Of Cameras and Courtrooms

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INTRODUCTION

You can't talk about cameras in the courtroom without talking about The Juice. And we'll get there. But this tale actually begins earlier, with a 1935 trial described by H.L. Mencken as "the greatest story since the Resurrection."[1] The defendant, Bruno

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1 David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181, 182 (2008). The quote may be apocryphal, but it shows up in so many sources, always attributed to Mencken, that it seems irrelevant at this point whether he actually said it. He ought to have.

The story of broadcasting from the courtroom actually begins earlier, with the radio broadcast of the infamous Scopes monkey trial. *See* L. SPRAGUE DE CAMP, THE GREAT MONKEY TRIAL 160 (1968). Mencken was present for that trial, too. *See, e.g.*, H.L. MENCKEN, A RELIGIOUS ORGY IN TENNESSEE: A REPORTER'S ACCOUNT OF THE SCOPES MONKEY TRIAL (2006). As Mencken tells it, the local residents didn't react kindly to the publicity in that case:

> [W]hen the main guard of Eastern and Northern journalists swarmed down . . . then the yokels began to sweat coldly, and in a few days they were full of terror and indignation. . . . When the last of [the journalists] departs Daytonians will disinfect the town with sulphur candles . . . .

Hauptmann, was charged with kidnapping and murdering the one-year-old child of Charles Lindbergh, famous transatlantic aviator.[2] An estimated 700 reporters came to town for the trial, and over 130 cameramen jockeyed for pictures.[3] The gallery was unruly and vocal.[4] Messengers ran back-and-forth, updating journalists outside the room.[5] Spectators "posed for pictures in the witness chair and the jury box, carved their initials in the woodwork, and carried off spittoons and pieces of tables and chairs as souvenirs."[6] Ginger Rogers and Jack Benny came to watch.[7] And footage of the spectacle played in movie theaters nationwide.[8]

Why should we care about any of this today? The first answer is that the Hauptmann trial inaugurated a profound distrust of cameras in the courtroom.[9] Just a few years later, the American Bar Association incorporated a ban on cameras into its canon of judicial ethics, opining that cameras "are calculated to detract from the essential dignity of the proceedings" and that they "create misconceptions with respect [to the court] in the mind of the public."[10] With some variations, critics of courtroom cameras have been making the same arguments ever since: Cameras poison

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Id. at 96.

2 *See generally* State v. Hauptmann, 180 A. 809 (N.J. 1935). For descriptions of the resulting trial, see David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627, 627–31 (1995); Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17–18 (1979); Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 793 (2004).

3 Kielbowicz, *supra* note 2, at 18.

4 *See Hauptmann*, 180 A. at 827.

5 *See id.*

6 Anderson, *supra* note 2, at 629.

7 *Id.*

8 Kielbowicz, *supra* note 2, at 18–19.

9 *See id.* at 20–21. Interestingly, Kielbowicz concludes that the presence of cameras in the Hauptmann trial was not generally disruptive, and that accounts of photographers "clamber[ing] on counsel's table and shov[ing] flashbulbs into the faces of witnesses" have been exaggerated. *Id.* at 17. Most film footage of the trial was actually taken after-the-fact, as witnesses would restate the highlights of their testimony after court had adjourned. *Id.* at 18. Kielbowicz concludes that the real problem was sensational media coverage more generally, and that banning cameras "was an inappropriate remedy for the problems made evident by the Hauptmann trial." *Id.* at 23.

10 *Canons of Judicial Ethics*, 62 ABA ANN. REP. 1123, 1134–35 (1937).

the atmosphere inside the courtroom, and they distort the public's view outside it.

The second possible answer to the question of why we should care about the Hauptmann trial today is that, truth be told, we shouldn't. Opponents of cameras in the courtroom posit a pre-Hauptmann Garden of Eden to which we should aspire to return: a small, rural courtroom, presided over by a stern but kindly judge vaguely reminiscent of Fred Gwynne in *My Cousin Vinny*.[11] The lawyers, the judges, the witnesses and the litigants are the only ones in the room, except, perhaps, a local journalist and a few spectators from the neighborhood. Everyone knows everyone. The room is open to the public, but this is effectively a quasi-secret proceeding. For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press.

The Hauptmann proceedings shattered this world, if it ever existed, and many felt the change was for the worse. But a lot has happened in the seventy-five years since Bruno Hauptmann stood trial: We invented the ballpoint pen, the microwave and Velcro; swing music came and went; you (probably) were born. We live in the twenty-first century. After so long, the time has come to rethink our aversion to cameras in the courtroom. In fact, cameras have become an essential tool to give the public a full and fair picture of what goes on inside the courtrooms that they pay for.

I. IN THE COURTROOM

The first criticism of cameras sounded by the ABA after the Hauptmann trial had to do with their effects inside the courtroom. Let's start there.

There was a time when cameras could legitimately be expected to disrupt the pre-Hauptmann ideal by creating chaos in the courtroom. As late as 1965, in an opinion that temporarily put the constitutional kibosh on courtroom cameras, the Supreme Court

[11] MY COUSIN VINNY (Palo Vista Productions, Peter V. Miller Investment Corporation, Twentieth Century Fox Film Corporation 1992).

described a courtroom with "at least 12 cameramen," "[c]ables and wires . . . snaked across the courtroom floor, three microphones . . . on the judge's bench and others . . . beamed at the jury box and the counsel table."[12] Not exactly a low profile operation; the parties conceded that "the activities of the television crews . . . led to considerable disruption."[13] But a mere sixteen years later, in an opinion lifting the prohibition, the Court noted evidence that those concerns were "less substantial factors" in 1981.[14] Today's cameras are small, easily concealed and capable of operating without obtrusive lighting or microphones. Even during the O.J. Simpson trial, widely considered a low point for cameras in the courtroom, nobody criticized the equipment or its operators as a physical distraction.[15]

Critics also worry that cameras disrupt the status quo and cause lawyers, judges, witnesses and jurors to alter their behavior.[16] And that's undoubtedly true. Cameras in the courtrooms mean change, and if there's one thing you can say about change, it's that it changes things. Critics tend to focus on the negative aspects: Some lawyers will ham it up for the camera. Some jurors won't be able to forget the camera is in the room. Some witnesses will feel extra nervous. And some judges won't be able to resist the

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12 Estes v. Texas, 381 U.S. 532, 536 (1965).

13 *Id.*

14 Chandler v. Florida, 449 U.S. 560, 576 (1981).

15 Judge Lance Ito carefully restricted the physical presence of the camera by limiting the press to a single shared camera, operated by Court TV, and by requiring that the camera be unobtrusive and remote-controlled. *See* M.L. Stein, *Camera Will Stay in O.J. Trial Courtroom*, EDITOR & PUBLISHER MAG., Nov. 12, 1994, at 18.

