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Television in the Courtroom: Mightier than the Pen?

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TELEVISION IN THE COURTROOM: MIGHTIER THAN THE PEN?

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TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS. By *Ronald L. Goldfarb.* New York: New York University Press. 1998. Pp. xxiv, 238. $24.95.

In his Introduction, author Ronald L. Goldfarb[1] explains that his purpose is to address all the arguments advanced against televised trials, cover the points made by proponents of televised trials, and find a sensible solution to what he believes is the fundamental issue: "How can we best blend new media technologies with our traditional and revered commitment to democracy and justice?" (p. xxiv). He ends the book with this prospective paragraph:

> I expect that all the courtrooms of the future — state and federal, trial and appellate — will be equipped with cameras. I suggest that all trials should be available for broadcast — as is generally the case in most states. A publicly run, noncommercial channel, like the one in Washington state, would present all proceedings, pursuant to legal rules. Future viewers, on their sophisticated new home or office "instruments" (a new-breed computer screen or television set), could tune into any case anywhere, anytime. The archival record of all trials would be available to the public. The right to oppose the broadcast of any trial should be available to a defendant, witness, juror, or participating lawyer. The circumstances under which a judge could grant such a request could be set by the legislature or the court system itself, but all guidelines and limitations on the general presumptive constitutional right to publicize public proceedings would have to be determined ultimately by the Supreme Court. The visibility of the judicial system is in the public interest and in the overall interests of justice. [p. 188]

Mr. Goldfarb's journey to this conclusion begins with recounting "excessively publicized criminal trials" (p. 3) in this country's history, from the libel case of John Peter Zenger to the murder trial of O.J. Simpson (pp. 3-15). Unusual public interest in many of the cases was due to the preexisting celebrity status of the victim or the accused. For example, the fame of the advocates and the clash of cultures made the Scopes trial the center of national attention (pp. 7-8). Most often, the subject matter of the case provided the

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opportunity for the press to appease the public's prurient or morbid interest. The transformation of notable trials into notorious events thus occurred long before the advent of television technology.

The tension between the societal values of a free press and a fair trial is explored with objectivity in the Second Chapter. The protective procedures of continuance, change of venue, voir dire, and jury instructions are fairly described together with the corrective procedures of mistrial, reversal of conviction, and orders for new trial. The principal Supreme Court cases addressing these conflicting constitutional rights are accurately summarized.

The book provides a comprehensive review of the development of televised trials in state courts after the Supreme Court's ruling in *Chandler v. Florida*,[2] rejecting any *per se* prohibition of cameras in the courtroom (pp. 64-84). The work of researchers in conducting surveys and simulations, and the expressed views and opinions of judges, lawyers, and jurors who have participated in televised trials, are generally supportive of the movement to televise. An entire chapter is devoted to the operation of Court TV (pp. 124-53).

There can be no dispute about the fundamental values served by transparency in the adjudication of civil disputes and the prosecution of criminal charges. The Fifth and Sixth Amendments to the United States Constitution protect the interests of the accused in a public trial of criminal charges, and the Supreme Court has recognized a qualified First Amendment right of public access to court proceedings.[3] Public confidence in the courts and acceptance of the fairness of the system depend upon open trials. There is an additional value, recognized by Chief Justice Burger in the following passage written almost twenty years ago:

> Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people's consciousness the fundamental, natural yearning to see justice done — or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is "done in a corner [or] in any covert manner." It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered

2. 449 U.S. 560 (1981).

3. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980). The right is not, however, absolute. Under limited circumstances it must yield to the fair trial rights of the accused, the protection of witnesses, the preservation of specific privileges, and the secrecy of grand jury proceedings. *See, e.g.*, Butterworth v. Smith, 494 U.S. 624, 636-37 (1990) (Scalia, J., concurring) (noting the government's interest in protecting the secrecy of grand jury proceedings); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 14-15 (1986) (holding that a defendant's right to a fair trial can limit media access to criminal proceedings); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 608-09 (1982) (acknowledging that protection of crime victims who testify in a sex-offense trial is a compelling interest); Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("Despite the fact that news gathering may be hampered, the press is regularly excluded from grand jury proceedings . . . .").

> untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and the appearance of justice can best be provided by allowing people to observe it.[4]

Mr. Goldfarb makes a policy argument for televised trials by pointing out that the print press filters the reportage of trials and can easily distort the public's perception by its inclusions, exclusions, and the slant of a story (pp. 168-72). Full access to the entire trial is seen as avoiding editorial influence and giving the viewers the opportunity to reach their own conclusions. The weakness of this supposed preference is in the assumption that there is an appreciable audience for viewing complete, unedited coverage of court proceedings.

Television is an entertainment medium and much of what is done in even the most dramatic of cases is tedious and boring to all but the most interested. There has been little use of camera access provided by the state courts. What the public sees most often are bits of videotape fitted into the formats of national and local news programming. Indeed, television coverage is determined by the same editorial influences as the print press, but the possibility for distortion is far greater due to the power of pictorial reporting.

