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# The Conundrum of Cameras in the Courtroom

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*The Conundrum of Cameras in the Courtroom*

Nancy S. Marder<sup>1</sup>

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## INTRODUCTION

In spite of a communications revolution that has given the public access to new media in new places, the revolution has been stopped cold at the steps to the U.S. federal courthouse. The question whether to allow television cameras into federal courtrooms has aroused strong passions on both sides. Indeed, U.S. Supreme Court Justice Souter once declared: "I think the case (against cameras) is so strong that I can tell you that the day you see a camera coming into our courtroom, it's going to roll over my dead body."<sup>2</sup> Now that Justice Souter, the most vocal opponent of cameras in the courtroom, has retired from the Supreme Court, the pressure by the media and Congress to allow cameras in the Supreme Court and other federal courts is likely to increase.

The debate over cameras in federal courtrooms in the United States has raged for several

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<sup>2</sup> Tony Mauro, *Roll the Cameras (or Soutersaurus Rex)*, LEGAL TIMES, Apr. 8, 1996, at 9.

decades. All fifty states now have provisions, albeit with limitations, to allow cameras at some level of their state court system.<sup>3</sup> States have been allowed to have cameras in courtrooms since 1978.<sup>4</sup> Although states have had several decades of experience with cameras in the courtroom, their experience has played a superficial role in shaping the debate over cameras in federal courts.

Not surprisingly, the issue has received a lot of attention and support in the media. Almost every newspaper article and editorial has come out in favor of allowing television cameras in the courtroom.<sup>5</sup> Those in the print media have joined those in television and have supported cameras in the courtroom, arguing that televised proceedings will help to educate the public about the court system and will make judges and lawyers accountable for their behavior. Furthermore, those in the media, both television and print, have focused on the unobtrusiveness of cameras and how participants in the courtroom will forget about the cameras after the first few minutes and will be unaffected by their presence.

Federal judges, many of whom are against cameras in the courtroom, have occasionally voiced their opposition, but for the most part, they have been reserved about expressing their views. Federal judges have spoken out when the Judicial Conference has taken up the issue or when they have given testimony before congressional committees. A central concern for federal judges is how cameras will affect participants' behavior; a related concern is whether cameras will compromise the dignity of the courtroom, as they have in several high-profile state court cases. Some judges also worry about being easily recognized by members of the public, which has not been as much of a concern as long as judges remain "practical[ly] obscure[e]."<sup>6</sup>

Other judges worry about public misperceptions about courts and the judicial system as a result of too much or too little coverage. For example, the recent Florida state court trial of Casey Anthony for the murder of her two-year old daughter, Caylee, left many members of the

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<sup>3</sup> See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 65 (2005) (statement of Seth Berlin, Partner, Levine, Sullivan, Koch & Schulz, LLP); *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 124-25 (2005) (statement of Henry Schleiff, Chairman & CEO, Court TV Network); Editorial, *For Courtroom Cameras*, CHI. TRIB., Nov. 27, 2005, at C10. For summaries of which states allow cameras in which types of courts, see BUREAU OF JUST. STAT., STATE COURT ORGANIZATION 2004, at 192-98 (2006) (Table 34); Knowledge & Info. Service Off., Nat'l Center St. Cts., *Cameras in the Courts: Summary of State Court Rules*, available at [www.ncsconline.org](http://www.ncsconline.org); Audrey Maness, Note, *Does the First Amendment's "Right of Access" Require Court Proceedings to be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123, 144-49 (2006-2007).

<sup>4</sup> See, e.g., *Chandler v. Florida*, 449 U.S. 560, 564 (1981) ("In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings."); *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 54 (2005) (statement of Seth Berlin).

<sup>5</sup> See *infra* note --.

<sup>6</sup> *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

public who had watched the trial on cable television and had shared their views via Facebook and Twitter feeling outraged by the jury's acquittal even though the jurors explained that the state had failed to prove its case beyond a reasonable doubt.<sup>7</sup> The public had watched the trial through the eyes of Nancy Grace, the host of the cable television show, who had already decided that the defendant was guilty.<sup>8</sup> The lesson for viewers was that the defendant was guilty and the jury was wrong; the lesson for the media was that viewers prefer coverage that "pick[s] a side."<sup>9</sup>

One goal of this article is to challenge traditional arguments that are given by proponents and opponents of cameras in the courtroom. Another goal is to explore the underlying motivations of each side, and to identify the policy considerations that should be part of the debate but have been largely absent from it. Yet another goal is to identify the competing broad values that are at stake for proponents and opponents of cameras in the courtroom and to accommodate both sets of values by recommending several steps that courts can take that will make courtrooms more accessible to the public, while at the same time acknowledging that images are powerful, difficult to control, and enduring.

This article proceeds in five Parts. Part I provides a thumbnail sketch of the traditional arguments that proponents and opponents of cameras in federal courtrooms have raised and where they fall short. Part II examines what is important to each side even though their underlying concerns are rarely articulated. Underlying the proponents' view is a distrust of federal judges and "a public-centered" view of courtroom proceedings. Proponents want to make sure that the public can observe court proceedings and assess how judges perform their jobs. In contrast, opponents, most of whom are federal judges, generally trust the way they perform their job and are more inclined to take "a participant-centered" view. They understand that a trial is a public proceeding, but they also want to protect the participants' privacy as much as possible and to preserve a robust but respectful exchange between lawyers and judges in the courtroom. They worry that cameras will expose participants and their disputes to a much larger audience than ever before and will alter the dynamics between judges and lawyers and distract them from the performance of their proper roles.

Part III identifies the policy considerations that should be raised in this debate, but have received little attention thus far, such as the problem of unintended consequences. Courts are dynamic institutions. A change in one area, such as the introduction of cameras in federal courtrooms, can lead to unanticipated changes in other areas that proponents of cameras have not considered. For example, judges who do not want to appear before cameras might choose to do more of their work in Chambers and less of their work in the public space of the courtroom. Cameras, rather than leading to greater public access to courts, might actually result in less

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<sup>7</sup> See Brian Stelter & Jenna Wortham, *Watching a Trial on TV, Discussing It on Twitter*, N.Y. TIMES, July 6, 2011, at A14.

<sup>8</sup> *Id.* (describing Nancy Grace as having "le[d] the charge against Ms. Anthony, whom she disparagingly calls 'Tot Mom'").

<sup>9</sup> *Id.* (quoting James Poniewozik, media columnist for TIME).

judicial activity being open to the public. In the past few decades, there has been a trend toward the “vanishing oral argument.” The presence of cameras may hasten this decline.

In addition, there is the current problem of limited empirical studies to provide guidance. Justice Brandeis suggested that the states could serve as laboratories for the federal system,<sup>10</sup> but state studies have been unreliable and state court judges, many of whom are elected and who are accustomed to being in the public eye, have different needs than federal judges, who are appointed for life and who do not seek public exposure. The Judicial Conference has just begun a pilot program to study the effects of cameras in federal courtrooms,<sup>11</sup> but its findings will not be known for three years.