16 *See, e.g.*, *Estes*, 381 U.S. at 546 ("[N]ot only will the juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting . . . ."); *id.* at 547 ("The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable."); *id.* at 548 ("Judges are human beings also and are subject to the same psychological reactions as laymen."); *id.* at 570 (Warren, C.J., concurring) ("[T]he evil of televised trials . . . lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised."); Andrew G.T. Moore II, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 ST. LOUIS U. L.J. 9, 10 (1996) ("Unfortunately, the [O.J. Simpson] trial became a stage for the jury, lawyers and judge to pursue their own self-serving purposes. With the defense attorneys claiming their client was the real 'victim,' the prosecution losing sight of its duty to present evidence fairly, a judge totally smitten with his own self-generated celebrity status, and jurors being discharged for a variety of problems, including misconduct, the whole proceeding became an embarrassing reflection of the American legal system.").

temptation to make themselves the central character in their own reality TV show. Take Judge Larry Seidlin (a.k.a. "Judge Larry"), a former Bronx cab driver who presided over the Anna Nicole Smith body custody hearing.[17] That judge's antics—including lengthy and personal monologues,[18] crying while delivering the judgment[19] and making an appearance on *Larry King Live*[20]—inspired ridicule[21] and led some to speculate that he was hoping to launch his own "Judge Judy"-esque show.[22] Judges, it turns out, are sometimes human too.

It's natural to focus on what can go wrong when things change, and to ignore what could go right. It's much easier to anticipate problems than imagine improvements. But when it comes to cameras in the courtrooms, there may be significant benefits. The first of these is mentioned by no less of an authority than Judge Judy: "[C]itizens of this country pay for a very expensive judicial

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[17] *Anna Nicole Smith Judge Is a Former New York City Cabbie*, FOXNEWS.COM (Feb. 16, 2007), http://www.foxnews.com/story/0,2933,252428,00.html.

[18] *Judge from the Anna Nicole Case*, YOUTUBE, http://www.youtube.com/watch?v=5zYa1p0jJco&feature=related (last visited Apr. 9, 2010).

[19] *Anna Nicole Smith Judge Breaks Down*, YOUTUBE, http://www.youtube.com/watch?v=lknVuCKX9SI (last visited Apr. 9, 2010).

[20] *Judge Larry Seidlin Meets Dannielyn*, YOUTUBE, http://www.youtube.com/watch?v=nE5HX8Btnd4 (last visited Mar. 21, 2010).

[21] *See, e.g.*, *Buzz Fleischman Parodies Judge Larry Seidlin*, YOUTUBE, http://www.youtube.com/watch?v=OM9mepY4BmE (last visited Mar. 21, 2010) ("There's no business like law business. Like no business I know. Everybody in my court will hear me. Every word I speak is made of gold."); Seth, *'Blubbering' Judge Seidlin Dumps the Anna Nicole Problem on Her Daughter's Guardian*, DEFAMER, GAWKER'S COLUMN FROM HOLLYWOOD (Feb. 22, 2007, 5:54 PM), http://defamer.gawker.com/238993/blubbering-judge-seidlin-dumps-the-anna-nicole-problem-on-her-daughters-guardian (referring to the "weepy-yet-wise" ruling of "a seemingly pre-menstrual Circuit Judge Larry Seidlin").

[22] *See, e.g.*, *All Rise!!! Judge Seidlin Says He's Ready for TV*, TMZ.COM (Feb. 20, 2007), http://www.tmz.com/2007/02/20/all-rise-judge-seidlin-says-hes-ready-for-tv. Judge Larry did reportedly tape a pilot episode after resigning from the bench. *See* Wanda J. DeMarzo, *Allegations Cloud Exit of Anna Nicole Judge*, MIAMI HERALD, June 30, 2007, at A1. But nothing ever came of it; last we heard of him, Judge Larry was embroiled in a nasty civil lawsuit brought by an elderly widow who claimed he bilked her out of her money. Bob Norman, *Witness: Judge Larry Seidlin Schemed for Widow's Cash*, NEW TIMES BROWARD-PALM BEACH (Mar. 18, 2010), http://www.browardpalmbeach.com/2010-03-18/news/witness-judge-larry-seidlin-is-lazy-and-a-schemer. For more on the good judge's antics, see generally TMZ.COM, http://www.tmz.com (last visited Apr. 24, 2010).

system and they are entitled to see how it's functioning."[23] The public can better monitor the judiciary—to ensure that its processes are fair, that its results are (generally) just and that its proceedings are carried out with an appropriate amount of dignity and seriousness—if it has an accurate perception of what happens in the courtroom.

Increased public scrutiny, in turn, may ultimately improve the trial process. Judges may avoid falling asleep on the bench or take more care explaining their decisions and avoiding arbitrary rulings or excessively lax courtroom management. Some lawyers will act with greater decorum and do a better job for their clients when they think that colleagues, classmates and potential clients may be watching. Some witnesses may feel too nervous to lie; others may hesitate to make up a story when they know that someone able to spot the falsehood may hear them talk. Conscience, after all, is that little voice in your head that tells you someone may be listening after all. And that someone might be the guy who was walking his dog on the golf course and knows for certain that you, the witness, couldn't possibly have been across town at eleven o'clock Wednesday morning. And some jurors may pay greater attention, and approach their task with greater seriousness, when they know their friends and family will be following the trial on TV and will be ready to second-guess the verdict after the trial is over.

There was a time when we had no idea how these changes would add up, and it may have been reasonable to assume that the risks outweigh the potential benefits.[24] But that time is long gone. In 1991, the Federal Judicial Center launched a three-year pilot program in the trial courts of six districts, and the appellate courts

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[23] *Larry King Live* (CNN television broadcast Feb. 17, 2010), *available at* http://transcripts.cnn.com/TRANSCRIPTS/1002/17/lkl.01.html.