Mr. Goldfarb argues that the First Amendment mandates equal access to the courts for all media and that there can be no "principled basis" upon which to discriminate against cameras.[5] Yet he recognizes the special power of television to impact our culture. He quotes Marshall McLuhan's observation that "'[s]ocieties have always been shaped more by the nature of the media by which men communicate than by the content of the communication'" (p. 175; footnote omitted). In a Chapter entitled "A Thing Observed, a Thing Changed" (pp. 96-123), Mr. Goldfarb acknowledges that observation affects the behavior of those being observed, and he is optimistic that increased socially acceptable behavior results.

At present, the print press and the broadcasters of radio and television signals have not achieved parity in access to coverage of some events. In *FCC v. Pacifica Foundation,* the Supreme Court upheld FCC regulation of offensive language in radio broadcasting because of the intrusive nature of the medium.[6] Differential treatment of television was expressly supported in *Red Lion Broadcasting Co. v. FCC;* the distinction rests in part on the public

4. *Richmond Newspapers,* 448 U.S. at 571-72 (citations omitted).

5. *See* p. 187 (citing 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 (1996)).

6. 438 U.S. 726, 748-50 (1978).

interest in the limited number of available frequencies.[7] The increased capacity and other technological changes in cable and satellite television, as well as the rise of the Internet, will undoubtedly affect future debate.[8]

There is an obvious inconsistency in Mr. Goldfarb's First Amendment contention and his willingness to concede the right of trial participants to oppose broadcasts. He expresses approval of the restrictions and limitations adopted by the states without any discussion of how they differ from the more limited authority of courts to conduct closed hearings and seal records.[9] That concession is an implicit acknowledgment that there is something different about televising trials.

Mr. Goldfarb appreciates the potential for commercial and political exploitation when trials are exposed to television. He recognizes the negative effects of interspersing film clips among commercials and the other staples of the mighty news. That sensitivity leads him to suggest broadcast by public, noncommercial channels (p. 188). He fails to consider the inability to control or restrict signal pirating and other reproduction methods.

A trial record, however made, is not subject to copyright protection. If there is sufficient public interest, copies can be made readily and used indiscriminately. Just as trial transcripts quickly become available on the Internet, so too would these trial tapes — made either at the courthouse or from the signal telecast on the court-authorized channel — be republished. If there is a First Amendment right of access for television equivalent to the print press, by what authority can the court exclude all but its own cameras? And once made public, the First Amendment surely would prohibit any attempt to restrict republication or use of the film. The Supreme Court made clear in *Nebraska Press Assn. v. Stuart* that a prior restraint on publication of information is qualitatively different from limiting the means to acquire it.[10]

It must be admitted that much of the opposition to broadcasting trial proceedings is intuitive. Neither side of this debate can pro-

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7. 395 U.S. 367, 385, 388-89 (1969) (upholding the FCC's "fairness doctrine" requiring television and radio stations to allow reply time to answer personal attacks and political editorials); *see also* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 636 (1994) (noting prior Supreme Court cases have permitted more intrusive regulation of broadcast speakers than of speakers in other media).

8. *See, e.g.*, Stephen C. Jacques, Comment, Reno v. ACLU: *Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 Am. U. L. Rev. 1945, 1961-65 (1997).

9. *See* p. 188 ("The right to oppose the broadcast of any trial should be available to a defendant, witness, juror, or participating lawyer.").

10. 427 U.S. 539, 556-70 (1976); *see also* New York Times Co. v. United States, 403 U.S. 713, 714 (1971) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'") (quoting Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963)).

vide valid scientifically supported evidence to buttress its view on whether the increased visibility of justice affects the quality of justice. What the opponents can say is that television has transformed the nature of everything that it has portrayed to the public. The political process, from candidate selection, through campaigns and even governance, is radically different. Sports have changed to accommodate the huge audiences viewing through this medium and instant replay of questionable judgment calls has eroded the authority of game officials. The morals and mores of our society and the fabric of our culture have been changed by the technology of television and ever-changing forms of electronic communication.

Mr. Goldfarb wonders at the reticence of the federal courts, suggesting that the failure to follow the forty-eight states that permit camera coverage is ironic given that federal judges have life tenure and many state judges are elected or serve terms with reappointment dependent upon public approval (pp. 76, 84-85). He does not acknowledge that the constitutional purpose of life appointment for federal judges is protection from political pressures,[11] including the power of the news industry to influence the process of adjudication.

The American jury trial is unique to this country. It has evolved over centuries of human experience. Procedural controls, the exclusionary rules of evidence, established protocols of courtroom decorum, and the professionalism of the advocates competing in the adversarial format are protections against the passions, prejudices, and other frailties of the humans participating in any given trial. Tradition and experience caution us in considering any changes, and those who seek to amplify the force of public opinion by adding an electronic audience bear a heavy burden of proof. They must show that the search for justice will not be transformed into just another spectacle for mass amusement. This book does not meet that burden.

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11. *See* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (quoting THE FEDERALIST No. 78, at 489 (Alexander Hamilton) (H. Lodge ed., 1888)).