⁴⁶ "[T]elevising the trial makes the actual jurors unnecessary surrogates for direct democracy in action." Arenella, *supra* note 7, at 906.

⁴⁷ Gewirtz, *supra* note 29, at 891. The public is no longer content to wait until an election to voice their dissatisfaction with elected officials and instead wants to assert its "right to decide" as soon as legislative issues arise. The irony is that this is occurring just as political institutions, especially juries, are becoming "more representative of America's diversity." *Id.* See also, Dooley, *supra* note 11, at 349-60 (correlating the increasing diversification of civil juries with the removal of its power, signaling a move away from representative democracy). Cf. CAL. CONST. art. IV, §1 (reserving the legislative power of referendum and initiative for the people of the state); CAL. CONST. art. II, §§ 8-10 (delineating the initiative and referendum process). The popularity of these processes is a strong indication of the public's desire to detour the legislative process to directly effectuate policy matters.

danger⁴⁸ inherent in this shift toward direct democracy is the loss of the moderating mechanism that the representative system provides.⁴⁹ The jury and its verdict provide this mitigation for the legal system; “temper[ing] the anger and fear of the community and protect[ing] individual defendants from hasty judgments.”⁵⁰

The televising of criminal trials advances the public’s desire for direct representation in the judicial system.⁵¹ Such coverage transmits an enormous amount of information, giving viewers the sense that the trial is speaking directly to them⁵² and imparting upon them all of the

48 There are many concerns surrounding this movement. However, a problem specific to the legal system is its inability to properly effectuate the public’s need for direct representation. Unlike political representatives, who can look to opinion polls and choose their course of action based upon what will satisfy the latest public inclination, the courts cannot allow public opinion to influence verdicts because to do so would negate the idealized goal of elevating the courts “above the morass of public clamor, political crassness, personal bias, and petty idiosyncrasies to perform the solemn task of deciding competing factual claims in accordance with objectively neutral law,” Lassiter, *supra* note 1, at 934, and “destroy law in the name of saving it.” Gewirtz, *supra* note 29, at 891.

49 The Framers of the American Constitution chose to implement a representative democracy because it is able “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens.” THE FEDERALIST NO. 10 at 82 (James Madison) (Clinton Rossiter ed., 1961). Madison believed that “it may well happen that the public voice, pronounced by representatives of the people, will be more consonant to the public good than if pronounced by the people themselves.” *Id.* The jury served as that democratic conduit between the people and the judicial branch because the “deepest constitutional function is to serve the people . . . by involving them in the administration of justice and the grand project of democratic self-government.” Amar, *Reinventing Juries*, *supra* note 11, at 1174.

50 Griffin, *supra* note 11, at 334. See also Stith-Cabranes, *supra* note 16, at 145 (“The jury’s greatest contribution may be precisely that it tempers [equality, rationality, and accountability] with the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy.”).

51 In political institutions, technology is also fueling and enabling the community’s demand for direct democracy. These mechanisms include “C-Span, instantaneous public opinion polling, fax machines, talk radio [and the] Internet.” Gewirtz, *supra* note 29, at 891.

52 See Arenella, *supra* note 7, at 908.

knowledge that the jury is receiving in the courtroom.⁵³ Thus, the audience believes that “there is no reason to defer to or trust the jury as the community’s representative.”⁵⁴ Instead, the community views themselves as the thirteenth juror,⁵⁵ empowered to make the determination of guilt or innocence.⁵⁶

The public’s bypass of the jury and injection of itself into the trial as the arbiter is not without consequence. Because the public feels that it is entitled to make its own independent judgment,⁵⁷ the jury, and its verdict, command little acceptance or respect.⁵⁸ The media encourages this sense of entitlement by inviting the public’s opinion⁵⁹ and further

⁵³ See Carey Goldberg, *Trial of Au Pair Reveals Unease in U.S. Society*, N.Y. TIMES, Nov. 10, 1997, at A14 (Televised trials “give viewers a sense that they know as much as the jury.”) (quoting Paula Foss, professor of history at University of California, Berkeley).

⁵⁴ Arenella, *supra* note 7, at 908. See also Gewirtz, *supra* note 29, at 888 (“What is disturbing is the public’s increasing sense that it is either on a par with or superior to the jury.”).

⁵⁵ See Arenella, *supra* note 7, at 906-07 (“The ‘viewing’ public sees itself as the 13th juror because it has considered the ‘same evidence’ as the real jurors. . . . Seeing is believing and many Americans believe they saw enough of the [Simpson criminal] trial to know with certainty that the acquittal reflected the success of the defense’s ‘race card’ strategy.”).

⁵⁶ See Paul, *supra* note 2, at 692. Even the public itself agrees that “[t]he camera turns everyone watching into a ‘juror’ who gets to decide.” *Id.* at 680 (citing *Do Cameras Belong in the Courtroom?*, GLAMOUR, Dec. 1995, at 107, which reports the findings of a survey in which 76% of respondents supported banning cameras in the courtroom).

⁵⁷ “The widening coverage for criminal trials . . . invites public judgments.” Gewirtz, *supra* note 29, at 886. See also Arenella, *supra* note 7, at 906 (accusing televised trials of indicating to the public that it is in the “same privileged position as the jurors” and, as such, should feel entitled to denounce the jury for “disagreeing with the [public’s] verdict.”). Thus, the problem is not that televising trials increases the probability that the public will reject the verdict, but instead empowers the community to condemn the jury itself. See *id.*

⁵⁸ “A public obsessed with what it thinks [of as the] verdict has little regard for what the jury thinks.” Perry Morgan, *The Jury is In: TV and Court Don’t Mix*, THE VIRGINIAN-PILOT (Norfolk, VA), Feb. 16, 1997, at J5 (indicating that television plays to the public’s obsession with its own judgment).

⁵⁹ The “rise of interactive media . . . encourage[s] everyone to have an opinion.” Goldberg, *supra* note 53. This has been compared to a similar increase in popularity of television talk shows that invite, encourage and validate the audience’s judgment.

undermines the role and legitimacy of the jury's verdict by comparing the two judgments⁶⁰ as if they were of equal weight and import.⁶¹ Such a diminution of respect for the jury in conjunction with wide-spread publicity of the institution's demise may discourage citizens from honoring their call to jury duty. The lack of available jurors is already a problem of epic proportions⁶² that does not need to be exacerbated. Even if this is not such a deterrence to jury service,⁶³ those jurors who

See Gewirtz, supra note 29, at 886. "The [talk show] audience is endlessly valorized" because its opinion is so respected and the cultural impact of these shows is elevated status of "the ordinary person's judgment." *Id.*

⁶⁰ *See Arenella, supra* note 7, at 906 ("The media feeds [the community's] sense on entitlement by polling them to determine whether their verdict coincides with the trial jury's decision.").

⁶¹ "Following a jury verdict, people on the street are interviewed about what they think, as if their judgment was adequately informed. Or they riot, as they did after the Rodney King verdict, and their rioting is seen to embody a superior truth to that determined by the jury." Gewirtz, *supra* note 29, at 888. Lawyers also reinforce this sense of parity when they treat the public "as a proxy for the jury to test what arguments are likely to work in court." *Id.* Televising the trial "gives people a feeling that we're doing this together." Alice Steinbach, *Steven Brill Plans to Bring the O.J. Simpson Trial to the Small Screen*, BALTIMORE SUN, Sept. 25 1994, at 1J (quoting Steven Brill, Chief Executive Officer of Court TV).

⁶² *See, e.g., Jan Hoffman, Jury Duty Dodgers Tell It to the Judge*, N.Y. TIMES, Apr. 8, 1996, at B1 (quoting the County Clerk of Manhattan as saying that "it's a miracle" that 30 percent of citizens called for jury duty during March 1996 actually appeared for service, because in January of that year only 15 percent of those called appeared).

⁶³ Of course, there always will be those who want to be juror on high-profile cases precisely for the potential of heightened attention or possible fame and "the cases where jurors are most likely to attempt to profit from their service are the most visible, and thus the ones most likely to influence the public's perceptions of the justice system." Marcy Strauss, *Juror Journalism*, 12 YALE L. & POL'Y REV. 389, 390 (1994). Strauss also predicts that juror journalism will only increase in the future and attributes this to the rise in televised trials. *See id.* at 394. *See also* Dennis Duggan, *The Oh-So-Visible Juror, Under T.V.'s Summoning Lights*, NEWSDAY, Dec. 9, 1990, at 42 ("The press has always hounded jurors for their version of what happened during deliberations. But lately it seems that jurors are even more visible — and one reason is probably the increased use of TV in the city's courtrooms. The moment TV is allowed inside, you had people primping for the cameras, writing

are impaneled may take their duty less seriously because they know they may be vilified by the public and the media.

B. *The Distorted View from the Television Jury Box*

The verdict given by the television audience is clearly not of the same quality as that of the jury. This is because, at the risk of stating the obvious, the audience is *not a juror*.⁶⁴ The television jury is not restricted by the many legal formalities that constrict the courtroom jury. Also, the public is separated from the courtroom by miles of cable and must receive its information via the filter of television.

1. The Public Audience is Unfettered by Rules

The jury “remains sharply differentiated from the public audience by pervasive restrictions on what it hears and how it behaves.”⁶⁵ The rules of evidence confine what the jury hears,⁶⁶ but the public is not so restrained and is able to feast on “gossip, prophecy, hunches, hearsay, guesstimates and oracular pronouncements.”⁶⁷ The jury must follow the court’s instructions, which include both the general rule of not discussing the case with anyone prior to the deliberations,⁶⁸ and in criminal cases, finding guilt beyond a reasonable doubt.⁶⁹ The

books about their cases, going on talk shows to say why they voted guilty or innocent-or were the lone holdout.”).

⁶⁴ “Judgment at trial is carefully structured and circumscribed.” Gewirtz, *supra* note 29, at 887. This is not the case with “television viewers [who] are not screened by voir dire, their consideration of matters is not limited by the strict laws of evidence, nor are they sworn to follow court instructions for evaluating the case under consideration.” Lassiter, *supra* note 1, at 934.

⁶⁵ Gewirtz, *supra* note 29, at 888.

⁶⁶ See Lassiter, *supra* note 1, at 934.

⁶⁷ Morgan, *supra* note 58. The public also gets to hear the “juicier morsels of testimony,” but the jury “must attend to all the dull stuff — bits and pieces of evidence that may fit into a pattern persuasive of guilt or innocence.” *Id.*

⁶⁸ See, e.g., CAL. PENAL CODE § 1122(a) (West 1997) (“[J]urors shall not converse among themselves, or with anyone else, on any subject connected with the trial.”).