[24] *See* Chandler v. Florida, 449 U.S. 560, 578–79 (1981) ("[A]t present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process."). Prior to *Chandler*, the Court in *Estes* rejected the notion that its concerns were "purely hypothetical" based on the fact that the federal courts and all but two states banned cameras in the courtroom. Estes v. Texas, 381 U.S. 532, 550 (1965). As explained *infra*, that's no longer the case.

of two circuits, that studied the question.[25] The study concluded that judges and attorneys reported "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice."[26] In fact, the study concluded, the "attitudes of judges towards electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program."[27]

You can peruse the data from the pilot program in this article's appendix, but here are a few of the highlights: Only 19% of lawyers thought cameras made witnesses even moderately more nervous (only 2% thought they had this effect to a very great extent);[28] only 10% of lawyers thought cameras even moderately distracted jurors (and none thought they had this effect to a very

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[25] *See* FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994) [hereinafter FJC REPORT]. Specifically, the study involved courts in the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania and Western District of Washington, as well as the Second and Ninth Circuits. *Id.* at 4. The districts were selected for size, caseload and proximity to major media markets, as well as to provide a cross-section of regions and circuits. *Id.*

[26] *Id.* at 7. The program didn't directly survey witnesses and jurors, as they lack the experience needed to meaningfully compare their experience to a courtroom without cameras, but it did survey the opinions of lawyers and judges regarding the effect on other participants. *Id.* at 8. For instance, only 19% of judges thought cameras made witnesses less willing to appear in court to even "a moderate extent;" and the same percentage thought cameras even moderately distracted witnesses. *Id.* at 14. The Federal Judicial Center explained these findings, in part, by noting that "increasing use of video depositions" meant that "many witnesses are already 'used to having cameras poked in their faces.'" *Id.* at 25.

Judges also reported that cameras had "no effect or a positive effect on the performance and behavior of counsel." *Id.* The most negative finding appears to be that 27% of judges thought cameras made counsel at least moderately more theatrical, but significantly only 7% saw this effect to a "great" or "very great" extent. *Id.* at 15. A significant majority, 66%, saw this effect only to "little or no" or "some" extent. *Id.* And judges also reported some positive effects: For instance, 34% thought cameras made attorneys at least moderately more courteous. *Id.*

The impact on judges was also minimal or positive. At least some judges reported positive effects: 27% thought cameras made them at least moderately more attentive, and 22% thought cameras made them at least moderately more courteous. *Id.* Judges also resoundingly rejected the idea that the presence of cameras had any impact on their own decisionmaking. *Id.*

[27] *Id.* at 7.

[28] *Id.* at 20.

great extent);[29] 25% of judges thought cameras at least moderately increased jurors' sense of responsibility for their verdict (although none saw this to a very great extent);[30] and 32% of judges thought cameras made attorneys at least moderately better prepared (7% thought they had this effect to a very great extent).[31] Anyone who thinks that allowing cameras in the courtroom will bring the end of civilization as we know it should give those numbers (and the other numbers in the appendix) a second look.

Ever since a study by the Florida judiciary concluded that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings,"[32] we've also seen a growing presence of cameras in state courts.[33] In fact, perhaps the most telling statistic about cameras in the courtroom is this one: After decades of experience, forty-four states now allow at least some camera access to trial courts.[34] Many of those states,

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29 *Id.*

30 *Id.* at 14.

31 *Id.* at 15.

32 *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979); *see also* Chandler v. Florida, 449 U.S. 560, 565 (1981).

33 In 1981, the Supreme Court decided a case relaxing constitutional restrictions on cameras in the courtroom. *Chandler*, 449 U.S. at 582–83. The case arose after Florida, following a limited pilot program, approved television coverage of court proceedings by a single, fixed camera, without artificial lighting, using the court's own audio equipment. *Id.* at 566. The Supreme Court expressed some concerns with cameras, but stated that the defendants in *Chandler* had "offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage." *Id.* at 579.

The ABA revised its model code of judicial ethics to relax the prohibition on cameras one year later, ABA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982), and in 1989, it removed the ethical provisions relating to electronic media altogether. *See* ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990). Around the same time, in federal courts, the Judicial Council of the United States relaxed its position on cameras—particularly with respect to appellate arguments. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (1996) [hereinafter JUDICIAL CONFERENCE REPORT].

34 *See Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php (last visited Feb. 18, 2010). All fifty states allow some form of camera access, but Illinois, Louisiana, Nebraska, New York and South Dakota generally limit access to appellate courts, while Utah limits access to still cameras. *Id.*; *see also* LORRAINE H. TONG, CONG. RESEARCH SERV., TELEVISING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES 17 (2006). At least, that's where

including California, leave the question of access largely to the discretion of the presiding judge.[35] The decisions of so many states, over so many years, tell us more than any survey data ever could.

And, if that's not enough for you, empirical evidence from the states is also positive. After reviewing multiple studies of state judiciaries, the Federal Judicial Center concluded that "for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent."[36] For instance, 90% of surveyed jurors in Florida and New Jersey thought cameras "had 'no effect' on their ability to judge the truthfulness of witnesses;"[37] "most witnesses reported that the presence of electronic media had no effect on their testimony;"[38] and "most jurors . . . indicated they were not distracted or were distracted only at first" by the presence of cameras.[39] Anecdotally, witnesses, judges, jurors and attorneys report that once a trial gets under way they tend to forget the cameras are there.[40]

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things stood in 2007, when the RTDNA conducted its survey. Since then, Nebraska has launched a pilot program experimenting with cameras in its trial courts. *See* Press Release, Neb. Supreme Court, Supreme Court Authorizes Television News Cameras in Trial Courts (Mar. 13, 2008), *available at* http://www.supremecourt.ne. gov/press/2008-releases/tvs-trial-courts-first-dist.pdf.

[35] *Cameras in the Court: A State-by-State Guide*, *supra* note 34. At least one court has found that bans on cameras in the courtroom violate the freedom of the press. *See* People v. Boss, 701 N.Y.S.2d 891, 895 (N.Y. Sup. Ct. 2000). Another court has indicated that they might someday, but don't just yet. *See* Westmoreland v. Columbia Broad. Sys., Inc., 752 F.2d 16, 23–24 (2d Cir. 1984). Of course, that was twenty-six years ago.

[36] FJC REPORT, *supra* note 25, at 42. The report summarized data from Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio and Virginia. *Id.* at 38; *see also* MARJORIE COHN & DAVID DOW, CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE 62–64 (1998) (surveying studies and concluding that "all the studies arrived at the same conclusion: that camera coverage generally did not affect the proceedings negatively").

[37] FJC REPORT, *supra* note 25, at 39.

[38] *Id.* at 40.

[39] *Id.* at 41.

[40] *See* COHN & DOW, *supra* note 36, at 67 ("The authors asked dozens of judges, lawyers, witnesses and jurors who had participated in televised proceedings a central question: did the camera make a difference? . . . [M]any who did admit a difference had a common response: they felt the camera's impact initially and soon forgot about it.").

Nobody seriously believes that cameras should be allowed for every moment of every trial. Where there are legitimate concerns with witness safety, or other special circumstances, cameras can be turned off or witnesses' faces can be blurred. As with any question of courtroom management, judges may be trusted to use their good sense and judgment to ensure a fair trial and balance competing concerns. But decades of experience in state courts, and ample empirical evidence, simply does not support a blanket prohibition on cameras in the courtroom.