Part IV considers lessons that can be learned from cameras in other contexts. For example, when Supreme Court confirmation hearings began to be televised, it is unclear that the public learned more about a nominee than when the hearings were conducted behind closed doors. Finally, Part V offers several policy recommendations to address the conundrum of cameras in federal courtrooms by taking into account the differences between trial and appellate courts, the legitimate concerns of federal judges and the media, and by recognizing new forms of media and federal judges' need to control the new media in the traditional courtroom. By proceeding slowly and incrementally, there is less danger of doing harm to the federal judiciary, an institution that still enjoys the respect of the citizenry.

My own view is that cameras in federal courtrooms will do more harm than good at this time, and that weight should be given to the preference of federal judges, who have a hard job and who generally perform it well. Moreover, it might be that a new generation of federal judges, who grew up on YouTube and Facebook, will not have the same reservations as today's federal judges about cameras in the courtroom and at that time the new media could have a new role to play in federal courtrooms. It also might be that courts should wait until a “technology etiquette” develops about when and where it is appropriate to use cameras now that “almost everyone carries a camera of some kind, whether in their phone, lap top or daily planner”<sup>12</sup> and

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<sup>10</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); *see Arizona v. Evans*, 514 U.S. 1, 30 (1995) (Ginsburg, J., dissenting); *Cruzan v. Director, Mo. Dep’t of Health*, 497 U.S. 261, 292 (1990); *Lackey v. Texas*, 514 U.S. 1045, 1047 (Stevens, J., respecting denial of certiorari); *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of certiorari).

<sup>11</sup> *See, e.g., Judiciary Approves Pilot Project for Cameras in District Courts*, Sept. 14, 2010, available at [http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary\\_Approves\\_Pilot\\_Project\\_fo](http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_fo) (“The Judicial Conference of the United States today approved a pilot project to evaluate the effect of cameras in federal district courtrooms and the public release of digital video recordings of some civil proceedings.”); *Courts Selected for Federal Cameras in Court Pilot Study*, June 8, 2011, available at [http://www.uscourts.gov/news/NewsView/11-06-08/Courts\\_Selected\\_for\\_Federal\\_Camera](http://www.uscourts.gov/news/NewsView/11-06-08/Courts_Selected_for_Federal_Camera) (“Fourteen federal trial courts have been selected to take part in the federal Judiciary’s digital video pilot, which will begin July 18, 2011, and will evaluate the effect of cameras in courtrooms.”).

<sup>12</sup> Jessica Silbey, *What Documentary Films Teach Us About the Criminal Justice System: Cross-Examining Film*, 8 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 17, 22 (2008).

now that every image can end up on the Web. Even though I urge a cautious, incremental approach, federal courts can take additional steps now to make courtroom proceedings more accessible to the public, such as making transcripts and audio recordings available online, without having to take the riskier step of allowing cameras in federal courtrooms.

## I. TRADITIONAL ARGUMENTS OF PROPONENTS AND OPPONENTS

### A. *Proponents' Arguments and a Critique*

Those who have advocated most vociferously for cameras in federal courtrooms are members of the media, including print, radio, and especially television, and the lawyers who represent them.<sup>13</sup> They have been joined by some federal judges<sup>14</sup> and law professors.<sup>15</sup> In congressional hearings,<sup>16</sup> editorials,<sup>17</sup> and articles,<sup>18</sup> members of the media have advanced several arguments in support of cameras in federal courtrooms. Several of these arguments, such as education and accountability go to good government, whereas other arguments, such as unobtrusiveness go to addressing concerns raised in early U.S. Supreme Court opinions.<sup>19</sup> Below are four arguments that proponents typically rely on, as well as several counterarguments, which they do not offer.

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<sup>13</sup> There are, of course, exceptions. *See, e.g.,* Don Hewitt, *At Trial, Let Pads and Pencils In--Keep Cameras Out*, L.A. DAILY J., June 21, 1995, at 6 ("But letting cameras in can turn a courtroom into a movie set.").

<sup>14</sup> *See, e.g.,* *Allowing Cameras and Electronic Media in the Courtroom: Hearing on S.721 Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 19 (2000) (statement of Nancy Gertner, Federal District Court Judge for the District of Massachusetts) ("I am delighted to be here and to speak in favor of the bill [S. 721].").

<sup>15</sup> *See, e.g.,* David C. Weiner, *Opening Statement: The Courtroom Camera*, LITIG., Winter 1995, at 1, 72 ("According to Professor Charles Nesson of Harvard Law School, there is widespread acknowledgment of the value of television in making a public trial truly public.").

<sup>16</sup> *See, e.g.,* *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 23, 25, 27 (2005).

<sup>17</sup> *See, e.g.,* Editorial, *Cameras in the Courts*, N.Y. TIMES, May 15, 2006, at A28; Editorial, *For Courtroom Cameras*, CHI. TRIB., Nov. 27, 2005, at 10; Editorial, *Judges, Cameras and Guns*, CHI. TRIB., June 19, 2000, at 12; Editorial, *Let the People See the Court*, CHI. TRIB., May 3, 2006, at 26; Editorial, *The Supreme Court Club*, N.Y. TIMES, Jan. 16, 2008, at –; Editorial, *Judges' Wise Decision*, L.A. TIMES, *reprinted in* L.A. DAILY J., Feb. 22, 1996, at 6.

<sup>18</sup> *See, e.g.,* Jane E. Kirtley, *Much Ado About Nothing? Preparing to Face Videocameras in the Courtroom*, LITIG., Spr. 2000, at 35 (executive director of Reporter's Committee for Freedom of the Press, in Arlington, Va., which supports cameras in courts).

<sup>19</sup> *See* *Chandler v. Florida*, 449 U.S. 560 (1981); *Estes v. Texas*, 381 U.S. 532 (1965).

## 1. Education

Proponents of cameras in federal courtrooms argue that cameras are necessary because televised proceedings are the only way to reach a large segment of the population and educate them as to the workings of the judicial system. They note that for many people in the United States, television is the means by which they learn about the world.<sup>20</sup> Proponents emphasize that trials are public proceedings and that federal courtrooms have limited capacity to accommodate members of the public. Given that many people rely on television for information and that few people can go to the courthouse to learn about the important issues that federal courts decide, televised federal court proceedings are the best way to reach the greatest number of people.<sup>21</sup>

One problem with proponents' argument that cameras will educate viewers is that while many viewers use television as a source of information,<sup>22</sup> television's format is not well-suited to education about the trial process. When the evening news reports on a trial, it devotes not even a minute to that story. According to one study of local television coverage of litigation, the median story "was 30 seconds in length; that is, the typical story lasts half a minute."<sup>23</sup> According to this same study, "[t]hirty-seven percent (37%) of the stories are between 20 and 30 seconds in length; 12% are less than 20 seconds, and 25% are 60 seconds or more."<sup>24</sup> Sometimes a picture of the courtroom is used as background for what the news reporter is saying about the trial; other times, the coverage might include a snippet from the trial. But in either case, the minute or less of coverage does not provide much education about the trial, and certainly falls short compared to the kind of education acquired by a member of the public who is present in the courtroom and who observes the trial.

Although proponents argue that at least viewers can glean some information about the trial, such cursory coverage can leave viewers more misinformed about the trial process than if they had seen no television coverage of it at all.<sup>25</sup> For example, the snippet might not present the

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<sup>20</sup> See *Allowing Cameras and Electronic Media in the Courtroom: Hearing Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 19, 20 (2000) (statement of Judge Gertner) ("The meaning of 'public' today is television.").