⁶⁹ See, e.g., CAL. PENAL CODE § 1096 (West 1997) (“A defendant in a criminal action is presumed to be innocent until the contrary is proved . . . the effect of this

audience is unencumbered by these disciplines; it is free to engage in any and all deliberation prior to the conclusion of the case and is not restricted by any standard of proof.

The general populace is also free of any sense of responsibility for the defendant, whereas the jury's decision is "capable of sending a [person] to prison."⁷⁰ Lastly, and perhaps most importantly, unlike the jury who is in attendance for the entire court proceeding,⁷¹ the public is an "intermittent audience."⁷² Few people actually have the time, patience, "stamina, or inclination"⁷³ to watch a televised trial from beginning to end.⁷⁴ Without a comprehensive and exhaustive knowledge of all of the trial's evidence, testimony, legal arguments,

presumption is only to place upon the state the burden of proving him or her guilty beyond a reasonable doubt.").

⁷⁰ Morgan, *supra* note 58 (indicating that the television audience is free of "the burden of flesh-and-blood deciding."). See also Steve Leben, *Constitutional Safeguards Were at Work in Simpson Trial*, KANSAS CITY STAR, October 9, 1995, at B5 (warning the public not to "confuse [its] experience[] in watching the proceedings on television or in responding to a pollster or [a] neighbor with those of the juror.").

⁷¹ "Jurors must be a constant . . . audience [and] must hear and consider everything that is admitted into evidence." Gewirtz, *supra* note 29, at 887.

⁷² *Id.*

⁷³ Andrew G.T. Moore II, *The O.J. Simpson Trial — Triumph of Justice or Debacle?*, 41 ST. LOUIS L.J. 9, 38-39 (1996) (suggesting that "most [people] will observe [the trial] on a catch-as-catch-can basis, while still relying principally on either the two or three minute evening news summaries, or short newspaper stories").

⁷⁴ See Paul, *supra* note 2, at 692 (concluding that due to the general failure to watch an entire televised trial, few people will "earn[] the right to proclaim guilt or innocence.") Don Hewitt, producer of the television news program 60 Minutes, agrees and suggests that it is not only unfair to the jury for the public to make such unfounded presumptions, but it is also unfair to the defendant. See Mike Royko, *In O.J. Case, Verdict Is in on TV Cameras*, CHI. TRIB., June 22, 1995, at N3. Hewitt cautions:

When you go on trial, you should be judged by a jury of your peers who sit there all day long and listen to all the evidence, [and who] weigh all the evidence. You shouldn't be tried in a court of public opinion where there's a guy who's not watching until his wife says, "Hey, Harry, come in here, they've got the socks on now." We go in and out of this thing because someone says, "Hey, this is the good part." That's not how you should be tried.

Id.

and rules of law,⁷⁵ the public is utterly incapable of rendering any sound verdict. Compound this with the freedom to deliberate without the hindrance of legal rules, procedures, or sense of consequence, and it is clear that the ‘public jury’ is in no position to compete with the ‘courtroom jury.’

2. Gazing at the Trial Through the Looking Glass

The validity of the public’s verdict also is seriously undermined by its sole reliance upon the information gleaned from the media’s coverage of the trial. The principle problem with the media’s information is its pervasive commercial aspect, which creates a constant need to appeal to the viewers. This need inserts an ‘entertainment filter’ over the reported information and the format in which it is broadcast. Such practices negatively affect the community’s verdict because they provide much more information to the public than the jury receives in court⁷⁶ and skew the information that is received by choosing and arranging it order to maximize its entertainment value.⁷⁷

The vast majority of television stations that broadcast ‘gavel to gavel’ coverage of high-profile trials are commercial, profit-motivated organizations. This results in programming choices based largely on ratings. As the ratings climb, more profits are reaped⁷⁸ and what makes ratings soar is the “lure of sex, power, and the perverse.”⁷⁹ In order to

⁷⁵ See Gewirtz, *supra* note 29, at 887 (indicating that the community, acting as audience, “is either ignorant of the legal instructions given to the jury or feels itself unrestrained by those instructions”).

⁷⁶ See *infra* Part II.B.2.a.

⁷⁷ See *infra* Part II.B.2.b.

⁷⁸ See Paul, *supra* note 2, at 672-73 (discussing Court TV). Alan Dershowitz, a Harvard Law Professor and one of the Simpson defense attorneys, believes that the commercial nature of broadcasters leads to sensational programming that mainly seeks to attract viewers. Ultimately, this has a negative effect on the American public. See *id.* See also Alan Dershowitz, *When Notoriety Is the Star*, WASH. TIMES, Feb. 11, 1992.

⁷⁹ Lassiter, *supra* note 1, at 977. Lassiter warns that “[a]s televising trials become more and more financially remunerative, competition for the mass audience will sink to the lowest common denominator.” *Id.* at 978 n.277. “Sex. Violence. Explicit language. Drug abuse. Scandal. Greed. Romance. Racial and ethnic tension.

attract viewers, television programs will choose the perceived high-points of the trial's daily happenings, such as controversial testimony, dramatic legal argument or attorney in-fighting. This method of selecting footage is a clear illustration of the sacrifice of substance for style,⁸⁰ whereby the import of the proceeding is hidden under the drama of the story and the actors.⁸¹

a. Supplemental Information

The need to attract and appease the viewing audience necessitates the commentary that supplements the trial broadcast. Viewers who watch the trial rely on legal analysts⁸² to tell them "who 'won' or 'lost'

Strange and interesting characters. Celebrities. Based-upon-a-true-story realism. Creative, overly enthusiastic, and downright bizarre strategies. Suspense, mystery, and high drama. The modern American criminal trial has everything that a television producer could possibly desire." Stephen D. Easton, *Whose Life Is It Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C.L. REV. 1, 2-5 (1997) (footnotes omitted).

⁸⁰ See *infra* notes 94-95 and accompanying text (discussing how the choice of footage affects the viewing audience).

⁸¹ "[T]he question of right or wrong, guilt or innocence, doesn't seem to be the main factor. As in any good drama, the acting is key." Robert Davis, *Justice as a Team Sport*, CHI. TRIB., Nov. 16, 1997, at C1 (discussing the television coverage of the Woodward trial). This phenomena was evident in the Simpson trial in which "the media . . . and the major participants seemed to forget that this trial was not a performance in search of an Emmy Award, but a court proceeding to determine the guilt or innocence of a real person." Moore, *supra* note 73, at 10. It's not just the performances of the trial participants that receive attention, even the trial coverage facilitators get into the act. One of Court TV's most successful anchors, Rikki Klieman, is theatrically trained. See John Strahinich, *Court TV's Rising Star*, BOSTON GLOBE MAGAZINE, March 19, 1995, at 24.

⁸² See David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?; Chapter Nine: Winners and Losers*, L.A. TIMES, Oct. 9, 1995, at S11 [hereinafter Shaw, *Chapter Nine*]. The corps of experts usually include "lawyers, ex-lawyers, and law professors who [are] available by beeper at any hour of the day or night" and their 'analysis' for television purposes usually consists of a "six-second sound bite." *Id.*

The ethical dilemma of lawyers acting as commentators is a hotly debated issue. The President of the American Bar Association contributes his opinion that "lawyers who

on a given day.”⁸³ This type of summation has been criticized as superficial — more like “play-by-play” or “[h]andicapping” than meaningful analysis.⁸⁴ It is the commercial entertainment nature of television that leads commentators to rely on such “quick, snappy sound-bites”⁸⁵ in order to maintain the viewer’s attention and interest. Regardless of its quality or completeness, any interpretation of the courtroom proceedings broadcast on television necessarily taints the verdict that the community reaches.⁸⁶ Whereas the jurors are required to rely on their own construction and understanding of the evidence,

become television commentators during high-publicity trials [are] ‘\$2 hookers.’” Jonathan M. Moses, Note, *Legal Spin Control: Ethics and Advocacy in the Court of Public Opinion*, 95 COLUM. L. REV. 1811, 1815 n.14 (1995). For a general discussion of legal commentary and ethical issues, see Erwin Chemerinsky & Laurie Levenson, *The Ethics of Being a Commentator II*, 37 SANTA CLARA L. REV. 913 (1997).

⁸³ Shaw, *Chapter Nine*, *supra* note 82. The live television broadcast of a high-profile trial “probably [makes] this kind of analysis inevitable. People could see for themselves what happened that day, [but] the reporters and legal analysts had to tell them why it had happened and what it meant.” *Id.*

⁸⁴ Caplan, *supra* note 12 (criticizing legal journalism as “information delivered without knowledge, escorted by opinion without explanation, and soothsaying without heed of consequences” and blaming Court TV for move towards sports-style reporting). The value of commentary offered by legal pundits is limited both by the brief time that they are allotted, *see* Arenella, *supra* note 7, at 907 n.54, and the qualifications of the commentator. *See* Shaw *Chapter Nine*, *supra* note 82 (noting that “virtually every print reporter who spent any time on [the Simpson case] was asked to go on TV and offer a thought or two”).

⁸⁵ Arenella, *supra* note 7, at 896. “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 . . . better [comment] in an entertaining manner or go back to his day job.” *Id.*

⁸⁶ Television commentators “conditioned the public to expect a not-guilty verdict” in the Woodward case. Aucoin, *supra* note 1 (quoting Steven D. Stark). Legal pundits also can affect the public’s view of the jury and its verdict when the commentary focuses on the validity of the verdict. “Given that most consumers of the popular media will be exposed predominantly to examples of jury verdicts painted as wrong-headed, the cultural perception is that jury decisionmaking is dangerous.” Dooley, *supra* note 11, at 341.

the public gets continuous 'instant replays' that can be viewed repeatedly in conjunction with expert narration.⁸⁷

Television transmits a vast quantity of other information that, like commentary, is extraneous to what the jury is allowed to consider in determining its verdict.⁸⁸ This information includes potential evidence or witness testimony that is aired on television but is never admitted into evidence for the jury's deliberation, because the information was either ruled inadmissible or was withheld by the attorneys for strategic reasons.⁸⁹ This provides the public with a much broader view of the trial's issues and results in a verdict that is not based on the evidence presented in court.

Once live coverage of a high-profile trial has begun, television exploits the public's interest in the story by offering auxiliary news and other programs dealing with the trial.⁹⁰ As a companion to the live broadcast of the trial, the populace is inundated with "story after story after story, until [it is] either hooked or too numb to resist."⁹¹ These additional avenues for ratings include interview programs or

⁸⁷ Expert commentary has a dramatic effect on what the public thinks about the court proceedings. See Honorable Chief Justice Gerald Kogan et al, *Criminal Law Symposium: Television Coverage of State Criminal Trials*, 9 ST. THOMAS L. REV. 505, 514 (1997) (discussing the media coverage of the first Rodney King trial and concluding that "[t]he impression that people got from the commentators was remarkably different than what they got from the unedited feeds").