Those who say that cameras will change the atmosphere of the courtroom must do more than blindly oppose the new and the different. The pre-Hauptmann ideal isn't enshrined in any rule book as The Way Things Ought to Be. Things change, and that's not a bad thing. Otherwise, why not reach back further, to a time when every juror was also a neighbor and close acquaintance of the defendant? I'm sure that system had its advantages. Or why not even earlier, to a time when we tried defendants by ordeal? Was it really so bad? There's no reason to think that allowing cameras in the courtroom will prove any worse than all the changes that have come before, and there's plenty of reasons to think it will be a good thing. The premise that transparency and accountability are good for institutions has animated our traditional preference for open courtrooms, and there's no reason to turn our back on it today.

But, you're probably thinking: What about O.J.? The case against cameras in the courtroom may begin with Hauptmann, but it ends with O.J. And so does the very brief story of cameras in the federal courts. The Judicial Conference of the United States, the main policymaking body for the federal judiciary, appeared in the early 1990s to be on the verge of approving cameras in both the circuit and district courts.[41] And then Judge Lance Ito, after some initial hesitation, decided to allow a single pool camera operated by Court TV into the O.J. Simpson courtroom.[42] An estimated 150

[41] *See, e.g.*, JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103–04 (1990); FJC REPORT, *supra* note 25, at 43.

[42] Stein, *supra* note 15, at 18. For a description of the limits Judge Ito placed upon the camera, see *supra* note 15. Judge Ito also prohibited the camera from filming the jury,

million people watched the verdict on live TV; smaller, but still significant, numbers watched the rest of the trial.[43] The spectacle was widely thought to be a disaster and a circus, many blamed the camera, and plans for cameras in the federal district courts were put on ice, and largely remain there today[44]—with the notable exception of two districts in New York.[45]

A lot of people have called the post-O.J. backlash an overreaction.[46] But I won't deny that the camera in the O.J. courtroom changed that proceeding in a host of ways. Every person in that courtroom, for better or worse, undoubtedly believed

and Court TV had the feed on a seven-second delay so that an employee could monitor to see that no errors occurred. Kim Cobb, *Ito Furious over Snafu with Video*, HOUSTON CHRON., Jan. 25, 1995, at A6. That system wasn't always successful, and one juror who leaned forward in her seat entered the camera's eye for eight-tenths of a second. *Id.* Judge Ito was furious. *Id.*

[43] Jefferson Graham, *O.J. Verdict Watched by 150 Million*, USA TODAY, Oct. 5, 1995, at 1D. This was more people than watched either the JFK funeral or the Apollo 13 moon landing. *Id.* The most-watched Super Bowl ever, in 2010, drew a paltry 106.5 million viewers. Neil Best, *Super Bowl New King of TV*, NEWSDAY, Feb. 9, 2010, at A05.

[44] *Compare* FJC REPORT, *supra* note 25, at 43, *with* JUDICIAL CONFERENCE REPORT, *supra* note 33, at 17. Dean Erwin Chemerinsky is on record with a telling anecdote: "There was . . . a panel discussion after the O.J. Simpson case. I was standing in the back of the room, and a judge said, 'Good thing the O.J. case happened, we'll never now have to deal with cameras in our Federal Courts.'" Symposium, *Justice in the Spotlight*, 21 T.M. COOLEY L. REV. 337, 349 (2004); *see also* Henry J. Reske, *Courtroom Cameras Face New Scrutiny*, 81 ABA J. 48D (1995).

[45] CIV. R. 1.8 (S.D.N.Y. 2009); CIV. R. 1.8 (E.D.N.Y. 2009).

[46] As Dalia Lithwick has put it, "Ultimately, the way in which the O.J. Simpson case differed from the celebrity trials that came before and after has little to do with the fact that the television cameras invited us in the courtroom, and everything to do with the fact that we showed up. And stayed." Dahlia Lithwick, *We Won't Get O.J.-ed Again*, SLATE (June 9, 2004), http://www.slate.com/id/2102084/; *see also* Symposium, *Justice in the Spotlight*, *supra* note 44, at 349 (statement of Dean Chemerinsky) ("I truly believe that when the jury was in the courtroom, the lawyers did not try the case any differently than if there had not been a camera in the courtroom."); 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, 1519 (1996) ("[T]he courtroom camera . . . has been singled out as the purported cause of every imaginable evil associated with the trial."); Jane Kirtley, *Forget O.J.: Cameras Belong in Court*, AM. JOURNALISM REV., Oct. 1995, at 66 ("[C]ameras in the court [are] unfairly labeled as the perpetrator, when the fault, if there is one, rests with reporting practices that are as old as journalism itself."); Scott Libin, *OJ Simpson and the Backlash Against Cameras in Court*, POYNTER ONLINE (Oct. 1, 1999), http://www.poynter.org/content/content_view.asp?id=5477&sid=14 ("[W]hat disgusted so many people about the OJ Simpson case would have happened with or without cameras in court. In fact, it might well have been worse.").

he was part of the biggest television event of all time. Not being omniscient, I won't try to imagine exactly how the trial would have looked without the dynamic created by that belief. Maybe Judge Ito would have kept firmer control of the proceedings, or maybe he would have felt less reason to exert any control at all. Maybe some lawyers would have acted with greater dignity; maybe some would have felt even greater license to engage in bad behavior.

But one thing is certain: However all the changes added up, it's dollars to doughnuts the jury would still have voted to acquit, although the public wouldn't be in nearly as good a position to judge the rightness or wrongness of that verdict or to evaluate the process that led the jury to reach it. We'd all assume the jury had its reasons; after all, we weren't there to see the whites of Kato Kaelin's eyes. We'd assume the judge, lawyers and other trial participants did their level best; the defense attorneys were latter-day Perry Masons, the prosecutors were Robert Jackson personified and the jurors were twelve little Solomons.[47] O.J. would be a celebrity in good standing, acquitted by an impartial jury of his peers and rewarded with his own reality TV show and a sponsorship deal for the Ford Bronco. Some might well prefer this model of the trial-as-black-box over the knowledge that somebody they believe committed murder is (or at least was) walking free, writing memoirs and pawning off his sports memorabilia. It's the "ignorance is bliss" school of justice.

So of course we blame the camera, just like generations before us have always shot the messenger. We blame the camera for letting us see the evidence, so that we could know we disagree with the way the case was decided. We blame the camera for exposing us to the lawyers, the judge and the witnesses—all of whom have been accused of falling short. We blame the camera for making the entire trial less legitimate, when in fact the only thing that tainted the trial was the trial itself. Better for the whole thing to have proceeded in sleepy obscurity, we say. At least then,

[47] In fact, perhaps they were. *See* United States *ex rel.* Balzer Pac. Equip. Co. v. Fid. & Deposit Co. of Md., 895 F.2d 546, 555 n.5 (9th Cir. 1990) (Kozinski, J., dissenting in part).

if the defense decided to ask for nullification, and the jury decided to oblige, we wouldn't have to see it in such vivid detail.