<sup>21</sup> See, e.g., Clara Tuma, *Open Courts: How Cameras in Courts Help Keep the System Honest*, 49 CLEVELAND ST. L. REV. 417, 420 (2001) ("With so many people relying on television as their primary resource of information, televised coverage of trials exposes greater numbers of citizens to our justice system."); *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 121 (2005) (statement of Henry Schleiff, Chairman & CEO, Court TV Network) (same).

<sup>22</sup> See *supra* note 21 (testimony of Judge Gertner).

<sup>23</sup> Herbert M. Kritzer & Robert E. Drechsel, *Reporting Civil Litigation on Local Television News* 5 (Sept. 25, 2008), available at <http://ssrn.com/abstract=1133510> (last visited July 22, 2011).

<sup>24</sup> Kritzer & Drechsel, *supra* note --, at 5.

<sup>25</sup> For example, Neil Vidmar and Valerie Hans observe that the public often reacts negatively when a jury returns a rare verdict of not guilty by reason of insanity. They explain this hostility as follows:

positions of both sides. In the courtroom, each side has an opportunity to present its case and to challenge the other side's position. This balance is integral to the adversarial system and will not necessarily be conveyed by a television snippet. If the snippet contains only one side's position, then the viewer will have a lopsided view of the trial, which may, in turn, lead the viewer to conclude that the trial has not been conducted fairly.

There is also the problem that television allows viewers to feel that they are "present" in the courtroom, and therefore, see everything that those in the courtroom see, without understanding that there is an editing process at work. Although television news stories, like newspaper stories and radio broadcasts, entail editing, the television editing is not as apparent to viewers. With the power and immediacy of the image, viewers feel as if they are there--in the courtroom. Newspaper readers do not have that same sense. With a newspaper story, it is clear that the trial is being recounted by a journalist. Although the same thing happens with television, viewers are not always as aware that the coverage is being shaped and edited by the reporter and producer.

Although the snippet of television coverage of a trial can convey the gist of a case, it cannot convey all the protections and procedures inherent in the trial process. Those in the courtroom have a sense of the procedures, even if they do not fully understand them. For example, at the start of a jury trial, there is voir dire, and with it, the exercise of peremptory and for cause challenges so that an impartial jury can be impaneled. During the trial, there are objections by attorneys, sidebars to discuss issues that arise, rulings by the judge, and instructions to the jury. This process is lost to television viewers who see only a head-shot of a witness or hear an objection made by one of the lawyers. Although cameras in the courtroom can inform television viewers as to the subject matter of the trial, the education is not nearly as complete as the one that members of the public who are present in the courtroom receive.

Even when the television coverage is gavel-to-gavel, as it was in the state criminal trial of O.J. Simpson, television viewers do not watch the trial in the same manner as members of the public in the courtroom. Television viewers may walk away from the television, and during that interlude something important might have happened in the courtroom.<sup>26</sup> Even if television viewers never leave the television, they are often multi-tasking. Members of the public who are present in the courtroom are not permitted to perform other tasks during the trial. Television

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The public does not have the evidence the jury has. Rather it hears only a few minutes on the evening news or reads only short accounts in the local paper on what transpired at trial. These stories are often devoted to descriptions of the horrors of the crime and the defendant's involvement in it. Expert testimony pertaining to the defendant's mental state may be summarized in a few sentences. The defendant's account of the actions leading up to the incident--either told directly or through police or psychiatrists--may sound like a ploy to avoid responsibility. . . . How could a jury buy this story?

NEIL VIDMAR & VALERIE P. HANS, *AMERICAN JURIES: THE VERDICT* 219 (2007).

<sup>26</sup> *Allowing Cameras and Electronic Media in the Courtroom: Hearing on S.721 Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106<sup>th</sup> Cong. 19, 21 (2000) (statement of Judge Nancy Gertner) ("You watch the proceeding on television, you take a bathroom break, you answer the phone, you make popcorn, you miss critical testimony. Yet, then when the outcome is inconsistent with what the home viewer believes, the home viewer may then be cynical.").

viewers think that they are in the same position as the judge or jury to decide on the guilt or innocence of the defendant or to conclude that the trial was fair or unfair, but they view the trial from a different vantage point than those in the courtroom.

Proponents of cameras in federal courtrooms argue that television coverage provides education to those who cannot be in the courtroom. Their argument is that because courtrooms have limited seating capacity,<sup>27</sup> television cameras can reach a much broader audience. The problem, however, is that television is not only a poor substitute for educating those who cannot be in the courtroom, but also it offers a distorted view about what takes place in the courtroom.<sup>28</sup>

It is also unclear how cameras in federal courtrooms will add to viewers' education in ways that are not already being met by cameras in state courts. As academics have noted, the number of trials is dwindling,<sup>29</sup> and it is dwindling in federal courts and state courts.<sup>30</sup> There are few trials for cameras to record in federal court, and many of the cases in federal court are unlikely to hold the interest of a television audience. The networks are more likely to find trials of any kind, and in particular trials that will attract a television audience, in state court. Thus, it is unclear in what ways television coverage of trials in federal court will add to viewers' education in ways that differ from the education already provided by cameras in state courts.<sup>31</sup> Interestingly, local television coverage of litigation does not focus on trials or appeals, but rather, on the initiation of lawsuits.<sup>32</sup> According to one study of local television coverage of litigation, about sixty percent of the coverage focused on the initiation of the lawsuit, whereas hearings,

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<sup>27</sup> See Maness, *supra* note --, at 126-28 (describing the space limitations at the U.S. Supreme Court).

<sup>28</sup> For example, after the O.J. Simpson trial, many people were convinced that the trial process was not fair, and that there was one set of rules for the rich and one for the poor. Thus, the O.J. Simpson trial, where there were cameras in the courtroom, taught negative lessons about the trial process.

<sup>29</sup> See generally Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

<sup>30</sup> Compare Galanter, *supra* note --, at 461 ("But the number of civil trials [in federal court] in 2002 was more than 20 percent lower than the number in 1962--some 4,569 now to 5,802 then. So the portion of dispositions that were by trial was less than one-sixth of what it was in 1962--1.8 percent now as opposed to 11.5 percent in 1962.") and *id.* at 492-93 ("Not only are a smaller percentage of criminal dispositions by trial--under 5 percent in 2002 compared with 15 percent in 1962--but the absolute number of criminal trials has diminished: from 5,097 in 1962 to 3,574 in 2002, a drop of 30 percent."), with Brian J. Ostrom et al., *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUDIES 755, 768 (2004) ("From 1976 through 1998, the number of civil jury trials [in 22 states] hovered between 23,000 and 25,000 per year, but then fell abruptly to less than 18,000 by 2002, a 28 percent decline . . . Expressed as a proportion of total civil dispositions, civil jury trials have fallen by nearly two-thirds from about 1.8 percent in 1976 to 0.6 percent in 2002.") and *id.* at 764 ("Overall, for the period 1976-2002, the number of criminal jury trials [in 23 states] has declined by 15 percent (from 42,049 to 35,664) while the number of bench trials has declined by 10 percent (from 61,382 to 55,447).").

<sup>31</sup> Although there are compelling reasons not to have cameras in state courts, cameras are already there and will therefore be hard to remove. In addition, as will be discussed, *see infra* Part III.C.3., there are institutional reasons why state and federal judges might have different views about cameras in the courtroom.