⁸⁸ "[T]he media that brings the public the trial itself also typically brings the public lots of additional evidence and argument." Gewirtz, *supra* note 29, at 887. See also Uelmen, *supra* note 42 (discussing that the effect of television coverage on the viewers of the Simpson trial made it "impossible for those who were exposed to all three rings of the [media] circus to purge their minds and remember only the evidence being presented" in court).

⁸⁹ "In the O.J. Simpson case, there was a virtual information 'overload' released to the public by many sources. Some of these sources were accurate and later admitted into evidence at trial, while others were nothing more than conjecture, public relations 'spin' and gossip." Moore, *supra* note 73, at 11.

⁹⁰ See Easton, *supra* note 79, at 19 (The "megatrials seem to generate television-driven industries of their own.").

⁹¹ Shaw, *Chapter One*, *supra* note 41.

“television news magazines,”⁹² legal panel discussions,⁹³ and network news segments that provide “video snippets” of the trial.⁹⁴ The problem with this ancillary programming is that the viewer is completely dependent upon the editorial decision of television producers as to what information to include. Thus, the view that the audience receives of the trial is not the reality of the courtroom, but the skewed reality that television has constructed to entice its viewers.⁹⁵

Also, during high-profile trials there is tremendous pressure on television organizations to provide peripheral information, such as features highlighting trial participants and associated people, as well as inside information about trial strategies and upcoming witnesses.⁹⁶ There are inherent dangers to such a time-sensitive and highly competitive news-gathering atmosphere. First, the boundary between ‘reputable’ news reporting and tabloid journalism begins to blur as major network television stations and mainstream, urban newspapers

⁹² David Shaw, *The Simpson Legacy; Obsession: Did the Media Overfeed a Starving Public?; Chapter Three: Tabloid Tornado, Mainstream Mania*, L.A. TIMES, Oct. 9, 1995, at S4 [hereinafter Shaw, *Chapter Three*] (noting that CBS interviewed Simpson’s mother on *Eye to Eye With Connie Chung*, the programs *20/20* and *PrimeTime Live* on ABC featured the families of victims Nicole Brown Simpson and Ronald Goldman, and NBC’s *Dateline* aired interviews with Simpson’s children from his first marriage). See also Bill Carter, *The Simpson Verdict: The Coverage After the Verdicts, Will It Still Sell?*, N.Y. TIMES, Feb. 6, 1997, at B11.

⁹³ See PAUL THALER, *THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL* 203 (1994); Jim Morrison, *Law of the Land: The Real-Life Dramas Behind Court TV’s Incredible Success*, SPIRIT, Mar. 1996, at 114 (discussing Court TV’s program *Prime Time Justice*).

⁹⁴ Arenella, *supra* note 7, at 900-01.

⁹⁵ See *id.* at 901, 907 (arguing that the media’s choice of snippets from Simpson defense attorney Johnny Cochran’s closing argument unduly influenced the public to believe that the jury’s acquittal of Simpson was jury nullification). See also, Steven A. Espisito, *Presumed Innocent? A Comparative Analysis of Network News’, Prime-time News Magazines’, and Tabloid TV’s Pretrial Coverage of the O.J. Simpson Criminal Case*, 18 COMM. & THE LAW 49 (Dec. 1996) (“[V]isuals from judicial proceedings are not very different from TV commercials or other types of entertaining programming. The images are woven together to excite viewer senses and ultimately to persuade the audience that the images are real and should be believed . . . image is sovereign and perception is reality.”).

⁹⁶ See Shaw, *Chapter Three, supra* note 92.

bend their standards for sourcing and credibility.⁹⁷ Also, as time pressures and the competition for ratings accelerate, the likelihood of making reporting errors drastically increases.⁹⁸ Such errors were made in the television coverage of many high-profile cases.⁹⁹ Thus, the very information that heavily influences the public jury emanates from television programming of questionable veracity and reliability.

b. Television's Need to Entertain

The entertainment nature of television creates another subset of problems for the accurate portrayal of a high-profile trial. "[T]he problem is not that television presents us with entertaining subject matter, but that all subject matter is presented as entertaining. . . . No matter what is depicted or from what point of view, the overarching presumption is that it is there for our amusement and pleasure."¹⁰⁰ The purpose of a criminal trial is to decide the guilt or innocence of the accused, not to amuse or entertain a public audience. Unfortunately, the very nature of television as an entertainment filter affects both the public's estimation of the courtroom and the events that transpire during a televised trial. These effects are caused by either the television camera's propensity to distort the information that it transmits, or its inability to convey all the necessary data.

⁹⁷ See *id.* ("Some journalistic critics say the [Los Angeles] Times breached its own ethical standards by repeating information from an unnamed source in a supermarket tabloid that sometimes pays people for information.") (quoting an L.A. Times article).

⁹⁸ See *id.*

⁹⁹ See *id.* (regarding the media coverage of the Simpson trial); Leigh Buchanon Blenen, *The Appearance if Justice: Juries, Judges and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096, 1103 (1996) (quoting a member of the Eric Menendez jury as characterizing the information offered to the public through the media as "full of misinformation" and asking "how many . . . details can [the media] get screwed up which do have a big impact?"); Stephen Jones and Holly Hillerman, *McVeigh, McJustice, McMedia*, 1998 U. CHI. LEGAL F. 53, 106 (1998) (arguing that news organizations covering the trial of Timothy McVeigh for the Oklahoma Federal Building bombing engaged in "false, misleading, and incomplete reporting.").

¹⁰⁰ NEIL POSTMAN, *AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN AN AGE OF SHOW BUSINESS* 87 (1985).

Compounding this problem is the fact that the viewing audience is generally unaware of the camera's ability to lure them into believing that they can be "unseen observers"¹⁰¹ and thus, the audience has no reason to distrust the picture it sees.¹⁰²

Watching a trial on television does not replicate the experience of the juror inside the courtroom. The nature of television as a visual medium unduly emphasizes form and style instead of directing the viewers' attention to the substance of what is being presented.¹⁰³ Thus, the at-home jurors tend to have a stronger reaction to the physical appearance and mannerisms of witnesses, which may unfairly influence their evaluation of the testimony given.¹⁰⁴ Television also has the tendency to "exaggerate the insignificant while trivializing what is important."¹⁰⁵ This creates a problem for the television viewer in that subtle points of testimony and argument may be ignored or forgotten in favor of flashier events with greater visual appeal.¹⁰⁶ Perhaps even more unsettling is the ease with which television convinces its audience that the image it presents is "the complete picture."¹⁰⁷ This is achieved by transmitting live coverage of the trial and combining it with news, summaries, and interpretation in a seemingly comprehensive package.¹⁰⁸

101 Arenella, *supra* note 7, at 892; see also POSTMAN, *supra* note 100, at 79 ("We do not doubt the reality of what we see on television [and] are largely unaware of the special angle of vision it affords.").

102 "Watching the trial on television in the comfort of one's home, it is far easier to treat the trial like anything else one watches on television — something that should be entertaining if it is to hold our attention." Arenella, *supra* note 7, at 897-98.

103 See *id.* at 895 (asserting that unlike visual mediums, print and audio "engage our analytical thought processes to focus on the substance"). See also Anthony Lewis, *Abroad At Home: On Madison's Grave*, N.Y. TIMES, Nov. 7, 1994, at A19 ("Television has an emotional power, an immediacy that the written word can hardly match. As a student . . . put it to me the other day: 'It's harder to filter television, to screen it. With print you have to reason. Television goes right through to your emotions.'").

104 See Arenella, *supra* note 7, at 895.

105 *Id.* at 895.

106 See *id.* at 894-95. In general, "[v]erbal nuance and complexity don't play well on television." *Id.* at 896.

107 Lassiter, *supra* note 1, at 999-1000.

108 See *id.* at 999.

In contrast, the television camera actually lacks the ability to capture and communicate all the information necessary to render a well-founded verdict. Part of the role of the courtroom is to convey respect for the rule of law, and the atmosphere of the courtroom is constructed to serve this purpose.¹⁰⁹ The camera cannot depict this aura of dignity and, as such, limits the scope of the audience's experience.¹¹⁰ The television audience misses other elements of the courtroom atmosphere, including the presence of family members, which often serves as a glaring reminder of the victim.¹¹¹

Also, television is unable to transmit all of the evidence that is available for the courtroom jury. Information necessary for the public to assess the credibility of witnesses cannot always be captured accurately by the camera.¹¹² These impressions, along with other evidence such as crime scene and autopsy photos,¹¹³ are withheld from the television audience. Thus, the validity of the public verdict is questionable because the realm of information upon which the public deliberates is incomplete.

C. *Keeping the Black Box of the Jury in the Shadows*

In contrast to television's barrage of programming surrounding a high-profile trial, the screen fades to black once the judge has

¹⁰⁹ See Arenella, *supra* note 7, at 893 (The "physical separation [of the jury] from the other trial participants" is a reminder of its power and obligation.).

¹¹⁰ See *id.* at 899. But 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, 1542 (1996).

¹¹¹ It may also be said that the home viewer is prejudiced because it receives *too* much information or pictures of the emotional family members. The reaction of the public to this emotion can be irritation at its intensity. See Arenella, *supra* note 7, at 895 (suggesting that the public reaction to the rage of Fred Goldman, the father of one of the victims in the Simpson trial, may have been negative because the intensity of such emotion "interfered with the viewers' enjoyment of the saga").

¹¹² See *id.* at 894 (discussing how Simpson trial witness Mark Fuhrman appeared more credible on television than he did in the courtroom where the "subtle and occasional cracks in his demeanor were more apparent").

¹¹³ See *id.* at 898 (indicating that these are withheld due to concerns for the privacy of the jury, the victim and his or her family).

instructed the jury and sent them to deliberate. Deferring to the sanctity of jury deliberation secrecy,¹¹⁴ the usually aggressive modern media disengages itself and turns off its camera. The jury is left to deliberate in private and when it is finished, the cameras switch back on, just in time to capture the dramatic moment¹¹⁵ when the verdict is announced.

After the long period of the trial's build-up, the jury's moment in the spotlight is almost anti-climatic given its brevity.¹¹⁶ The verdict is read without any embellishing detail of its grounds or the jury's reasoning. The public gets the climax that is crucial for every good drama,¹¹⁷ but is denied the opportunity to have any deeper understanding of why the jury reached its decision.¹¹⁸ If the jury's decision conflicts with that of the television audience, the jury's failure to convey its rationale may impede public acceptance of the verdict.¹¹⁹

114 See Clifford Holt Ruprecht, Note, *Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy*, 146 U. PA. L. REV. 217, 219 & n.8 (1997) ("The secrecy of the jury is a treasured feature of our common-law heritage."). Such secrecy may be deliberate as "[t]he institution of the jury seems almost to have been designed to ensure ignorance about its functioning, perhaps designed to promote respect by generating mystique." Michael J. Saks, *Blaming the Jury*, 75 GEO. L.J. 693, 693 (1986).