The problem with this response to the O.J. trial is that the public has a right and even an obligation to know the truth. We can't bury our heads in the sand when it comes to matters as important as the administration of justice; that's the very reason trials are public. If the jury acquits a guilty man, the public absolutely should be upset; nothing says a man found not guilty by a jury has a right to be considered innocent by the world at large. If prosecutors misbehave, or judges fail to do their job, the public should express its disapproval and demand change. And if defense attorneys cross an ethical line, they should pay the price in diminished reputation. As Justice Brandeis put it, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[48] If we don't like the way courtrooms look on camera, the solution is to change the courtrooms, not toss out the cameras. At least that's how a free and open society ought to work.

II. OUTSIDE THE COURTROOM

Which brings me to the second concern advanced by the ABA after the Hauptmann trial: that cameras "create misconceptions with respect [to the court] in the mind of the public."[49] Cameras in the courtroom have been accused of sensationalizing courtroom proceedings and of giving the public a less accurate description than might be gleaned from a written report. If the goal of camera access is increased transparency and public access, this argument goes, cameras are actually counterproductive.

Once again, we have to be careful to avoid turning cameras into scapegoats. We know that a trial can be transformed into a

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[48] Buckley v. Valeo, 424 U.S. 1, 67 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (Nat'l Home Library Found. ed. 1933)) (internal quotation marks omitted); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980) (Burger, C.J.) ("[A] trial courtroom also is a public place where the people generally . . . have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.").

[49] *Canons of Judicial Ethics*, *supra* note 10, at 1135.

spectacle, and the rights of a defendant unfairly prejudiced, without any help from cameras in the courtroom. Consider *Sheppard v. Maxwell*,[50] the trial of a Cleveland surgeon for the murder of his wife (and the inspiration for *The Fugitive*).[51] In that case, newspapers did the job—publishing articles that "emphasized evidence that tended to incriminate Sheppard" and "portray[ing] Sheppard as a Lothario" based on evidence that was never introduced in court.[52] The Supreme Court concluded that Sheppard's trial compared unfavorably to a proceeding that *had* been filmed and broadcast: "The press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given . . . to Sheppard's prosecution."[53] Likewise, in the O.J. Simpson trial, many of the worst media practices—including sensationalist coverage and excessive pretrial publicity—had nothing to do with cameras.[54] Sensational reporting, and its effect on the public, is the inevitable price we pay for public trials.

Sensational press coverage may be unfair to individuals caught in the justice system, and it may complicate the job of the court, but it's also essential that the public have a full and fair understanding of what goes on in court.[55] If the public instead

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[50] 384 U.S. 333 (1966). There, a coroner's inquest into the murder was filmed and broadcast, but the trial wasn't. *Id.* at 339, 343–44. During the trial, cameramen did wait to catch people entering and leaving the courtroom. *Id.* at 344.

[51] THE FUGITIVE (Warner Brothers 1993).

[52] *Sheppard*, 384 U.S. at 340.

[53] *Id.* at 353–54. The Court also noted that "[t]he *Estes* jury saw none of the television broadcasts from the courtroom," because it was sequestered, whereas "the *Sheppard* jurors were subjected to newspaper, radio and television coverage of the trial" even though there were no cameras in the courtroom. *Id.* at 353.

[54] When Judge Ito approved the presence of cameras, he noted that he had concerns about the media's coverage, but that the cameras were innocent of wrongdoing. *See* Michael Fleeman, *Ito Allows Cameras in Simpson Trial*, ASSOCIATED PRESS, Nov. 7, 1994; Sally Ann Stewart, *Ito Allows Televised Trial*, USA TODAY, Nov. 8, 1994, at 1A.

For a detailed description of the excesses of the O.J. Simpson trial, see Moore, *supra* note 16. Moore concludes that the Los Angeles D.A. gave out so many sensational details about the crime before trial, including false information, that he "fail[ed] in his professional responsibilities," *id.* at 12, and that defense lawyers improperly engaged in a "publicity blitz to influence potential jurors" before the beginning of trial, *id.* at 19.

[55] *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 578 (1980); Symposium, *Justice in the Spotlight*, *supra* note 44, at 351 (statement of Dean Chemerinsky) ("[F]ree press is quite complementary to a fair trial. The opposite of a free press, closed

lacks the tools to understand why cases are decided as they are, those outcomes will come to seem arbitrary and capricious, and the public will lose respect for our system of justice. My former boss, Chief Justice Burger, put it nicely: "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[56]

What the guarantee of an open trial means has changed over the years. There was a time, back in the pre-Hauptmann Garden of Eden, when the cost and time required to travel to see a distant proceeding was so great that few, if any, would ever undertake it. Today, even if a trial is held in California, residents of New York are able to exercise their right to see it, at least so long as they are willing to shell out the cost of a cross-country flight. Trials have opened in other ways, as well, as observers have begun twittering and live blogging from the gallery. Outside the federal courts—in Congress, state courts and most other public institutions—the definition of a "public" proceeding has also come to include cameras. If courts fail to provide forms of access that accord with those changing expectations,[57] limits on access that once seemed perfectly reasonable will appear increasingly secretive, and judicial proceedings will lose a measure of the public's respect as a result. At a time when we've had gavel-to-gavel coverage of both houses of Congress for over two decades,[58] it's hard to explain why the

proceedings, leads to the star-chamber type abuses that occurred during the Middle Ages.").

[56] *Richmond Newspapers*, 448 U.S. at 572.

[57] *See, e.g.*, Editorial, *Cameras in Our Federal Courts—The Time Has Come*, 93 JUDICATURE 136, 172 (2010); Editorial, *A Step Forward for Cameras in Court*, STAR TRIB. (Minneapolis, Minn.), Feb. 21, 2009, at 14A; Editorial, *Cameras in the Courtroom: It's Time to Shine More Light into the Federal Courthouse*, ROANOKE TIMES, Mar. 17, 2010, at A16; Editorial, *Cameras in the Courtroom*, ST. PETERSBURG TIMES, Oct. 4, 2005, at 12A; Editorial, *Cameras in the Courts*, N.Y. TIMES, May 15, 2007, at A18; Editorial, *Cameras Open Courts to Public*, NEW HAVEN REG., Apr. 16, 2007, at A6; Editorial, *Case Made for Cameras in the Courts*, DAILY HERALD (Chicago, Ill.), Mar. 12, 2008, at 14; Editorial, *Expand Court Access by Allowing Cameras*, DES MOINES REG., Nov. 8, 2007, at A14; Editorial, *Seeing for Ourselves*, N.Y. DAILY NEWS, Feb. 3, 2010, at 24; Editorial, *The Case for Cameras*, L.A. TIMES, May 26, 2009, at A20; Editorial, *Trial Shows Value of Cameras in Court*, LINCOLN J. STAR, May 24, 2008, at B5.