<sup>32</sup> See, e.g., Kritzer & Drechsel, *supra* note --, at 10.

trials, and jury deliberations constituted twenty percent of the coverage, and reports on appeals constituted a mere three percent.<sup>33</sup>

Finally, there is the added twist that growing numbers of viewers, particularly young viewers, are turning to the Internet to be educated about current events.<sup>34</sup> Although television networks have long sought to secure cameras in the courtroom, with programs like Court-TV leading the fight, the Web is fast replacing television as a source of news.<sup>35</sup> Television is the old medium, and the Web is the new medium. Moreover, the Web is less monolithic than television and websites are more willing to reshape what cameras record once the images have been broadcast. Once an image had been shown on the Web, whether taken from television or directly from cameras in the courtroom, it can be edited, reproduced, and archived on the Web forever.<sup>36</sup> Thus, while television is still the primary source of people's education about current events,<sup>37</sup> this is beginning to change, particularly among young people. To the extent the Web takes over that function, images broadcast from cameras in the courtroom will not be subject to the control of television networks.

## 2. Accountability

Proponents of cameras in federal courtrooms also urge that cameras should be allowed

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<sup>33</sup> See *id.*

<sup>34</sup> See, e.g., Joe McGinniss, *The Selling of a President*, PARADE, Apr. 27, 2008, at 12 ("For the first time, there are signs that--among younger voters, at least--the Internet is replacing TV as the primary source of information about candidates."). See also Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER, Mar. 31, 2008, available at [http://www.newyorker.com/reporting/2008/03/31/080331fa\\_fact\\_alterman?printable=true](http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman?printable=true) ("Taking its place, of course, is the Internet, which is about to pass newspapers as a source of political news for American readers. For young people, and for the most politically engaged, it has already done so.").

<sup>35</sup> See, e.g., Kevin J. Martin, Op-Ed., *The Daily Show*, N.Y. TIMES, Nov. 13, 2007, at A29 ("Now, nearly one-third of all Americans regularly receive news through the Internet.").

<sup>36</sup> See Maria Aspan, *Caught in Facebook's Web*, CHI. DAILY L. BULL., Feb. 14, 2008, at 5 ("While [Facebook] offers users the option to deactivate their accounts, Facebook servers keep copies of the information in those accounts indefinitely. . . . Facebook's quiet archiving of information from deactivated accounts has increased concerns about the network's potential abuse of private data . . . ."); Clark Hoyt, *When Bad News Follows You*, N.Y. TIMES, Aug. 26, 2007, at 10 ("Through the ages, humans have generally remembered the important stuff and forgotten the trivial . . . . The computer age has turned that upside down. Now, everything lasts forever, whether it is insignificant or important, ancient or recent, complete or overtaken by events.").

<sup>37</sup> See, e.g., Kritzer & Drechsel, *supra* note --, at 1 n.3 ("Pew found that 54% of survey respondents reported regularly watching local TV news . . . ."); Dennis Donoghue, How Modern Juries Decide, Panel at the Seventh Circuit Bar Ass'n Annual Meeting (May 19, 2008) (notes on file with author) (finding that 56% of adults obtained their information about current events from television) (sample based on 165 people polled in Chicago in 2008); see also Jane S. Schacter, *Digitally Democratizing Congress? Technology and Political Accountability*, 89 B.U. L. REV. 641, 656 (2009) ("Both the Annenberg and Pew studies did show that television continues to be the leading source of campaign information, but Pew found that Internet sources had narrowly passed newspapers in 2008, with 33% using the Internet and 29% using newspapers for election news.").

because they would make judges and lawyers accountable for their behavior.<sup>38</sup> Their argument is that good judges and lawyers have nothing to fear. Cameras should not change their behavior.<sup>39</sup> The idea is that cameras in the courtroom will reveal bad judges and lawyers, and that the public has a right to know which of its officials or advocates are acting improperly. The judge who is a tyrant in the courtroom or the lawyer who falls asleep and fails to represent his client zealously will be captured on camera and revealed to the viewer. Similarly, proponents contend that the lawyer or judge who performs responsibly will be seen by television viewers, and their able performances will help build public confidence in the federal judiciary.

Another way in which proponents argue accountability is that the judiciary as a branch of government should be accountable in the same way that the executive and legislative branches are accountable. According to proponents, the judiciary should not be exempt from cameras because these other branches are not exempt. Just as the President appears before cameras to deliver his State of the Union address and Members of Congress give their speeches on C-SPAN, federal court judges should permit courtroom proceedings to be broadcast on television.<sup>40</sup>

Proponents of cameras in federal courtrooms argue that cameras will make judges accountable for their conduct in the courtroom. Presumably, judges who conduct themselves well in the courtroom will lead viewers to have greater respect for the federal judiciary,<sup>41</sup> and judges who do not conduct themselves well will be identified and criticized.

There are several problems, however, with the accountability argument. First, it is unclear in what sense federal judges, who have life tenure, are “accountable” to the public. Even if they meet with public criticism, they need not, and should not, respond to it. Second, federal judges are already held “accountable” in ways that are unique to the judiciary; namely, their decisions are subject to appellate review. Third, federal judges, unlike other politicians, have life-time tenure so that they will remain independent and reach the right decision even when it is unpopular. Elected politicians do not have that obligation, and thus to argue that federal judges should appear before cameras because other politicians do overlooks the distinctive roles that each branch is supposed to play.

Federal judges are not accountable in the same way as elected politicians who might not be returned to office if the voters are dissatisfied, but federal judges engage in a number of

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<sup>38</sup> See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 77 (2005) (statement of Barbara Cochran, President, Radio-Television News Directors Association & Foundation) (“[Legislation allowing cameras in federal courtrooms] has the potential to . . . subject the federal judicial process to an appropriate level of public scrutiny.”); *id.* at 121 (2005) (statement of Henry Schleiff).

<sup>39</sup> Kirtley, *supra* note --, at 35.

<sup>40</sup> Editorial, *For Courtroom Cameras*, *supra* note --, at 10.

<sup>41</sup> Sunshine in the Courtroom Act of 2007: Hearing on H.R. 2128, -- Cong. – (2007) (statement of Judge Nancy Gertner, U.S. District Court Judge) (“[With cameras, t]he public will see why our judicial system is one of the most respected in the world.”).

practices that make them accountable at least to the legal community. Judges write judicial opinions in which they explain the reasons for their decisions. Their opinions are supposed to speak for themselves. In fact, *The Judicial Code of Ethics* precludes judges from offering their views on cases through any vehicle other than their judicial opinions.<sup>42</sup> Their opinions are read by members of the legal community as well as by any interested members of the public. The opinions are published<sup>43</sup> and are signed by the judge who wrote them.<sup>44</sup> Opinions by trial judges are reviewed by appellate panels,<sup>45</sup> and in some cases, by en banc panels.<sup>46</sup> Appellate court opinions are reviewed by the U.S. Supreme Court when the Court believes that there is the need to resolve a circuit split, when the issue seems particularly important, or when the Court believes that further clarification is in order.<sup>47</sup> Thus, judges are accountable for their decisions through their signed written opinions, and these opinions are reviewed by other judges at other levels of the federal judiciary.