115 The "suspense and unpredictability of a verdict . . . draw[s] viewers into the cases." Moran, *supra* note 17.

116 See William T. Pizzi & Walter Perron, *Crime Victims In German Courtrooms: A Comparative Perspective on American Problems*, 32 STAN. J. INT'L L. 37, 49 (1996) ("While the trial may have taken a substantial period of time, the conclusion is swift.").

117 See Griffin, *supra* note 11, at 353. See also Lassiter, *supra* note 1, at 929 n.5 (noting Court TV's advertising slogan: "Great Drama. No Scripts.").

118 This is yet another example of television's sacrifice of substantive content for entertainment value. See *supra* note 80 and accompanying text.

119 Offering reasons for a decision provides many advantages, including the fact that "it is easier to accept a verdict as fair and just when there is a written document demonstrating that the judges have done their job fairly, conscientiously, and in conformity with the law. One can be disappointed with a verdict, yet conclude after listening to the reasoning behind it that it is, nonetheless, understandable or even justifiable." Pizzi & Perron, *supra* note 116, at 50. Such an offering provides an opportunity for the verdict to be "subject to at least some critical review," which may make it more palatable to the public. Ruprecht, *supra* note 114, at 245.

Whereas the public is able to offer its supporting arguments,¹²⁰ even if they are built upon the unstable foundation of evidence gleaned from the televised trial,¹²¹ the jury is afforded no such opportunity. This leaves the public and the media free to construct their own “sinister explanations . . . for how the trial jurors could have made such an obvious mistake.”¹²² There is no way for the jury to counter these public attacks upon their “intelligence, moral character and even eyesight.”¹²³ Thus, the gap in television coverage, while seeking to protect the jurors by deferring to the privacy of their deliberations, results in harming the jury nevertheless.¹²⁴ Moreover, the more instances of public rejection of the jury’s verdict that come and go without rebuttal, the more public esteem will diminish,¹²⁵ for both the jury and the entire legal system.

120 The expression of the public’s views can be to a wide audience, through letters to newspaper editors or interviews with either the print or electronic media, or can take the form of simple conversations between people.

121 See *supra* Part II.B.2 for a discussion of how the public’s judgment is tainted.

122 Arenella, *supra* note 7, at 907 (noting that in the Simpson case, these explanations took the form of: “jury nullification, racism, hidden agendas, stupidity, [and] sleazy defense lawyers fabricating defenses”).

123 Moran, *supra* note 17. It seems that the sporting event atmosphere created by the ‘play-by-play’ commentary and instant replays of trial footage transforms the jury into the umpire or referee and opens it to similar attacks. See *supra* notes 84, 87 and accompanying text.

124 Television does not shoulder the entire burden for this harm. Procedural mechanisms built into the criminal trial prevent the taping of deliberations, 18 U.S.C.A. 1508 (West 1997), and forbid jurors from revealing the internal workings of their discussions. FED. R. OF EVID. 606(b). The long history of the jury being ensconced behind closed doors also has helped create this tradition of secrecy.

125 Some commentators argue that the opposite is true. Cass R. Sunstein argues that “there is a good reason to be wary of reason-giving: reasons may be both over- and under-inclusive.” Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L.R. 1733, 1755 (1995). See also Bernard Grofman, *Public Choice, Civil Republicanism, and American Politics: Perspectives of a “Reasonable Choice” Modeler*, 71 TEX. L.R. 1541, 1583 n.194 (1993) (“Sometimes it is a very bad idea to give reasons for what we do; giving reasons will force out into the open conflicts over ideology, values, or distributions of payoffs that may best be left hidden. Similarly, it is probably a good thing, on balance, that jurors are not required to give reasons for the decisions that they reach.”).

III. SOLUTIONS

To slow the rapidly decreasing respect for the institution lauded as the embodiment of “the ideals of populism, federalism, and civic virtue,”¹²⁶ it is necessary to strike a better balance between the overload of information provided by television coverage of the trial and lack of information conveyed about the jury verdict’s rationale. Solutions either limit the excessive public dissemination of information about the trial¹²⁷ or create an outlet for the jury to explain itself by opening deliberations to television coverage¹²⁸ or allowing a jury opinion to be issued.¹²⁹

A. *Turning off the Courtroom Camera*

1. The Camera’s Brief History in the Courtroom

The camera’s first, surreptitious appearance in the courtroom resulted in its expulsion for sixteen years. Following the discovery of a hidden newsreel camera recording the trial of Bruno Hauptmann,¹³⁰ in 1937 the American Bar Association adopted Canon 35, which prohibited all courtroom photography.¹³¹ However, in 1953, Oklahoma allowed footage of trials to be recorded for use on television news broadcasts¹³² and two years later, Texas allowed the first live televised trial.¹³³ The Texas judge, when asked if he thought that televising criminal cases would have any negative effects, unknowingly forecast

¹²⁶ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1190 (1991).

¹²⁷ See *infra* Part III.A.

¹²⁸ See *infra* Part III.B.

¹²⁹ See *infra* Part III.C.

¹³⁰ See *supra* note 1 for a more complete discussion of the Hauptmann case.

¹³¹ See A.B.A. STANDARDS FOR CRIMINAL JUSTICE § 8-3.8 commentary at 55 (1991). An explicit ban on televising courtroom proceedings was added in 1952. See *id.*

¹³² See THALER, *supra* note 93, at 25. Oklahoma professed to follow Canon 35, but did not enforce its ban on televised trials. See *id.* at 213 n.33.

¹³³ See *id.* at xix.

the impending storm when he replied, "Naw, let it go all over the world."¹³⁴

Today, while forty-seven states allow trials to be televised,¹³⁵ federal courts have vacillated on the issue.¹³⁶ This current state of affairs is the result of over thirty years of conflict over the constitutionality of cameras in the criminal courtroom,¹³⁷ which has culminated in the "Solomon-type wisdom . . . that the Constitution neither prohibit[s] nor mandate[s] televised coverage."¹³⁸

Those arguing that televising criminal trials is unconstitutional claim that such a practice violates the defendant's right to a fair trial as provided under the Fourteenth Amendment of the Constitution.¹³⁹ The Supreme Court's response is that, although there is a possibility that televising trials impinges upon due process rights, especially in high-

134 *Id.*

135 See Lassiter, *supra* note 1, at 929. This figure may overstate the scope of the camera's access because of the 47 states that allow television coverage, only approximately 26 regularly allow cameras in the courtroom and most state judges have broad discretion to exclude them. See *id.* at 930 n.8.

136 In 1994, the U.S. Judicial Conference rejected a proposal that would allow cameras in federal court permanently. This followed a three-year experiment that allowed a temporary exemption from the rule of criminal procedure that prohibited the "taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Linda Greenhouse, *Disdaining a Sound Bite, Federal Judges Banish TV*, N.Y. TIMES, Sept. 24, 1994, at E4 (citing Federal Rule of Criminal Procedure 53). But this stance, which effectively banned cameras, was reversed two years later to allow individual judges the discretion to allow cameras in their courtrooms. See Linda Greenhouse, *Reversing Course, Judicial Panel Allows Televising Appeals Court*, N.Y. TIMES, Mar. 13, 1996, at A1.

137 For a discussion of the right to televise *civil* trials see Carolyn E. Riemer, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267, 1283 n.60 (1985).

138 Lassiter, *supra* note 1, at 942.

139 The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. CONST. amend. XIV, § 1.

profile cases, there is no presumption of such a prejudicial effect and, as such, no per se ban on cameras in the courtroom.¹⁴⁰

On the opposite side, supporters of televising trials claim a right of absolute access to the courtroom under both the Sixth Amendment's promise of a "public trial"¹⁴¹ and the First Amendment's provision guaranteeing the freedom of the press.¹⁴² However, neither has provided the electronic media with guaranteed entry to the courtroom. The Supreme Court has interpreted the Sixth Amendment's open trial as a right personal to a criminal defendant, not held by the public.¹⁴³ But, under the First Amendment's provisions the press does enjoy some special protection against exclusion from the courtroom.¹⁴⁴ This access is not absolute¹⁴⁵ and does not necessarily extend to television cameras. For instance, in *Nixon v. Warner Communications, Inc.*¹⁴⁶ the Court indicated that:

¹⁴⁰ See *Estes v. Texas*, 381 U.S. 532 (1965); *Chandler v. Florida*, 449 U.S. 560 (1981). See generally, Lassiter, *supra* note 1, at 938-942 (discussing, in more detail, the *Estes* and *Chandler* opinions).

¹⁴¹ U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.").

¹⁴² See U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of . . . the press.").

¹⁴³ See *Gannett Co. v. DePasquale*, 443 U.S. 368, 381-83 (1979) (indicating that the presence of the trial participants sufficiently protects the interest of the public, and likewise that of the press, in having an open proceedings); *Estes*, 381 U.S. 532, 584-91; *In re Oliver*, 333 U.S. 257, 270 (1948).

¹⁴⁴ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality). See also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606-07 (1982) (recognizing that the media's right of access is limited, but the government must show a compelling interest to exclude the press and the order preventing access must be narrowly drawn to serve that interest).

¹⁴⁵ See *Richmond Newspapers*, 448 U.S. at 581 n.18 (stating that "a trial judge [may], in the interest of the fair administration of justice, impose reasonable limitations on access to a trial" which may include ensuring that the court atmosphere is quiet and orderly and taking into account the limited capacity of the courtroom). Various state constitutions may afford broader access rights. For example, Oregon's constitution includes a clause which provides that "no court shall be secret," possibly allowing virtually unrestricted access. See David Weinstein, *Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options*, 70 TEMP. L. REV. 1, 11-12 & n.84 (1997).

¹⁴⁶ 435 U.S. 589 (1978).

there is no constitutional right to have [witness] testimony recorded and broadcast [and] while the guarantee of a public trial, in the words of Mr. Justice Black, is “a safeguard against any attempt to employ our courts as instruments of persecution,” it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial — or any part of it — be broadcast live or on tape to the public.¹⁴⁷

Lower court decisions have allowed courts to ban cameras from the courtroom using a similar rationale.¹⁴⁸

Media proponents counter with two responses. The first is an extension of the court’s ruling in *Richmond Newspapers, Inc. v. Virginia*¹⁴⁹ that the public has a right to attend criminal trials. The argument insists that the *Richmond* opinion should be interpreted as requiring the maximization of public access to criminal trials.¹⁵⁰ This, in conjunction with the assertion that maximization can be achieved only through electronic coverage,¹⁵¹ leads to the conclusion that to not televise a criminal trial is to violate *Richmond* and, by extension, the Constitution. The flaw in this analysis is that it is doubtful that the *Richmond* decision requires the maximization of public access to criminal courts. In fact, the opinion suggests that in the instance where courtroom seating is limited, reasonable restrictions upon access are acceptable.¹⁵² It is likely that “the presence of print and electronic

¹⁴⁷ *Id.* at 610 (citations omitted).