[58] *Marking 30 Years Covering Washington Like No Other*, C-SPAN.ORG, http://www.c-span.org/30Years/default.aspx (last visited Apr. 21, 2010) (noting that C-

prospect of broadcasting a judicial trial to a courtroom across the country merits the emergency intervention of the Supreme Court.[59]

At the same time, change doesn't have to be a suicide march. Trials would be more open and transparent if they were held in Madison Square Garden, and that would certainly be technologically feasible. Yet the Supreme Court has said that a defendant "is entitled to his day in court, not in a stadium."[60] If cameras in the courtroom rob criminal defendants and civil litigants of their dignity, and promote a public perception of trials as more about sensational entertainment than a sober search for truth, courts may be justified in parting ways with other public institutions, and public expectations, to exclude cameras in favor of forms of reporting that better advance respect for the rule of law and the guarantee of a fair trial.

Unlike concern with the effect of cameras inside the courtroom, this argument retains real bite after the O.J. experience. Consider footage of the verdict (available now on YouTube).[61] It's high drama: As the courtroom waited, the camera zoomed in for an intense close-up of O.J.'s face, and remained there for the agonizing moments before—and during—the verdict. Because the camera was positioned above the jury, O.J. appeared to gaze ominously into the camera's eye. Ron Goldman's sister began to cry, and the camera pivoted for a close-up of her face. From there, to the stunned faces of the prosecution. And back to Ron Goldman's sister. As the Supreme Court has said, "[t]he television camera is a powerful weapon" and "inevitable close-ups of [the accused's] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities [and] his dignity."[62] That's to say nothing of the impact on the victim's family, or the public perception of a trial depicted in such a manner.

SPAN has televised 28,603 hours of live U.S. House debate since March 19, 1979 and that C-SPAN2 has televised 26,954 hours of live U.S. Senate debate since June 2, 1986).

59 *See* Hollingsworth v. Perry, 130 S. Ct. 705, 709, 715 (2010) (per curiam).

60 Estes v. Texas, 381 U.S. 532, 549 (1965).

61 *See The O.J. Simpson Trial Verdict Is Revealed (Oct. 3, 1995)*, YOUTUBE, http://www.youtube.com/watch?v=jED_PB5YQgk (last visited Feb. 16, 2010).

62 *Estes*, 381 U.S. at 549.

No doubt many would prefer to return to the pre-Hauptmann ideal of the stalwart beat reporter, alone in the courtroom with his pad and pencil. I'm thinking of journalists like the Supreme Court's Linda Greenhouse and Nina Totenberg, but at the trial level; repeat-players in the courtroom who have incentives to maintain a sterling reputation, who know and understand what they're seeing and who earn their living making courtroom drama intelligible to a lay audience. The trusty beat reporter doesn't sensationalize, if only because it will sour his relationship with the court. And he knows how to give an account of judicial proceedings for a lay audience that is in some ways superior to a seat inside the courtroom. When the public sees a trial for itself, or through the lens of the camera, there's always a risk of misunderstanding: The public may mistake zealous advocacy for obstruction of justice, or vice versa. A judge's impartial ruling, based on binding law, may seem arbitrary or even biased; when a defendant prevails on an obscure legal ground like immunity or jurisdiction, some will see injustice. On the other hand, the trusty beat reporter can fairly and accurately explain the trial so as to educate the public while avoiding misunderstanding.

Sounds good, and if the choice were between that and the O.J. media circus, we would have a hard choice indeed. But, in truth, we may never have had the ability to restrict media coverage to these super-journalists. Such reporters have occasionally walked the earth, but print media isn't uniformly composed of the best of the best. The *Sheppard* case, for example, illustrates what can happen when newspaper journalism goes bad. And even if print media were all goodness and light, banning cameras from the courtroom wouldn't prevent TV coverage. Many people, disappointed at not being able to watch the recent trial of Michael Jackson, watched a daily reenactment on the E! network instead.[63] And the TV media also can't be stopped from capturing

[63] Tom Shales, *Holding E! in Contempt for Trial Reenactment*, WASH. POST, Mar. 2, 2005, at C1 (describing "a bargain-basement reenactment" that "does have a sticky irresistibility, like a glazed doughnut that's gone all gooey"); *see also* Geoffrey A. Fowler, *Prop 8 Trial Testimony Gets a Marisa Tomei Makeover*, WALL ST. J. L. BLOG (May 13, 2010, 3:43 PM), http://blogs.wsj.com/law/2010/05/13/prop-8-trial-testimony-gets-a-marisa-tomei-makeover/; *Prop 8 Trial Re-enactment, Day 1 Chapter 1*, YOUTUBE, http://www.youtube.com/watch?v=tDmA_n5ygS4&NR=1 (last visited Mar. 29, 2010).

sensationalist footage of the defendant or the victims outside the courtroom.[64]

The trusty beat reporter is also proving increasingly elusive, and will only become more so in the future. We've seen a long, slow decline in the newspaper industry, and it recently got a lot worse: In 2009, over one hundred newspapers closed, and over 10,000 newspaper jobs were lost.[65] There's no reason to think those papers and jobs will come back; if anything, the state of the print industry is only going to decline further. Craig killed the classifieds; newspaper.com cannibalized The Newspaper; JDate wooed away the personals; Monster devoured help wanted; and the fastest way to get the news is through the blogosphere (or, better yet, the Twitterverse).[66] The old business model is no longer sustainable, and as newspapers decline the beat reporter will disappear along with them.

Instead, we're witnessing the rise of a much more diffuse style of reporting. Consider the recent criminal prosecution of the chemical company W.R. Grace (of *A Civil Action*[67] fame) for mining practices that allegedly caused a lung cancer outbreak in

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[64] One court, fearing that a ban on photographing the defendant in court would be circumvented by photographing the defendant *out* of court, tried to ban all photography of the defendant in the judicial complex; the New Mexico Supreme Court found that didn't fly. State *ex rel*. N.M. Press Ass'n v. Kaufman, 648 P.2d 300 (N.M. 1982). Another court, frustrated with bright lights and pandemonium in the corridors of the courthouse, tried to ban cameras there; the Florida Supreme Court thought that violated the First Amendment too. *In re* Adoption of Proposed Local Rule 17, 339 So. 2d 181 (Fla. 1976); *see also* Dorfman v. Meiszner, 430 F.2d 558 (7th Cir. 1970) (per curiam) (striking down a ban on all photography within federal building containing a courtroom).