In contrast, legislators have an obligation only to cast votes, not to give reasons for their votes. Moreover, their votes are not subject to review by other members of their branch. Rather, their votes are scrutinized by constituents who only have to decide whether they agree or disagree. Members of the executive branch make policy decisions and set agendas, and as with legislators, if voters do not agree with them they can vote for their opponents in the next election.

Judges, unlike members of the legislative and executive branches, need to maintain their impartiality and independence. Whereas legislators and members of the executive try to make decisions that accord with the popular will or public good<sup>48</sup> so that they will be re-elected,

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<sup>42</sup> See *infra* note -- (citing canon).

<sup>43</sup> Some federal district court and court of appeal opinions are unpublished because, in the view of their judicial authors, they do not advance the law. See *infra* note --. According to one study, however, the number of unpublished or non-precedential opinions among federal courts of appeals has continued to grow. See Peter W. Martin, Finding and Citing the "Unimportant" Decisions of the U.S. Courts of Appeals, at [http://ssrn.papers.com/so13/papers.cfm?abstract\\_id=1125484](http://ssrn.papers.com/so13/papers.cfm?abstract_id=1125484) (last visited on July 22, 2011). But a rule change to the *Federal Rules of Appellate Procedure*, 32.1, which became effective December 1, 2006, provides that all federal court cases decided after January 1, 2007 can be cited "notwithstanding their being designated 'unpublished,' 'not for publication,' 'non-precedential,' or 'not precedent' by the deciding court." *Id.*

<sup>44</sup> An opinion is signed by the judge who wrote it unless it is an unpublished memorandum opinion or a per curiam.

<sup>45</sup> See 28 U.S.C. § 46c.

<sup>46</sup> See 28 U.S.C. § 46c.

<sup>47</sup> See generally SUP.CT.R.10.

<sup>48</sup> There are at least two theories of representation. See, e.g., WILLIAM N. ESKRIDGE, JR. ET. AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 123-25, 299-301 (4th ed. 2007) (citing HANNA PITKIN, *THE CONCEPT OF REPRESENTATION* (1967)). According to the "trustee" view, legislators should exercise good judgment and vote in accordance with the policy that they believe is for the public good. According to the "agency" view, legislators should vote in accordance with the policy their constituents want and should check back often with their constituents to make sure that they are reflecting their views.

federal judges have an obligation to reach decisions that are consistent with the federal constitution, statutes, or precedent regardless of the popularity of these decisions. They have an obligation to give reasons in their written opinion for their decision, but they do not have an obligation, like members of the other two branches or those state judges who are elected, to reach popular decisions. If an appellate panel or the U.S. Supreme Court disagrees with a lower court judge's reasoning, then the reviewing court can reverse the decision.

It is unclear, then, in what sense cameras in the courtroom contribute to judicial accountability. If a federal trial judge makes an error in one of his or her rulings during the trial, then the lawyer against whom the ruling was made will object and preserve the issue for appeal. If the lawyer loses the case, then he or she can raise that ruling as part of the appeal. Errors from the trial, which are not found to be harmless, can be reversed on appeal. Again, there is judicial accountability in that the federal district court judge conducts a trial that is transcribed by a court reporter; all rulings objected to at trial and properly preserved on the record can be raised on appeal; the trial judge will explain his or her reasoning in a signed written opinion; and appellate courts will review the reasoning of the opinion, including any trial errors raised by the lawyer who has lost the case.

It is also unclear how cameras at an appellate oral argument add to accountability of appellate judges. Appellate judges, like trial judges, are accountable in that they sign their name to a written opinion in which they give reasons for their decision. The oral argument can help them to understand the issues, but different judges use oral argument in different ways. Some are active listeners; others are active questioners.<sup>49</sup> The point is that there is no one right way to conduct an oral argument. Cameras in an appellate courtroom would reveal a range of styles, but it is unclear how it would lead to judicial accountability. Moreover, it is unclear that the public would know what an appellate judge is supposed to do.

Perhaps proponents of cameras in the courtroom believe appellate judges would be better prepared for oral argument and pay closer attention during the argument if cameras were present. But most appellate judges do this anyway because they want to maintain their reputation among their fellow judges and members of the legal community.<sup>50</sup> Even if they choose not to prepare for oral argument because they view it as an introduction to the case, as long as they manage to decide the case and issue their opinion, they would meet their judicial obligations.

Perhaps proponents of cameras in the courtroom believe that cameras--whether in a trial court or an appellate court--would improve judges' behavior or decorum in the setting of the courtroom. Although cameras might do this, they also might not. Proponents of cameras are quick to assert that participants simply forget about the cameras after the first few minutes. If

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<sup>49</sup> Justice Thomas, who has asked very few questions during oral argument, suggested that “you can do this job [of Supreme Court Justice] without asking a single question.” Mark Sherman, *Thomas Stays Silent for More Than 2 Years of Oral Argument*, CHI. DAILY L. BULL., Feb. 26, 2008, at 2.

<sup>50</sup> See, e.g., 1 ALMANAC OF THE FEDERAL JUDICIARY 2009 (providing lawyers' evaluations of federal district and circuit court judges, in addition to biographical information).

they are correct about this, then the presence of cameras is unlikely to inspire particularly good behavior. If they are incorrect about this, then it is likely to make judges think more carefully about how they will be viewed by the television audience and how their decisions will be regarded by the public at large, when judicial independence requires them to be impervious to these concerns.

Moreover, the courtroom is already a public place. Whether at the trial or appellate level, the courtroom is open to the public; proceedings are transcribed by a court reporter; and members of the press and public are present. At a trial, the parties are present, and if it is a jury trial, jurors are present. Thus, a federal judge's courtroom behavior is already subject to observation and comment. Admittedly, cameras would extend the reach of that observation, but it is unclear how cameras would make judges more accountable to the public than they already are, and to the extent that they should not succumb to popular preferences, cameras would make it harder for judges to maintain their independence and to perform their job effectively.

Although the courtroom is a public place, it is also a workplace. Trial judges conduct trials, hear motions, hold arraignments, and sentence convicted criminal defendants in the courtroom. Appellate judges hear oral arguments in the courtroom. Proponents of cameras argue that legislators in Congress give speeches before cameras and the President gives a State of the Union address and other speeches before cameras;<sup>51</sup> however, these political actors usually present a finished product to their audience. They do not formulate their views for the first time in the presence of cameras; rather, they give a scripted performance. The equivalent for the judiciary would be if judges read aloud their opinions before the cameras, but this is not what proponents of cameras in the courtroom seek.

Proponents' insistence that cameras in the courtroom will advance judicial accountability suggests a distrust of judges<sup>52</sup> and their decision-making that is not being directed toward the Executive or Legislature. If it were, then proponents would seek cameras in subcommittee meetings in Congress or in the Oval Office of the White House--places where positions are actually thrashed out, rather than simply announced, as they are in speeches before C-SPAN or the major networks. But even if cameras were placed where these other branches actually do their work, that is still not a reason for cameras to be placed in the courtroom, where parties, witnesses, and lawyers depend upon a fair proceeding before an impartial decision-maker.

### *3. Unobtrusiveness of Cameras*

Proponents of cameras in federal courtrooms argue that cameras today are small and unobtrusive. Those who are being televised in the courtroom will ignore the camera after the

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<sup>51</sup> See *supra* note --; see also *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 122 (statement of Henry S. Schleiff, Chairman and CEO of Courtroom Television Network LLC).