¹⁴⁸ See *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986) (“[T]he right of access [to a criminal trial is] a right to attend, listen and report. No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials.”); *Westmoreland v. Columbia Broad. Sys.* 752 F.2d 16, 23 (2d Cir. 1984) (“There is a long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised.”); *United States v. Hastings*, 695 F.2d 1278, 1281-83 (11th Cir. 1983) (upholding the trial court’s rejection of a request made by a television station *and the defendant* to televise a case in federal court and even sanctioning a per se ban on cameras in the federal courts as a reasonable time, place, and manner restriction).

¹⁴⁹ 448 U.S. 555 (1980).

¹⁵⁰ See Sager & Frederiksen, *supra* note 110, at 1533.

¹⁵¹ See *id.*

¹⁵² See *Richmond Newspapers*, 448 U.S. at 582 n.18.

media inside the courtroom [satisfies] the First Amendment's requirement of public access to such trials."¹⁵³

The second media claim, a disparate treatment argument, asserts that without some compelling interest, there can be no differentiation between different types of media.¹⁵⁴ Courts have been receptive to this argument when the differentiation is between different news organizations,¹⁵⁵ but less amenable when the disparate treatment involves distinguishing between the print and electronic media.¹⁵⁶ The Supreme Court has minimized the difference between the print and broadcast reporter and has indicated that their privileges inside the courtroom are the same.¹⁵⁷ In more practical terms, if the disparate treatment argument was accepted, all state laws that allow judges to decide whether cameras should be in their courtrooms would be invalidated.¹⁵⁸

153 Arenella, *supra* note 7, at 885. See also Gewirtz, *supra* note 29, at 883-84 (The constitutional requirement of access "means only that the public and the media must be admitted insofar as courtroom space permits . . . [T]here is no requirement that the media must be allowed to televise court proceedings. . . . Representatives of the public must generally be allowed to attend criminal trials, not members of the public directly.").

154 See Sager & Frederiksen, *supra* note 110, at 1534-39

155 See *American Broad. Co. v. Cuomo*, 570 F.2d 1080 (2d Cir, 1977).

156 See *Associated Press v. Bost*, 656 So. 2d 113, 115-18 (Miss. 1995) (finding that, in regard to allowing different access to print and broadcast media, the strict scrutiny required under equal protection analysis does not apply because televising trials is not a constitutionally recognized right and that the less strict rational basis standard was fulfilled by the court's interest in maintaining decorum and preserving the truth-seeking function of the trial). See generally, Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 944-47 (1992). But see, Stacy R. Horth-Neubert, Note, *In the Hot Box and on the Tube: Witnesses' Interests in Televised Trials*, 66 FORDHAM L. REV. 165, 197 (1997) ("Strict scrutiny applies to government-imposed regulations on broadcast speech if that speech touches on important public issues [and] [j]udicial proceedings are clearly part of the legitimate public interest.").

157 See *Estes v. Texas*, 381 U.S. 532, 540 (1965) ("[T]he courts [cannot] be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public.").

158 See Arenella, *supra* note 7, at 882 n.4.

It seems as if the constitutionality question regarding the televising of criminal trials is at an impasse: it is unlikely that there is a constitutional right to televise criminal trials,¹⁵⁹ but neither is there a per se prohibition upon televising criminal trials. Thus, it is likely that the trial court judge will retain the discretion to exclude cameras from the courtroom.¹⁶⁰

2. The Judge's Balancing Act

The effects that are the most instrumental in eroding respect for the jury system are mitigated by the removal of the camera from the courtroom. These include the unnecessary increase in the participation of the television audience and television's distortion of the trial's evidence and testimony.¹⁶¹ Televising the trial also has the ancillary effect of transforming the courtroom into a theater, which can more directly undermine the public's regard for the judicial system.

Television coverage of the trial stimulates the audience's misguided sense that it is receiving all the necessary information to qualify it as the thirteenth juror.¹⁶² This is supplemented by programming that television presents in conjunction with the trial.¹⁶³ Both this false sense of empowerment and the interrelated "television-

¹⁵⁹ If there was such a right, the only way for trial court judges to exercise discretion to deny access to the television camera would be to identify a "compelling interest" that outweighed the interest in public access. See Sager & Frederiksen, *supra* note 110, at 1529.

¹⁶⁰ This determination takes on added significance if, as one commentator has suggested, once the judicial decision to allow cameras into the courtroom is made, the judge loses any control over what can or cannot be broadcast. See Horth-Neubert, *supra* note 156, at 197 (arguing that once televising the trial has been approved, allowing the judge to preclude the televising of certain witnesses is to allow the "ad hoc balancing of First Amendment editorial rights [which] bears a striking resemblance to a [prohibited] prior restraint on press").

¹⁶¹ See *supra* Parts II.A and II.B for an explanation of how these effects negatively influence the television audience.

¹⁶² See *supra* Part II.A.

¹⁶³ See *supra* Part II.B.2.a for examples of the extra information television coverage provides for the trial audience.

driven industry”¹⁶⁴ would cease to exist without their centerpiece: live television coverage of the trial.

Media proponents insist that turning off the source of information is not the answer. They argue that without ‘gavel-to-gavel’ television coverage, the public must rely solely upon the impressions of the media representatives in the courtroom. This is a valid concern, but it assumes that live television coverage of the trial does not have similar distortion problems. As discussed above, this is not an accurate assumption.¹⁶⁵ It also assumes that the public is actually watching the live coverage. This likely is false as well, as the vast majority of the public still relies upon nightly media summaries to inform themselves of the day’s events.¹⁶⁶ The courtroom camera only enhances the media’s influence over this wide segment of the public. The trial footage becomes an assortment of video clips that can be sorted through in order to choose those that best support the media’s interpretation¹⁶⁷ and fulfill its need to entertain.¹⁶⁸ This is especially dangerous given that the information supplied by the media is usually offered as objective, thus providing no warning to the audience of possible media bias.¹⁶⁹

Another perceived benefit of televised trials is the increased accountability of, and heightened confidence in, a judicial system that

164 Easton, *supra* note 79, at 19.

165 See *supra* Part II.B.

166 See *supra* note 5; Arenella, *supra* note 7, at 900-01, 908 (discussing the “two audience problem”). The argument that the more information provided, the better definitely has more merit when it is applied to the small segment of the audience that actually watches the entire trial. They will get more access to unfiltered information, but also are likely to see more commentary and auxiliary programming. Moreover, this segment may not constitute enough of the audience to warrant incurring the myriad of drawbacks of televised coverage. See *id.* at 900-01.

167 See Arenella, *supra* note 7, at 901, 910.

168 See *supra* Part II.B.2.b regarding the entertainment function of televising trials.

169 Television is “the latest, the subtlest, and by far the most effective medium for injecting bias into the message delivered.” Lassiter, *supra* note 1, at 979. It achieves this through the appearance of presenting a comprehensive view and the instantaneous nature of such a presentation. See *id.*

is open and visible.¹⁷⁰ It can be argued that expanding the public's exposure to the inside of the courtroom better ensures that the judicial proceedings are following closely the tenets of fairness.¹⁷¹ However, televising trials is not necessary to achieve this benefit. Non-televised trials are not 'closed' trials, they are still accessible to the public and the media in the courtroom. This assures those that are not present that the rules of law and fair procedure are being sufficiently protected.¹⁷² Also, it is unclear whether public confidence in the judicial system is increased by watching live coverage of trials.¹⁷³ The negative public response to the verdicts of recent high-profile cases suggests that the opposite is true.¹⁷⁴

¹⁷⁰ In *Richmond Newspapers Inc. v. Virginia*, Chief Justice Burger indicates that open justice serves a therapeutic value for a community that has experienced the shock of criminal acts. 448 U.S. 555, 569 (1980) (plurality). Thus, "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion." *Id.* at 571. However, if the public objects to the jury's verdict, "it is highly unlikely that a trial's public nature will encourage appropriate community catharsis [instead it] only serves to enhance and prolong public anger and resentment." Arenella, *supra* note 7, at 886.

¹⁷¹ See Lassiter, *supra* note 1, at 960. What transpires in secret can only breed distrust for the outcome it produces. See *Richmond Newspapers*, 448 U.S. at 571-72 (stressing the importance of the appearance of justice and suggesting that observation of the criminal process is the best way to achieve this appearance); Gerald L. Chaleff, *The Simpson Legacy: Trial & Error: Focus Shifts to a Justice System and its Flaws*, L.A. TIMES, Oct. 8, 1995, at S7 ("Justice done in private is not as fair as justice done in public.").

¹⁷² See *Richmond Newspapers*, 448 U.S. at 572 (indicating that public attendance increases respect for the law and confidence in judicial remedies) (emphasis added); Arenella, *supra* note 7, at 888-90.

¹⁷³ "[T]he confidence-inspiring aspects of television coverage are speculative." Lassiter, *supra* note 1, at 975. See also Paul Raymond, *The Impact of a Televised Trial on Individuals' Information and Attitudes*, 75 JUDICATURE 204, 208 (discussing a study of people's reaction to watching a trial on television and its findings that "[i]n general, participants' confidence in the courts was unaffected by watching the trial"). Of course, this study did not replicate the experience of watching an high-profile trial on television; the trial was not one that would garnish intense media attention, there were no external commentary or other programming, and study participants were required to watch the trial in its entirety.

¹⁷⁴ Disappointment in the system was the most prevalent response to the Simpson trial. See generally Sherry Lee Alexander, *The Impact of California v.*

A trial's magnified visibility does increase public education about the courts and their processes.¹⁷⁵ This is an important function as "[t]here is no field of governmental activity about which the people are so poorly informed as the judicial branch."¹⁷⁶ Televising trials certainly provides information about the judicial processes and would likely reach the widest audience.¹⁷⁷ However, the quality of the education taught by the courtroom camera has been questioned.¹⁷⁸ Instead of imparting substantive knowledge of the judiciary, televised trials simply may give the public the impression that its legal understanding is enhanced.¹⁷⁹ Such a limited educational benefit probably could be achieved through "extensive news coverage, expert commentary, and panel discussions outside the courtroom,"¹⁸⁰ all of which do not require the intrusion of the camera into the courtroom.