[65] Preethi Dumpala, *The Year the Newspaper Died*, BUS. INSIDER (July 4, 2009), http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7; *see also* Stephanie Chen, *Newspapers Fold as Readers Defect and Economy Sours*, CNN.COM (Mar. 19, 2009), http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html.

[66] *See* Megan McArdle, *Old Media Blues*, ATLANTIC (July 1, 2009), http://megan mcardle.theatlantic.com/archives/2009/07/old_media_blues.php (adding that "Google took those tiny ads for weird products. And Macy's can email its own damn customers to announce a sale.").

[67] A CIVIL ACTION (Touchstone Pictures, Paramount Pictures, Wildwood Enterprises, Scott Rudin Productions 1998).

Libby, Montana.[68] The trial was in Missoula, but the prosecution requested the creation of an overflow room in Libby—a four-hour drive away.[69] The court denied the request in light of the ban on cameras in federal criminal trials.[70] But the result wasn't that members of the Libby community had to wait patiently for a trusted beat reporter to file an evening dispatch. The trial was covered in real-time via Twitter, at feeds such as mslngracetrial (a local print journalist),[71] UMGraceCase (a group of students from the University of Montana),[72] wrgracetrial (a local TV station)[73] and asinvestigates (an investigative reporter).[74]

Some of this coverage may have been provided by impartial journalists, but much of it wasn't. Tweets from asinvestigates, for instance, were stridently pro-prosecution. When the defense seemed to score points, asinvestigates suggested that "Grace lawyers team[ed] up to stifle government expert witness."[75] Or, in another tweet: "Second week of Grace trial ends with defense using usual tricks to discredit physicians."[76] On the other hand, when the prosecution scored points it was a triumph of justice: "Defense fails to prove that EPA's top emergency response wizard was a cowboy who made bad decisions."[77] Asinvestigates also

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[68] *See generally* Indictment, United States v. W.R. Grace, No. CR 05-07-M-DWM (D. Mont. Feb. 7, 2005).

[69] Order at 1–2, United States v. W.R. Grace, No. CR 05-07-M-DWM (D. Mont. May 12, 2006).

[70] *Id.* at 2. The prosecution argued that this was necessary to comply with a federal statue affording victims "[t]he right not to be excluded from any public proceeding." *Id.* (citing 18 U.S.C. § 3771(a) (2006)). The district court reasoned, however, that the "right accorded crime victims is the right to be physically present at court proceedings, not the right to have court proceedings broadcast." *Id.* at 3.

[71] Profile of mslngracetrial, TWITTER, http://www.twitter.com/mslngracetrial (last visited Apr. 5, 2010).

[72] Profile of UMGraceCase, TWITTER, http://www.twitter.com/UMGraceCase (last visited Apr. 5, 2010). For an assessment of the University of Montana students' coverage, see Nadia White, *UM's Grace Case Project*, MONT. LAW., Apr. 2010, at 6.

[73] Profile of wrgracetrial, TWITTER, http://www.twitter.com/Wrgracetrial (last visited Apr. 14, 2010).

[74] Profile of asinvestigates, TWITTER, http://www.twitter.com/asinvestigates (last visited Apr. 14, 2010).

[75] Tweet of asinvestigates, TWITTER (Mar. 9, 2009, 9:20 PM), http://www.twitter.com/asinvestigates.

[76] *Id.* (Mar. 4, 2009, 10:54 PM).

[77] *Id.* (May 5, 2009, 7:59 PM).

made his feelings about the judge quite clear: "A statue of Lady Justice in Judge Molloy's courtroom would need earplugs along with her blindfold."[78] Without the context of a video recording, the public had no way to evaluate the truth of these observations.

Because the internet gives a platform to everybody who cares enough to make his voice heard, it's often inevitable that the loudest voices will be those who care the most. During a recent medical malpractice trial in Massachusetts, a blogger named "Dr. Flea" provided a strongly pro-defense account.[79] The blog attracted a sympathetic following[80] and even won an award as one of the best medical blogs on the internet.[81] Surprise: It turned out that Dr. Flea was none other than the defendant.[82] It may not usually be litigants themselves who take to the blogs, but members of the public who feel some sort of a personal stake in a trial—because they know a litigant or victim, because they have had some similar experience or simply because they feel passionately about the issue—will frequently use the internet to disseminate their views. And they won't always make their biases explicit.

Let's be clear: There's absolutely nothing wrong with opinionated people making their opinions known; it is every citizen's right and privilege to express discontent with the way a trial has been handled, or to declare a firm belief that a defendant is guilty as sin (or innocent as virtue) and deserves to be convicted (or not). The problem arises when such coverage becomes the public's primary means of experiencing a trial and—in particular—when the public lacks the tools to evaluate those

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78 *Id.* (Apr. 22, 2009, 8:20 AM).

79 *See* Sellers, *supra* note 1, at 193; Jonathan Saltzman, *Blogger Unmasked, Court Case Upended*, BOSTON GLOBE, May 31, 2007, at A1.

80 *See, e.g.*, *Dr. Flea Disappears*, DOCTOR ANONYMOUS (May 16, 2007, 1:01 AM), http://doctoranonymous.blogspot.com/2007/05/dr-flea-disappears.html ("I'm going to very much miss Dr. Flea and his witty rantings. Dr. Flea, if you're still out there, you have an open invitation to guest post on my blog any time. Best of luck in your court case. We're all pulling for you.").

81 *See 2006 Medical Weblog Awards: Meet the Winners!*, MEDGADGET (Jan. 19, 2007), http://medgadget.com/archives/2007/01/2006_medical_we.html.

82 Saltzman, *supra* note 79. In the end, the doctor's approach wasn't the most successful; Dr. Flea ridiculed the jury for dozing off during trial, and when Dr. Flea's identity was revealed in court the defendant quickly settled the case for a substantial sum. *Id.*

opinions. If partisans dominate the public's understanding of what goes on inside the courtroom, the public will become more likely to mistake a correct verdict for a miscarriage of justice, or to miss a genuinely unjust verdict because the wrongly prevailing party made a lot of (metaphorical) noise online. That can only erode the public's respect for the business of the courts and, ultimately, the public's regard for the rule of law.

The trusty beat reporter can't help us out of this new paradigm; even if he weren't disappearing, no single voice could rise out of the online din to establish itself as sufficiently authoritative to serve that function today. Nor is the solution to keep new forms of media out of the courtroom. If judges banish laptops and smart phones, bloggers will simply wait to post until after court is out, and tweeters will run across the hall to tweet where the tweeting's good. If judges forbid tweeting in the hallway, they'll just tweet on the courthouse steps. Judges obviously can't ban the public from using the internet altogether, and the reality today is that the internet gives every member of the public a platform to make his opinion known. When a high-profile case attracts attention, the people who care the most will seize that platform and make every effort to skew the public's perception of the trial. What we urgently need is an impartial voice, capable of truthfully and authoritatively recounting the events of trial for the absent public in order to set the record straight.