<sup>52</sup> See *infra* Part II.B.3 (describing the media's underlying distrust of federal judges).

first few minutes.<sup>53</sup> This was not always the case. In the early days of television, the cameras and accompanying equipment were far more obtrusive. For example, in *Estes v. Texas*,<sup>54</sup> Justice Clark, writing for a plurality, described the scene in a state court criminal case in which the defendant objected to the presence of cameras during pretrial proceedings:

Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.<sup>55</sup>

Proponents of cameras point out that the technology has developed significantly since the early days and today's cameras are neither obtrusive nor disruptive. They emphasize that most courtroom participants will neither see nor hear the cameras during the proceedings and will only be aware of them initially when they are told by the judge that the proceedings are being televised. In his testimony before Congress, the CEO of Court TV Networks described the current scene in the courtroom as follows:

. . . Court TV and other broadcasters today employ a single, stationary camera, which produces no noise and requires no lighting other than existing courtroom lighting. The camera is placed away from the proceedings . . . . Wiring is unobtrusive. Microphones are small . . . . The fact is that cameras may well be less intrusive than the sketch artist's drawing pad or even the print reporter's pen and paper . . . .<sup>56</sup>

Proponents are correct that today's cameras are small and unobtrusive and that they no longer cause the kind of physical disturbance--flashing lights, wires, and microphones everywhere--that they once did.<sup>57</sup> However, proponents' portrayal of the camera as a neutral, passive, all-seeing eye, which merely captures but does not shape what is before it, is misleading.

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<sup>53</sup> See, e.g., Kirtley, *supra* note --, at 35 ("[Most experienced litigators] will tell you that once the camera has been running for a few minutes, they and most trial participants forget that it is there."); Tuma, *supra* note --, at 419; Patricia Jacobus, *Off the Air: Judge in the Polly Klaas Case Wants to Avoid the Problems of O.J.*, L.A. DAILY J., June 14, 1995, at 1; Linda Seebach, *Task Force Shouldn't Act Hastily on Cameras in the Courts*, L.A. DAILY J., Jan. 25, 1996, at 6 ("The camera just sits there [in court], and if it were always there people would simply forget about it.").

<sup>54</sup> 381 U.S. 532 (1965).

<sup>55</sup> *Id.* at 536.

<sup>56</sup> *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 131 (2005) (statement of Henry Schleiff).

<sup>57</sup> See *Estes*, 381 U.S. at 536.

Cameras shape what an audience sees. The distance between the camera and the subject, the lighting, and the focus are among the variables that can make a subject look more or less attractive, likable, or trustworthy. One famous example was the presidential debate between Richard M. Nixon and John F. Kennedy. The close-up camera shots of Nixon revealed his five o'clock shadow and beads of perspiration.<sup>58</sup> They made him look shifty and unreliable, as if he had something to hide. So, while those who listened to the debate on the radio thought that Nixon had "won," those who watched it on television thought that Kennedy had "won."<sup>59</sup> The close-up shots of Nixon captured the sweat and the shadow, whereas a shot from a greater distance away would not have included these details. Which shot is the "neutral" one? The cameraman makes a decision, and the decision affects what the viewer sees. Moreover, while the details were there, they were probably heightened by the close-up and the hot lights. Someone sitting in the audience at the debate might not have seen the shadow or the sweat. Sometimes the camera might reveal a truth about the subject (Nixon was untrustworthy after all), but other times, it leads viewers to miss important points (he also had strengths, such as knowledge and charisma) that were obscured by the medium.

Either way, the camera is not objective or neutral. It heightens attributes that might not otherwise be seen or might not appear as prominently as they do before the camera. It also elevates style above substance, which is the reverse of what courts strive to do. As Raymond Price, Nixon's image adviser, wrote in an internal memo, "the response is to the image, not the man. . . . It's not what's there that counts, it's what's projected."<sup>60</sup> Don Hewitt, who produced the first Kennedy-Nixon presidential debate in 1960 at WBBM-TV, said that he expected the debate to turn "on the higher plane of issues and ideas that would strike a responsive chord with the audience."<sup>61</sup> Instead, "[w]hat struck a responsive chord was, 'Jeez, would you take a look at this guy?' Hewitt said, referring to Kennedy. 'Nobody had ever seen a president[ial] [candidate] that looked like a matinee idol. It was like he could have been cast in a movie."<sup>62</sup> That debate

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<sup>58</sup> See, e.g., PAUL F. BOLLER, JR., *PRESIDENTIAL CAMPAIGNS* 298-99 (1984) ("[T]he cameras were kinder to Kennedy than to Nixon. During the debate Kennedy looked pleasant, relaxed, and self-assured, while Nixon (who had barely recovered from his illness) looked pale, tired, and emaciated, with his customary five o'clock shadow making him look a bit sinister.").

<sup>59</sup> See, e.g., *id.* at 299 ("Radio listeners had the impression that Nixon did as well as, if not better than, Kennedy in the confrontation; but viewers including Nixon's own fans, generally agreed that Kennedy came out ahead in the first debate.").

<sup>60</sup> McGinniss, *supra* note --, at 12. In the 2008 presidential campaign, as Barack Obama and John McCain prepared to debate each other on television, one article pointed out that "[s]ometimes it's how a person seems and not what he says that can change a voter's mind during a debate." Jill Zuckman & John McCormick, *How Rivals Will Seek Edge in 1st Debate: Faceoff Could Be Crucial With Election Up for Grabs*, CHI. TRIB., Sept. 24, 2008, at A1.

<sup>61</sup> Tim Jones, *Debate Made, Changed History: TV Event Broadcast a New Message: Style Is as Important as Substance*, CHI. TRIB., Sept. 26, 2008, §1, at 8.

<sup>62</sup> *Id.*

established "the power of TV in a campaign" and "vaulted style onto an equal plane with substance."<sup>63</sup>

Another way in which cameras shape what is seen in the courtroom is that they are in a fixed position and focus on one or two speakers, depending on how many cameras there are. For example, if there is one camera and it is focused on the witness stand, then the television viewer will see only the witness. In contrast, an observer in the courtroom would see not only the witness, but also the lawyer, the parties, the judge, the jurors, and the press.<sup>64</sup> The courtroom observer could see other people's reactions to the witness, which provide a context that is missing for the television viewer. The courtroom observer also observes the interaction between the witness and other participants in the trial. For example, if a lawyer questioning a witness does so in an angry, sarcastic, or overbearing manner, the witness might respond defensively, but it is necessary to see both lawyer and witness interact in order to understand the witness's defensiveness as a response to the lawyer's tone and demeanor.

Television viewers lack the context provided by the courtroom. They watch the courtroom on television and think that the camera has "captur[ed] an event, place, or person as filmed."<sup>65</sup> They believe that they can trust what they see. Instead, they need to recognize that there is a craft that "requires an interpreter to analyze its specific language and account for how it creates meaning" and that television, like film, does not provide "a window into an unambiguous and objective truth," but rather, television, like film, provides an incomplete and partial view, and that the viewer must constantly ask what has been omitted.<sup>66</sup> This is hard work. As Professor Richard Sherwin explains: "It takes a good deal of mental energy to confront an image for the purpose of critical assessment. And the plain truth is that people tend to conserve their mental energy whenever possible."<sup>67</sup>

#### 4. *No Effect on Participants*

Proponents claim that cameras in federal courtrooms will have no effect on participants. Their claim is based on the fact that today's cameras are small and unobtrusive, and therefore,

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<sup>63</sup> *Id.*

<sup>64</sup> One study focused on jurors' observations of other trial participants when they were "offstage" during the trial. See Mary R. Rose & Shari Seidman Diamond, *Offstage Behavior: Real Jurors' Scrutiny of Non-Testimonial Conduct*, 58 DEPAUL L. REV. 311 (2009). Jurors recognized that attorneys' and litigants' body language could be part of the performance even when they were just sitting at counsel's table. Jurors also paid close attention to see whether litigants' behavior when they were not in the witness box supported their testimony when they were in the witness box. *Id.* at 340.