There is a concrete disadvantage of televising trials that is eliminated when the camera is turned off. Instead of transforming the

Simpson on Cameras in the Courtroom, 79 JUDICATURE 169 (1996); Tony Mauro, *OJ Trial Could Spell Change to Justice System*, USA TODAY, Oct. 5, 1995, at A7; Jan Crawford Greenburg & Ginger Orr, *The Simpson Verdict: Aftershocks*, CHI. TRIB., Oct. 4, 1995, at N17.

¹⁷⁵ See, e.g., *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring) (observing that "television is capable of performing an educational function by acquainting the public with the judicial process in action").

¹⁷⁶ Richard H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 HASTINGS COMM. & ENT. L.J., 748, 795-96 & n.289 (1987).

¹⁷⁷ See Piccus, *supra* note 24, at 1085 ("Television is our nation's most common and constant learning environment.") (quoting George Gerbner, *Introduction to SUSANNA BARBER, NEW CAMERAS IN THE COURTROOM: A FREE PRESS - FAIR TRIAL DEBATE* xii, xii-xiv (1987)).

¹⁷⁸

Experienced legal educators know that high profile cases are of mixed pedagogical worth: they excite student interest, but the student interest fixates on the political lure of the trial and not the legal issues implicated in the discussion . . . [T]here has yet to surface a study testing viewers to see if their actual knowledge of the legal system has been improved as a result of cameras inside the courtroom.

Lassiter, *supra* note 1, at 973 (citing Charles L. Lindner, *Put Out the Camera's Eye in the Courtroom*, L.A. TIMES, Feb. 19, 1995, at M6). Lindner further comments that "TV coverage of the Simpson case has reduced the most powerful education medium in history to an interactive People's Court." *Id.*

¹⁷⁹ See *id.* at 973.

¹⁸⁰ *Id.*

courtroom into a stage¹⁸¹ upon which the trial participants perform,¹⁸² the court retains its judicial nature. The claim that televising a trial influences the behavior of its participants is widely debated. There are those who assert that awareness of the public's vicarious presence affects courtroom conduct.¹⁸³ However, some studies¹⁸⁴ have shown that the camera's presence in the courtroom does not impact the behavior of the trial participants.¹⁸⁵ While it is uncertain how this

¹⁸¹ In a televised high-profile trial, there are two trials being conducted: one for the jury and one for the public. See *supra* notes 40-43 and accompanying text. As the trial participants alter their behavior to impact upon the jurors, it seems natural that they would also perform for the community audience. Thus, the courtroom becomes a stage because "[p]resenting one's self for the public is theater." Lassiter, *supra* note 1, at 980 n.282.

¹⁸² Commentators have suggested that televising trials compels the court participants, including the judge, the attorneys, and the witnesses, to perform for the television audience. See, e.g., Moore, *supra* note 73, at 10 (describing the Simpson trial as "a stage for the jury, lawyers and judge to pursue their own self-serving purposes").

¹⁸³ See, e.g., Tommy Denton, *Trials Take a Close Look at Deep Social Issues*, TIMES UNION (Albany, N.Y.), July 6, 1997, at E1 (describing the Simpson criminal trial as "a circus atmosphere complete with an irresolute judge, posturing performances by lawyers before the cameras inside the courtroom and shameless promotion outside"); Mark Henry, *Court, Cameras Don't Mix, Marcia Clark Says*, PRESS-ENTERPRISE (Riverside, Cal.), Feb. 16, 1996, at B3 (indicating that Simpson prosecutor Marcia Clark believes that "cameras influence the behavior of trial lawyers . . . skew[ing] a case against justice, with lawyers pandering to cameras"); Rory K. Little, *That's Entertainment! The Continuing Debate Over Cameras in the Courtroom*, 42 FED. LAW 28, 30 (July, 1995) ("Available data, in addition to anecdotal experience, support the view that cameras have undesired, adverse effects on all court participants: witnesses, jurors, lawyers, and judges.").

¹⁸⁴ The reliability of these studies is also the subject of dispute. One scholar asserts that the problem with the reliability of these studies is largely a function of "the gap between what people say and what they really do." Little, *supra* note 183, at 30. This gap arises because "virtually all camera studies are based on the participants' self-reporting. Trial participants may maintain that the possibility of being on the news every night at dinner has no effect on their behavior; but then their attire and appearance change [and] lawyers' and judges' 'speechifying' increases." *Id.*

¹⁸⁵ See, e.g., Susan E. Harding, Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. CAL. L. REV. 827, 837-38

dispute will be resolved, it is clear that the courtroom camera in a high-profile case exerts especially intense pressures upon the participants.¹⁸⁶

Overall, it seems that the harms inherent in televising high-profile cases could outweigh the benefits. Instead of instituting a per se ban upon televising trials, which would provoke vehement protest from media and constitutional scholars,¹⁸⁷ a more moderate solution would be to advise trial judges to consider the impact of televising the specific high-profile case before them. Perhaps they could follow a rule of "Inverse Publicity," which suggests that television coverage of a case becomes less attractive the greater the public attention it engenders.¹⁸⁸ The cases that would not be televised likely would be those with aspects that appeal to the masses, but do not provide educational or other public benefit. For these types of cases, the role of public educator and accountability watch-dog would be adequately performed by the print media. For cases that truly embody important social or legal issues, which weigh against barring cameras, television coverage would still be available to educate a wider audience.¹⁸⁹

(1996) (discussing a University of Minnesota Psychology Department study which "found that the electronic media witnesses recalled just as much correct information as the witnesses whose trials received conventional media or no media coverage"); Daniel E. Troy, *Can Cameras in the Court Bring Justice?* WASH. TIMES, May 2, 1997, at A23 (noting that empirical data from the states that allow cameras in their courtrooms indicate that television does not "influence participants in a material or harmful way"); J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 486 (stating that "experience with the media in the trial courtroom, controlled by the judge, indicates litigants and attorneys tend to behave as though the cameras are not present"). See also Ken Hoover, *Verdict Still Out on Cameras in Courtrooms: Klaas Case Illustrates Courts' Shift*, SAN FRANCISCO CHRON., Apr. 22, 1996, at A17 (indicating that Frances Kahn Zemans, president of the Chicago-based American Judicature Society, believes that "in high-profile trials odd and even raucous behavior occurs — regardless of whether TV cameras are present").

¹⁸⁶ See Troy, *supra* note 184 (conceding that in high-profile cases "the pressure and publicity" may influence trial participants).

¹⁸⁷ Although it appears that there is no constitutional right to televise trials, the Court has not spoken directly to this issue and current Supreme Court cases have extended the scope of the media's access to the courtroom. See *supra* notes 138-48, 159 and accompanying text.

¹⁸⁸ See *Camera Shy?*, NAT'L L.J., Oct. 23, 1995, at A22.

¹⁸⁹ See *id.*

B. *Switching on the Juryroom Monitor*

An even more radical suggestion would be to tip the scales in the opposite direction and open jury deliberations to television coverage. Although this proposal might garnish some support from proponents of courtroom cameras, in the end it presents more problems than it solves and may be too severe a break with tradition.

The question of whether proceedings should be open depends upon two factors: 1) whether it has been open historically and 2) whether access will have a positive impact upon the particular proceeding.¹⁹⁰ Jury deliberations have not enjoyed a history of accessibility and it is unclear whether opening them for public scrutiny would have the requisite positive impact.

1. History of Secrecy

It is undisputed that jury deliberations have always been conducted behind a shroud of secrecy.¹⁹¹ The rationales for this policy include: ensuring that the jurors' decision will be free from external influences,¹⁹² preserving the integrity of the group discussion

¹⁹⁰ See *Press-Enterprise Co. v. Superior Court of Cal.*, 478 U.S. 1, 8 (1986); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 586 (1980). But see Eugene Cerruti, "Dancing in the Courthouse": *The First Amendment Right of Access Opens a New Round*, 29 U. RICH. L. REV. 237, 269 (arguing that this test is not the correct threshold question because "many [lower] courts have in fact quite explicitly forsaken the two-prong standard").

¹⁹¹ See, e.g., *In re Globe Newspaper Co.*, 920 F.2d 88, 94 (1st Cir. 1990) (indicating that there is "a special historical and essential value [that] applies to the secrecy of jury deliberations which is not applicable to other . . . proceedings"); *United States v. Watson*, 669 F.2d 1374, 1391 (11th Cir. 1982) (stating that "[j]ury deliberations are kept private and secret"); *Babson v. United States*, 330 F.2d 662, 666 (9th Cir. 1964) ("[T]he law requires that all deliberations by a jury must be conducted in the utmost privacy."). Some commentators have even gone so far as to insist that secrecy is an inherent element of the jury system and if it was abandoned, "the time [will have] come to set up another kind of tribunal." WILLIAM R. CORNISH, *THE JURY* 258 (1968).

¹⁹² See *People v. Oliver*, 241 Cal. Rptr. 804, 806 (Ct. App. 1987) (stating that jury deliberations should be "free from all outside intrusions, and extraneous influences or intimidations"); *Babson*, 330 F.2d at 665-66 ("A juror must be

dynamic,¹⁹³ and protecting juror privacy and safety.¹⁹⁴ Secrecy also affects the public's estimation of juries and their verdicts, as the opaque nature of the deliberations may help to diffuse criticism of the jury and dissatisfaction with the verdict.¹⁹⁵ Some even believe that the legitimizing function of the jury, which serves to foster public acceptance of the judicial system, is rooted in its impenetrability as a 'black box.'¹⁹⁶

insulated from influences and protected against pressures that would tend to fetter him in the free exercise of his own judgment.”). This seeks to uphold the right of litigants “to a verdict based on the independent judgment” of the jurors. *Watson*, 669 F.2d at 1391.

¹⁹³ See *Globe Newspaper*, 920 F.2d at 94 (indicating that the secrecy of jury deliberations allows the free, open and candid debate necessary to render a proper verdict). The purpose of jury deliberation is to arrive at a common decision through an exchange of opinion and thoughts. For this to work, jurors must feel completely free to express their ideas. This freedom may be hampered by the knowledge that details of the discussion may “reach a larger audience.” Note, *Public Disclosures of Jury Deliberations*, 96 Harv. L. Rev. 886, 890 (1983) [hereinafter *Public Disclosures*]. See also Abraham S. Goldstein, *Jury Secrecy and the Media: The Problem of Postverdict Interviews*, 1993 U. ILL. L. REV. 295, 295 (“[J]urors must deliberate in secret so that they may communicate freely with one another, secure in the knowledge that what they say will not be passed along to others.”).