Luckily, the courtroom camera is ready, willing and able to step into that role. It's no longer the case that the courtroom camera must be operated by the media, as it was during the O.J. trial. Video cameras have become cheap and ubiquitous, and many courtrooms already have cameras installed for internal court use: to create video records,[83] to allow participants to make remote appearances[84] and to provide overflow facilities in nearby rooms.[85] The internet has also made it possible to cheaply disseminate video worldwide. It's only a small step—both in terms of expense and technical knowhow—for courts to make footage from a court-

[83] Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1111–12 (1994).

[84] *Id.* at 1118–19.

[85] Sellers, *supra* note 1, at 189.

operated camera available online. In fact, a number of jurisdictions, including the Ninth Circuit, have already taken or considered such measures.[86] Combined with a delay before posting, this approach gives judges and litigants an opportunity to prevent dissemination of video if the need arises. And such video can be presented in as boring and straightforward a fashion as you please: no close-ups, no moving camera and no filming of the defense table or the gallery.

Perhaps most significantly, footage of the trial can also be posted online in full, without editing or interruption. This matters because, although the camera doesn't lie, editors sometimes do: Choice selection of footage can pull words out of context and warp the meaning of statements by lawyers, witnesses and judges. Editing will also often focus public attention on the sensational aspects of the trial, at the expense of the proceedings' bread and butter. This, in turn, distorts public perceptions and diminishes public respect for the seriousness of the judicial process. In fact, when the Federal Judicial Center ran its pilot program of cameras in federal courts, the lack of gavel-to-gavel coverage was one of its few negative findings,[87] although the study nevertheless found that judges overwhelmingly believed that cameras in the courtroom helped to educate the public about the courts.[88] If courts control the cameras, those already considerable benefits will be magnified, and the public will be provided with the impartial and authoritative account of proceedings that is required in our present internet age.

While the choice between the court-operated camera and the trusty beat reporter might be a tough one, the choice between the camera and the Twitterverse isn't. The days when a trial could

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[86] The Judicial Conference of the Ninth Circuit voted in 2007 to reconsider its prohibition on all cameras in district courts, and lawyers and judges (voting separately) approved the resolution by resounding margins. In 2009, the Ninth Circuit approved a limited pilot program for non-jury civil cases; the experience from that will guide the circuit's consideration of a permanent rule change. *See also* Stepniak, *supra* note 2, at 821–22.

[87] FJC REPORT, *supra* note 25, at 36.

[88] After the three-year program, 30% of judges felt that the presence of cameras educated the public about court procedures to a "very great extent," 24% thought it did so to a "great extent" and 12% saw this effect to a "moderate extent." *Id.* at 15. Only 12% of judges thought cameras educated the public to "little or no extent." *Id.*

proceed in sleepy obscurity, unless reported by "reputable" and trustworthy journalists, are gone—if they ever existed. The spectators have arrived, and they're armed with laptops, Blackberries and iPhones. If the public is going to judge the resulting cascade of information, it must be given the tools and information necessary to decide for itself whom to believe. We must let cameras into the courtroom for the same reason that we kicked them out 75 years ago: to advance the public's understanding of the justice system.

CONCLUSION

And yet, in the federal district courts, the pre-Hauptmann status quo remains remarkably unchanged, at least when it comes to cameras. So far, Congress has been patient with that glacial pace of change, but such forbearance cannot last forever. Legislation is currently pending that would authorize district judges to allow media recording and broadcast of court proceedings.[89] If the federal courts don't change with the times, others will institute change for us.

Rightly so. If the public is to appreciate our justice system, and the legal regime that it upholds, the public must have full and fair information about proceedings in the courts. That means something different today than it did in 1935, when courts and members of the bar first considered the issue of cameras in the courtroom. We must consider the issue again, in light of the world today.

[89] *See* Sunshine in the Courtroom Act of 2009, S. 657, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=s111-657; Sunshine in the Courtroom Act of 2009, H.R. 3054, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-3054.

APPENDIX

Table 1. Ratings of Effects by District Judges Who Experienced Electronic Media Coverage Under the Federal Judicial Center Pilot Program, by Percentage[90]

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Motivates witnesses to be truthful	61	7	7	2	0	22
Violates witnesses' privacy	37	34	10	7	5	7
Makes witnesses less willing to appear in court	32	27	15	2	2	22
Distracts witnesses	51	22	15	2	2	7
Makes witnesses more nervous than they would otherwise be	24	37	22	5	0	12
Increases juror attentiveness	46	22	7	7	2	15

[90] FJC REPORT, *supra* note 25, at 14–15.

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Signals to jurors that a witness or argument is particularly important	51	15	10	5	7	12
Increases jurors' sense of responsibility for their verdict	49	15	15	10	0	12
Prompts people who see the coverage to try to influence juror-friends	54	10	7	0	0	27
Motivates attorneys to come to court better prepared	32	32	15	10	7	5
Causes attorneys to be more theatrical in their presentation	29	37	20	2	5	7

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Prompts attorneys to be more courteous	44	20	15	17	2	2
Increases judge attentiveness	63	10	15	10	2	0
Causes judges to avoid unpopular decisions or positions	88	2	5	2	0	2
Prompts judges to be more courteous	56	22	15	7	0	0
Disrupts courtroom proceedings	83	15	0	2	0	0
Educates the public about courtroom procedure	12	20	12	24	30	2

Table 2. Attorney Ratings of Electronic Media Effects in Proceedings in Which They Were Involved During the Federal Judicial Center Pilot Program, by Percentage[91]

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Motivate witnesses to be more truthful than they otherwise would	58	3	2	0	0	38
Distract witnesses	52	18	9	5	0	17
Make witnesses more nervous than they otherwise would be	46	21	12	5	2	15
Increase juror attentiveness	26	6	8	6	0	55
Distract jurors	30	9	6	4	0	52

[91] *Id.* at 20–21.

Effect	**To Little or No Extent**	**To Some Extent**	**To a Moderate Extent**	**To a Great Extent**	**To a Very Great Extent**	**No Opinion**
Motivate attorneys to come to court better prepared	71	11	7	4	1	6
Cause attorneys to be more theatrical in their presentation	78	7	9	2	3	2
Distract attorneys	73	20	6	1	0	1
Prompt attorneys to be more courteous	80	12	3	1	0	5
Increase judge attentiveness	54	17	10	6	1	12
Prompt judges to be more courteous	62	12	8	4	3	11
Disrupt the courtroom proceedings	77	10	8	3	0	3