<sup>65</sup> Silbey, *supra* note --, at 23

<sup>66</sup> *Id.* at 32.

<sup>67</sup> Richard K. Sherwin, *A Manifesto for Visual Legal Realism*, 40 LOY. L.A. L. REV. 719, 726 (2007).

will not distract participants.<sup>68</sup> The view is that cameras will simply broadcast to a much larger audience what those seated in the courtroom see.<sup>69</sup> Proponents tend to view the camera as a neutral, unobtrusive eye on the court:<sup>70</sup> it broadcasts what is before it, without any distortions and without changing trial participants' behavior in any way.

Proponents also point to the fifty states that have allowed cameras in some courtrooms and have reported favorable results including no identifiable effect on participants. Proponents conclude that cameras in state courts have not affected participants' behavior because no verdicts have held otherwise;<sup>71</sup> states have not returned to their pre-camera days; and those states that have conducted their own studies have not found evidence of an effect on participants' behavior.<sup>72</sup> Proponents of cameras in the courtroom also rely on one study by the Federal Judicial Center (FJC).<sup>73</sup> Proponents believe these studies show that cameras in the courtroom do not have much or any discernible effect on participants.

The problem with the claim about states' verdicts is that it is unlikely that a verdict would be reversed because of cameras in the courtroom unless the cameras were so distracting as to interfere with a defendant's Sixth Amendment right to a fair trial.<sup>74</sup> The early U.S. Supreme Court case found such a Sixth Amendment violation but that was largely because the disturbances caused by the cameras were so great.<sup>75</sup> With today's small, unobtrusive cameras

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<sup>68</sup> See, e.g., Weiner, *supra* note --, at 72 ("First, the use of current audio-visual technology can prevent cameras from being a physical distraction. The technology exists for the use of one small, fixed camera, that could be operated by remote control, thus obviating the need for a 'cameraman' to be physically present."); *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 72 (2005) (statement of Barbara Cochran, President, Radio-Television News Directors Association & Foundation).

<sup>69</sup> See Kirtley, *supra* note --, at 35 ("Like the courtroom regulars sitting in the back seats, those watching at home can draw their own conclusions without having everything filtered through the print media's prism.").

<sup>70</sup> See Tuma, *supra* note --, at 420 ("Allowing the public to watch the justice system at work . . . helps assure that the proceedings are conducted fairly, and offers an unbiased unblinking look at the system at work.").

<sup>71</sup> See *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 73 (2005) (statement of Barbara Cochran, President, Radio-Television News Directors Association & Foundation); Peter Johnson, *Court TV Pushes for Wider Camera Access in Courtrooms*, USA TODAY, Oct. 6, 2004, at 3D ("Court TV says there has never been a verdict returned or reversed because of the presence of cameras.").

<sup>72</sup> *Id.* at 66 (statement of Seth Berlin) (Partner, Levine Sullivan Koch & Schultz, LLP) ("The survey of state court studies further concluded that there was little if any distraction of jurors and witnesses or effect on witness testimony or juror deliberations.").

<sup>73</sup> See Molly Treadway Johnson & Carol Krafka, Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings* (1994), available at [http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf) [hereinafter FJC Study].

<sup>74</sup> The Sixth Amendment provides that a defendant in a criminal case is entitled to "a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed." U.S. CONST., amend. VI, cl. 1.

<sup>75</sup> See *Estes v. Texas*, 381 U.S. 532 (1965).

such disruptions are unlikely. However, just because cameras no longer require wires, microphones, and lights everywhere, does not mean that cameras have no effect on participants. Pointing to the lack of reversals to prove that there is no effect on participants requires relying on a very blunt measure. There can be far more subtle effects, such as witnesses who feel more nervous testifying before cameras or lawyers who play to the cameras, and these effects would not be apparent to a reviewing court; yet, they can have far-reaching consequences.

The problem with the claim about states' studies that have been done thus far is that most have serious methodological problems. Even the best study, conducted by the FJC in 1994 and based on a pilot program of cameras in federal courts,<sup>76</sup> acknowledged the weaknesses of many of the state studies.<sup>77</sup>

As the FJC study acknowledged, the only way to study the effects of cameras on lawyers, judges, jurors, witnesses, and parties in the courtroom is to compare the behavior of those who participated in a trial in which there were no cameras with those who participated in a trial in which there were cameras. Even then, there would be differences to account for, such as the type of case, the different personalities of those involved in the two trials, and the kind of media attention the cases received. On the one hand, this might be the kind of study that could best be done in the laboratory, where the same trial could be run with two different groups--one that conducted a mock trial in front of cameras and one that did not. The difficulty, however, in using mock trial participants in this kind of experiment is that they would care less than actual trial participants about the very issues that cameras might affect, such as their interests in safeguarding their privacy, reputation, and safety. On the other hand, using actual participants in a trial means that the only comparison can be with actual participants in another trial and no two trials are alike. Trials differ in terms of the participants, the nature of the case, and the strengths and weaknesses of the evidence.

### *B. Opponents' Arguments and a Critique*

Federal judges, though certainly not all of them,<sup>78</sup> have been the main opponents of

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<sup>76</sup> The FJC undertook an evaluation of a pilot program that introduced cameras in the courtroom in six federal district courts and two federal courts of appeals for a limited time period (July 1, 1991 - December 31, 1994). The study used questionnaires, telephone interviews, content analysis, and reviews of other state court studies to assess the effects of the pilot program. See FJC Study, *supra* note --.

<sup>77</sup> See, e.g., *id.* at 38 n.33 ("A handful of state studies other than those mentioned here address juror and witness issues; we did not include all of them, however, because some reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for this evaluation (e.g., a judge polling one jury after a trial about whether cameras affected them.")).

<sup>78</sup> See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, -- Cong. -- (2000) (statement of Judge Nancy Gertner, Federal District Court Judge) ("I am strongly in favor of this bill [S. 721]."); Jonathan Groner, *Who Rules? Which Rules?*, LEGAL TIMES, Mar. 11, 1996, at 1, 18 (describing a decision by U.S. District Judge Robert Ward to allow Court TV to televise a trial in his courtroom, contrary to the Judicial Conference ban, and describing Richard Arnold, Chief Judge of the 8th Circuit, as "a supporter of televised trials"); Dan Horn, *U.S. Judges Camera-Shy in Courtroom*, CINCINNATI ENQUIRER (Ohio), Jan. 29, 2006, at 1B ("Judge Boyce Martin Jr., former chief judge of the 6th Circuit, believes the courts must change with the times. . . . But

cameras in federal courtrooms.<sup>79</sup> They have been joined by some lawyers,<sup>80</sup> especially defense lawyers,<sup>81</sup> and some law professors.<sup>82</sup> Federal judges are usually reticent about speaking out on public issues;<sup>83</sup> thus, their views often go unheard. However, on this issue, which affects their courtrooms, they have spoken out from time to time, at least at congressional hearings<sup>84</sup> and Judicial Conference meetings<sup>85</sup> on the issue. High-profile cases in state courts in which cameras were permitted also have led to public debate on the issue, including federal judges' views. Although the print media uses editorial pages to express its support of cameras in the courtroom,<sup>86</sup> federal judges do not have a comparable vehicle.