¹⁹⁴ Respect for juror's privacy arises out of consideration of their right to be left alone, which has been called one of “the most comprehensive of rights [that is] most valued by civilized men.” *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). Juror safety is especially a concern in trials receiving intense media scrutiny. See Copernicus T. Gaza, Note, *Getting Inside the Jury's Head: Media Access to Jurors After the Trial*, 12 N.Y.L. SCH. J. HUM. RTS. 311, 317-18 (1995).

There also may be a more practical motive in that the “failure to shield current jurors from unwanted scrutiny will cause other citizens to shun jury duty in the future.” *Public Disclosures*, *supra* note 193, at 889. *But see* *United States v. Sherman*, 581 F.2d 1358, 1361 (9th Cir. 1978) (concluding that the jury's need for protection from harassment was not a sufficiently compelling interest to prohibit the press from conducting postverdict interviews of jurors).

¹⁹⁵ See *Developments in the Law - The Civil Jury*, 110 HARV. L. REV. 1407, 1433-34 (1997). Although this author is discussing the transient, ad hoc nature of the civil jury and its inscrutable verdict, these are also characteristics of the criminal jury and its verdict.

¹⁹⁶ See *id.* at 1435-36 (“The jury's legitimizing force lies in the fact that jurors ‘apply societal standards without ever telling us what these standards are, or even that

However, secrecy is not necessarily an integral component of juries or deliberations.¹⁹⁷ If the inscrutability of the jury¹⁹⁸ is de-emphasized in favor of its role as a political institution in an open democratic society,¹⁹⁹ it becomes less important to keep deliberations secret. Instead, the representative function²⁰⁰ and educational value²⁰¹ of the jury take on greater significance. These would be best served by open deliberations.²⁰² Also, the historical rule does not seem to be inviolable, as other proceedings have been opened despite a lack of traditional access.²⁰³ But, there are also many proceedings, such as bench conferences²⁰⁴ and matters before the grand jury,²⁰⁵ which courts

they exist.”) (quoting GUIDO CALABRESI & PHILIP BOBBITT, *TRAGIC CHOICES* 57 (1978)); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441, 496 (1997).

¹⁹⁷ See Amar, *Reinventing Juries*, *supra* note 11, at 1187.

¹⁹⁸ Professor Goldstein insists that inscrutability is at the core of the jury and to breach it is to “unravel the distinctive nonrational and intuitive ‘genius’” of the jury. Goldstein, *supra* note 193, at 314. See also, Stith-Cabranes, *supra* note 16, at 137 (describing the jury as an “essentially non-rationalistic and discretionary institution”).

¹⁹⁹ See Amar, *Reinventing Juries*, *supra* note 11, at 1187 & n.37.

²⁰⁰ See *supra* note 48 and accompanying text (discussing the representative function of the jury).

²⁰¹ DeTocqueville called the jury a “gratuitous public school, ever open, in which every juror learns his rights . . . I look upon it as one of the most efficacious means for the education of the people which society can employ.” DeTocqueville, *supra* note 15, at 296.

²⁰² Open deliberations would teach ‘democracy in action’ and allow the public to see what jury service entails. Professor Amar compares the jury to the legislature and indicates that opening jury deliberations would have a similar instructional value as broadcasting legislative debates and hearings. See Amar, *Reinventing Juries*, *supra* note 11, at 1187.

²⁰³ See, e.g., *Seattle Times v. United States Dist. Ct.*, 15 Media L. Rep. (BNA) 1273 (9th Cir. 1988) (allowing access to bail hearings which have traditionally been closed); *Vermont v. Tallmen*, 15 Media L. Rep. (BNA) 1344 (Vt. 1987) (opening pre-trial hearings even though there is no history of access). Another long-standing tradition in the judicial system, providing the identities of jurors, is routinely breached by the impaneling of anonymous juries. See Abraham Abramovsky & Jonathan I. Edelstein, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, 28 Ariz. St. L.J. 865, 878-79 (1996).

²⁰⁴ See *United States v. Gurney*, 558 F.2d 1202, 1207-09 (5th Cir. 1977).

²⁰⁵ See *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

have emphatically refused to open. It is uncertain as to whether jury deliberations would fall into the former or the latter category.

2. The Impact on the Deliberation Process

Although televising jury deliberations might produce some benefit to the jury, given the many problems that could result, it is unlikely that allowing access to deliberations would have a positive impact upon the process.

The most notable benefit of open jury deliberations would be the improved accountability of "one of the least accountable elements of the American judicial system."²⁰⁶ Given that juries are instilled with the power to "decide whether the coercive power of the state should be invoked to deprive a party of liberty, property, or even life,"²⁰⁷ they should be accountable to the "community they represent."²⁰⁸ Allowing the public to watch deliberations would provide an independent verification of the process's validity.²⁰⁹ A by-product of this scrutiny is the education of the community about the role of the juror and the realities of jury duty.²¹⁰ The trial participants also could receive some instruction about how to improve jury instructions and more effectively present evidence.²¹¹

If the jury verdict is at odds with the independent judgment the public feels empowered to render, the appearance of fairness in the deliberative process is especially important. This is because it is likely that the public will be more accepting of a contrary verdict if it is aware of, and confident in, the efficacy and soundness of the process through

206 Abramovsky & Edelstein, *supra* note 203, at 879. See also, GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 57-64 (1978) (describing the jury as the prototypical "aresponsible" decisionmaking agency).

207 Ruprecht, *supra* note 114, at 219.

208 Goldstein, *supra* note 193, at 313.

209 See *United States v. Doherty*, 675 F. Supp. 719, 723 (D. Mass. 1987) (discussing postverdict juror interviews by the press and the importance of the public receiving "information about the operation of the administration of justice, including information about the actual people who do render justice").

210 See *id.*

211 See Christine J. Iversen, Note, *Post-Verdict Interviews: The Key to Understanding the Decision Behind the Verdict*, 30 J. MARSHALL L. REV. 507, 524 (1997).

which it was decided.²¹² However, there is the danger that exposing the deliberations will actually increase dissatisfaction with the jury and its verdict and in revealing the discussions underlying the final decision, may give the public much more to disagree with and subsequently criticize.²¹³

Thus, any increase in jury accountability or enhanced public confidence does not come without a price. Television coverage of jury deliberations will suffer from similar distortion problems that arise from televising trials: providing too much extraneous information²¹⁴ and pandering to the underlying need to entertain.²¹⁵ The availability of these recorded deliberations also may “open the door to a stream of potential litigation” that uses the taped footage as evidence of juror misconduct.²¹⁶ This would obstruct the legal system’s need for finality in litigation.²¹⁷ Beyond these issues, there are other problems with broadcasting jury deliberations that are likely fatal.

It is unclear if televising deliberations would be legal, given state and federal law as well as the Constitutional barriers. Federal and state

212 See *Offutt v. United States*, 348 U.S. 11, 14 (1954) (“Justice must satisfy the appearance of justice.”); Friedman, *supra* note 12, at 1599.

213 See *Public Disclosures*, *supra* note 193, at 891.

214 See *supra* Part II.B.2.a. While showing more information than the jury sees is clearly not a problem, it is likely that the public will still be inundated with legal commentary explaining the deliberations and the inevitable ‘play-by-play’ of their progress. Also, whereas the jury must ask the court’s approval before reexamining evidence or testimony, the media is free to run and re-run any television clip of the trial footage or its supplemental coverage to aid the viewers’ ‘deliberations.’

215 See *supra* Part II.B.2.b. Presumably, in broadcasting jury deliberations, television organizations will be just as concerned with the commercial aspects of their business and this quest for ratings and profits can skew the presentation of the information.

216 Abramovsky & Edelstein, *supra* note 203, at 881-82 (indicating that the distinction between “permissible discussion of character and impermissible discussion of factors extraneous to the case is a fine one” and that arguments can be constructed to support almost any appeal). Critics of this argument insist that it is based upon a “mistrust of counsel, jurors or the system itself.” *Id.* at 882 n.119 (quoting Alan Calnan).

217 See *Public Disclosures*, *supra* note 193, at 897.

statutes prohibit the recording of deliberations²¹⁸ and there are common law regimes in most states that preserve the sanctity of deliberations.²¹⁹ Moreover, breaching the juryroom secrecy with the insertion of the public through the camera's lens, may implicate the reversible error of outsider presence. Such a presence, a restraint upon the jurors' freedom of expression²²⁰ and impediment to the free debate required to

²¹⁸ See 18 U.S.C. § 1508 (1997); ALA. CODE § 13A-10-130 (1997); HAW. REV. STAT. § 710-1077 (1995); MICH. COMP. LAWS § 750.120B (1997); S.D. CODIFIED LAWS ANN. § 23A-35A-20 (1996); VA. CODE ANN. § 18.2-468 (Michie 1996). California and North Carolina allow recording with the consent of the jury. See CAL. PENAL CODE § 167; N.C. GEN. STAT. §14-227.2.

There has been court approval of the recording and televising of deliberations in at least three states. Wisconsin was the first to allow the taping, and subsequent broadcasting, of jury deliberations for a PBS "Frontline" special. More recently, CBS requested permission from courts in both Maine and Arizona to open their juryrooms for a similar project. Both courts agreed, but due to a last minute settlement in the case chosen in Maine, only footage from the Arizona jury was recorded and televised. In all of these situations, consent was required of all the trial participants, including the jurors. For a more comprehensive discussion of the circumstances surrounding these broadcasts, see Abramovsky & Edelstein, *supra* note 203, at 867-73.

²¹⁹ See, e.g., *State v. Lehner*, 569 P.2d 54, 55 (Or. Ct. App. 1977); *People v. Bacon* 136 N.Y.S.2d 431, 432 (Tioga County Ct. 1954). There is also a body of law, including Federal Rule of Evidence 606b, which prohibits the impeachment of the jury verdict. Rule 606 states that:

Upon and inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror.

Fed. R. Evid. 606(b).

The most common interpretation of the rule excludes "[c]onversations among the jurors, or descriptions of their own mental processes — their beliefs, biases, motives, mistakes, miscalculations, or misunderstandings" from the allowable juror testimony. Goldstein, *supra* note 193, at 299. It is precisely these elements that would comprise much of the public appeal of televised deliberations.

²²⁰ See *United States v. Virginia Erection Corp.*, 335 F.2d 868, 872 (4th Cir. 1964) (finding reversible error in the presence of an alternate juror in the juryroom).

reach an impartial verdict, could violate the defendant's Sixth Amendment right to trial by jury.²²¹

The camera likely qualifies as this prohibited external presence due to its effect upon the behavior of jurors and the complexion of the deliberations.²²² Jurors may feel intimidated by the knowledge that their comments will be disseminated to the public. This could cause jurors to suppress or edit their opinions to ensure that they are being politically correct or to court public approval.²²³ These concerns should not play any part in the determination of the crucial issues of innocence or guilt. Because the television camera is the mechanism that introduces such inappropriate influences into the deliberative process and does not bestow enough of a benefit to outweigh its harms, it should not be invited into the juryroom.²²⁴

221 See *Johnson v. Duckworth*, 650 F.2d 122, 125 (7th Cir. 1981) (finding that the presence of alternate jurors in the juryroom was not reversible error because these jurors were selected through the same process as a regular juror, but indicating that "other 'strangers' to the regular jury stand in stark contrast to the alternate"). Because the public audience is not subject to the selection process, is not constrained by the same demands of attendance or adherence to rules of evidence and court instructions, and does not possess the same qualifications of the trial jurors, they are similar to the "strangers" to which the *Johnson* court refers.

222 Jurors are likely to display what has been termed the "Hawthorne effect." This theory asserts that people who are aware that they are being observed modify their behavior to conform to what they believe to be the expectations of the observing audience. See Abramovsky & Edelstein, *supra* note 203, at 874 (citing the observations of George V. Higgins regarding the PBS "Frontline" broadcast of jury deliberations).

223 See *id.* at 883 (cautioning that jurors being recorded "may censor themselves to avoid appearing soft on crime, to avoid perceived alignment with unpopular social or political opinion, or simply because they fear appearing foolish on television"); Stith-Cabranes, *supra* note 16, at 145 (indicating that her greatest fear is "[t]hat in the cases that most demand courage, the insistence on public accountability will mean more juries responding not to the jurors' consciences, but to the mob").

224 One scholar has argued that jury deliberations should remain secret in order to preserve one of its greatest contributions: the tempering of the modern value of "access and openness over confidentiality and secrecy" with "the competing values of intuition, common-sense, lay judgment, anonymity, and secrecy." Stith-Cabranes, *supra* note 16, at 136, 145.

C. *Middle of the Road: Issuing a Jury Opinion*

Because much of the damage to the jury's reputation has come from the lack of information about its reasoning, a clear solution is to issue a simple statement explaining the basis for the jury verdict.²²⁵ This is a more moderate proposal seeking to correct the imbalance of information created by televising the courtroom drama of high-profile trials but omitting coverage of jury deliberations. It raises fewer problems, but also does not provide as large a measure of relief.

The jury opinion could be written by the jury itself or by an assigned "jury clerk," similar to the clerk who works for the judge, who would consult with the jurors after their deliberations²²⁶ and draft the statement, pending final approval by the jury.²²⁷ The advantage to having the jurors craft their own opinion is that if they are aware that they are required to explain their reasoning, such knowledge may help structure "deliberations and improve [their] analysis."²²⁸ However, this could backfire. It has been suggested that "good judgment is often 'an intuition of experience which outruns analysis and sums up many unnamed and tangled impressions.'"²²⁹ Thus if the jurors are aware, during their deliberation, that they will be required to physically record a coherent rationale for their decision, they might censor themselves and hinder the free flow of discussions, resulting in a verdict that is not in their 'good judgment.' Also, the jurors, having just completed what

225 "[C]ommon sense dictates that if court rules require judges to give written judgments stating the basis for their decisions, why should not the same onus be placed on juries?" Selva Kumar, *The Reasoning of a Reasonable Jury*, BUS. TIMES [Singapore], May 13, 1992, at 16. This jury opinion would be akin to an unpublished judicial opinion in that it would serve solely informational purposes and carry no precedential value.

226 The clerk would not be included in the deliberations, in order to avoid incurring the reversible error of an external presence. See *supra* notes 218-20 and accompanying text.

227 See Amar, *Reinventing Juries*, *supra* note 11, at 1187 (suggesting that the clerk-assisted statement would "enhance public understanding and education").

228 Nancy S. Marder, *Deliberations and Disclosures: A Study of Post-Verdict Interviews of Jurors*, 82 IOWA L. REV. 465, 533 (1997).

229 Mark S. Brodin, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 61-62 (1990) (quoting *Chicago B. & O.R.R. v. Babcock*, 204 U.S. 585, 598 (1907) (Holmes, J.)).

may have been a highly contentious deliberation, may not have enough remaining unity to agree upon the structure and manner of expressing their reasoning. Even after a less hostile session, individual jurors still may not have the overarching perspective needed to articulate the process leading to the group's consensus.

A more successful approach may be to allow the jury clerk to prepare the jury opinion. After the deliberations were complete, the clerk would meet with the jury and discuss the outcome. This discussion would protect the privacy of individual jurors as their relative satisfaction with the decision would not be revealed. Instead, the clerk would craft an amalgamation of the individual jurors' approaches and thoughts. This approach would free the jury to focus solely upon the deliberation process and the looming stress of crafting a synopsis would not inhibit the jurors' full participation. The clerk also could take advantage of his or her neutral, non-participatory position and greater familiarity and skill in legal writing to develop a clear overview of the deliberations and structure the most persuasive reasoning for the jury's verdict.²³⁰

The dissemination of the opinion to the public would help to mitigate any public outcry against the verdict and increase juror accountability.²³¹ Even if it did not completely appease the public's dissatisfaction with the outcome, it would at least afford the jury an opportunity to defend itself against attack²³² and give the public a concrete assurance that proper procedure was followed. A collateral

²³⁰ See Marder, *supra* note 226, at 534.

²³¹ See *id.* at 533.

²³² See Dooley, *supra* note 11, at 338 (noting that as a result of juries being prohibited from giving reasons for the rendered verdict, they are "stripped of their chance to give voice to their concerns, memorialize their reasoning, or defend their decision against external attack").

The sharp increase in jurors giving postverdict interviews likely indicates that they want the opportunity to explain or defend the jury's decision. See, e.g., Iversen, *supra* note 211, at 508 n.17 (indicating that the jurors in the case of Ronald Reagan's would-be assassin John Hinckley Jr. felt it necessary to defend themselves from the public's dissatisfaction with the verdict). Some jurors have even taken it upon themselves to elaborate on their decision, either when rendering the verdict in court or in a letter to the judge. See Brodin, *supra* note 227, at 69.

benefit would be that the entire text of the opinion could be provided to the public, thereby by-passing the media filters that likely would reduce it to a few culled sound-bites. This would afford the jury more control over its statement²³³ and the court more control over any impermissible divulgence of the internal processes of the deliberations.²³⁴ Also, having the entire jury issue a collective statement prevents individual jurors from feeling the need to divulge their own personal impressions.²³⁵ Jurors are more secure in the knowledge that they will have significant control over what is revealed to the public, which could encourage them to be open and frank with their opinions.²³⁶

This is not a problem-free solution. Employing a jury clerk and disseminating the opinion involves financial expenses. Eliminating the jury clerk and allowing the jurors to craft their own opinion would decrease some of these costs, but would increase the expense of a trial already lengthened by the opinion writing process.²³⁷ Retaining the jury clerk would also mitigate against the danger of revealing too much about the inner workings of the deliberations to ensure there is no violation of the impeachment rules. However, these problems are not insurmountable and are a small relative to the potential improvement in the reputation and accountability of juries.

233 A juror-controlled dissemination of the jury's statement would be a sharp contrast to post-verdict interviews, in which the reporter controls the direction of the juror's statement and, to some extent, what information is revealed. See Marder, *supra* note 226, at 476.

234 Avoiding disclosure of the deliberations would ensure that Federal Rule of Evidence 606b, precluding verdict impeachment, was not violated. See *supra* note 217 for the text of this rule.

235 See Marder, *supra* note 226, at 533.

236 Providing jurors with a greater sense of control would make jury service more attractive.

237 The amount of time involved in crafting a jury-opinion is probably not substantial. The opinion is simply a concise statement of the jury's reasoning. A possible impediment might be obtaining the approval of all jurors. The potential for such difficulty would provide an incentive to the writer to provide only a cursory treatment of the verdict's rationale, thereby curtailing a lengthy writing process.

IV. CONCLUSION

The satiation of America's voyeuristic hunger for the torrid details of others' lives²³⁸ with the criminal trial as the ultimate source of real-life drama²³⁹ is not a new phenomenon.²⁴⁰ What the final decades of the twentieth century have added to the mix are: advanced technology, which allows a global audience to peer into the courtroom from the comfort of their own homes, and a media that is deeply committed to supplementing every moment of the trial with endless commentary and extraneous information.

The era of the mega-trial and its corresponding media explosion has arrived and it is unlikely that the genie can be put back into the bottle. Instead of attempting this futile feat, the debate should turn to the mitigation of the effects of televising high-profile criminal cases. The nature of television to distort the message it transmits and the particular manner in which the media covers these trials erroneously empowers the television audience at the expense of the jury, inevitably eroding respect for this institution and the entire legal system.

Possible solutions to this dilemma lie along a continuum from eliminating television camera access in high-profile trials to opening

238 See TIMOTHY R. MURPHY, A MANUAL FOR MANAGING NOTORIOUS CASES xiii (1992) (noting the "American appetite for . . . pure, unadulterated voyeurism").

239 See Leslie Gospill & Julia A. Molander, *Cameras in the Courtroom*, DEF. COMMENT, Spring 1995, at 7, 8 ("We watch [televised trials], mouths agape, to see if the guy gets kicked in the groin. Only this time, without a laugh track, these kicks deliver life sentences.").

240 Historical examples of public fervor for trials include: "(t)he Salem witch trials, the trial of Aaron Burr, the Scopes trial, the Lindbergh kidnapping case, the Sacco and Vanzetti trials, as well as the trials of Alger Hiss, Dr. Sam Sheppard, the Chicago 7, Roxanne Pulitzer, and the Watergate defendants." MURPHY, *supra* note 238, at xiii. The first of many "trials of the century" in the twentieth century garnered this title surprisingly early. The 1906 trial of the accused killer of Stanford White received top billing due to its love triangle and spicy testimony. See The Honorable John F. Onion, Jr., *Mass Media's Impact on Litigation: A Judge's Perspective*, 14 REV. LITIG. 585, 588-89 (1995). Even then the media attention attracted by the case was criticized, as "President Teddy Roosevelt wanted to have the newspapers sued for promoting obscenities because they were printing the trial transcripts verbatim." *Id.* at 589.

jury deliberations for public viewing. Falling between these options is allowing the jury to issue an opinion explaining its reasoning. This intermediate proposal bypasses the pitfalls of denying media access to an open government forum and preserves the historic secrecy of the internal processes of jury deliberations. More significantly, it provides a conduit through which the jury can announce the reasoning behind its verdict. Hopefully, providing this explanation will calm public dissatisfaction with the jurors' verdict and satisfy the immediate goal of soothing the volatile 'love-hate triangle' between the public, the electronic media, and the jury. Striking a balance between these entities is an important first step in restoring the public's confidence and esteem in the jury and, ultimately, the tarnished American judiciary.