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Martin is in the minority of judges."); Tony Mauro, *Courtside: Camera Debate Was Sloppy and Shallow*, LEGAL TIMES, Sept. 26, 1994, at 10 ("U.S. District Judge Barbara Crabb, chief judge of the Western District of Wisconsin, reportedly made an eloquent case for access, telling judges that the time had come.").

<sup>79</sup> See, e.g., Horn, *supra* note --, at 1B ("[M]ost federal judges here [in Ohio] and across the country remain camera shy.").

<sup>80</sup> See *id.* ("Although I've gotten used to cameras in court, they are a distraction," said Cincinnati lawyer Louis Sirkin, who is wary of cameras in court even though his practice focuses on First Amendment cases.").

<sup>81</sup> See, e.g., Katherine E. Finkelstein, *Court TV Files Suit To End State's Ban On Televising Trials*, N.Y. TIMES, Sept. 6, 2001, at A23 ("Many defense lawyers adamantly oppose televising trials.").

<sup>82</sup> See, e.g., Johnson, *supra* note --, at 3D ("The camera in these kinds of [high-profile] cases is an unnecessary intrusion and potentially an impediment to justice. They can get in the way.") (quoting Professor Robert Pugsley, Southwestern University School of Law).

<sup>83</sup> See MODEL CODE OF JUDICIAL CONDUCT 3B(10) cmt. (2004) ("The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition.").

<sup>84</sup> Compare *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 12, 14 (2005) (statement of Jan E. Dubois, Federal District Court Judge for the Eastern District of Pennsylvania) ("I will say this about cameras in the courtroom: My personal view is that the disadvantages far outweigh the advantages."), with *id.* at 14 (statement of Judge Diarmuid O'Scannlain, Court of Appeals for the Ninth Circuit) ("I think our experience now over 13 years [with cameras at the Court of Appeals for the Ninth Circuit] . . . has indicated that it seems to work well and the vast majority of us feel that it is perfectly acceptable.") and *Allowing Cameras and Electronic Media in the Courtroom: Hearing on S. 721 Before the Subcomm. On Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106<sup>th</sup> Cong. 19, 20 (2000) (statement of Nancy Gertner, Federal District Court Judge for the District of Massachusetts) ("I strongly disagree with the position taken by the Judicial Conference. . . . I want to address why I speak in favor of the bill . . .").

<sup>85</sup> See, e.g., *Rally for Court Cameras Falls Short*, A.B.A. J., Mar. 1995, at 30 ("A committee of the U.S. Judicial Conference has decided not to revive the issue of cameras in the federal courts . . . . Following the vote, most of the chief judges of the 13 federal circuits signed a letter to the committee requesting that appeals courts be allowed to broadcast proceedings.").

<sup>86</sup> See *supra* note 18 (citing editorials).

## 1. Effects on Participants

Opponents of cameras in federal courtrooms are concerned about the effects that cameras will have on the participants in the courtroom. In trial courts, they worry that witnesses' behavior could be changed by the presence of cameras. Witnesses could become reluctant to testify.<sup>87</sup> Witnesses could become concerned about their own safety if they are seen by television viewers. Opponents are also concerned that witnesses could be nervous about testifying before the camera<sup>88</sup> and that their nervousness could be misunderstood by jurors.<sup>89</sup> Jurors could find the witnesses less credible even though their nervousness was attributable to the camera and not to untruthful testimony.

Opponents of cameras in federal district courts also worry about the effects of cameras on jurors. Jurors could become distracted by the cameras, as unobtrusive as they are, and focus on the cameras rather than on what is happening during the trial. Jurors also could worry about their safety. If the cameras capture their faces, even though the rules typically do not permit cameras to focus on individual jurors, then jurors could be identified. As one potential juror wrote: "I, for one, will be less willing to serve on a jury of a televised trial, because I will have to take the media's word that they won't accidentally show my face on the camera."<sup>90</sup>

Jurors who are not sequestered also could come under pressure from neighbors, friends, and relatives, who have watched a trial on television and know that they are serving on that jury.<sup>91</sup> It could become harder for these jurors to reach an unpopular verdict. Even when judges instruct jurors not to watch the news, they still might do so and see parts of the trial that they were not meant to see.<sup>92</sup> If the case needs to be retried, opponents worry that there will be a

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<sup>87</sup> See, e.g., *Broadcast Coverage Banned From Susan Smith's Trial*, L.A. DAILY J., July 3, 1995, at 4 (describing arguments by Susan Smith's lawyer that a televised trial would make witnesses "afraid to share intimate information necessary for her defense" and would subject witnesses to "community hostility" for their testimony). According to testimony by one federal district court judge, the Federal Judicial Center's study of a pilot program of cameras in certain federal courts led 46% of the participating judges to believe that "cameras made witnesses less willing to appear in court." *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 83 (2005) (statement of Jan E. Dubois, Federal District Court Judge for the Eastern District of Pennsylvania).

<sup>88</sup> *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 83 (statement of Jan E. Dubois) (expressing concern that 64% of the participating judges found that cameras made witnesses more nervous).

<sup>89</sup> See, e.g., Jack T. Litman, *Show Trials?*, L.A. DAILY J., Feb. 22, 1996, at 6 ("Many witnesses say the cameras make them nervous. A jury may conclude that a nervous witness is not telling the truth.").

<sup>90</sup> Patrick Frank, Letter to the Editor, *Trials on TV? No Thanks*, N.Y. TIMES, May 21, 2007, at A20; see Litman, *supra* note --, at 6 ("A significant part of the jury pool may be averse to serving on a televised case.").

<sup>91</sup> See *id.* ("[A]s a juror I want to be responsible only to the people in the room, not to millions of television viewers who may tune in for sensational reasons.").

<sup>92</sup> See, e.g., Litman, *supra* note --, at 6.

paucity of impartial jurors because prospective jurors could have watched the televised trial. Jury service is seen as a burden by many, leading them to ignore their summons.<sup>93</sup> Opponents of cameras in the courtroom worry that the added burden of jury service before a camera will lead additional prospective jurors to avoid their jury service.

Opponents of cameras in federal courtrooms also worry about the camera's effects on lawyers and judges. They worry that lawyers will play more to the cameras than to the courtroom.<sup>94</sup> Lawyers could become more dramatic, argumentative, or long-winded as they think about their image on television. Meanwhile, judges could become stricter or more lenient, more garrulous or taciturn, as they too think about television coverage.<sup>95</sup>

Even U.S. Supreme Court justices worry about how cameras might affect their exchange with lawyers during oral argument. Justice Kennedy expressed concern that cameras in the Supreme Court could encourage lawyers and justices to engage in sound-bites rather than legal arguments.<sup>96</sup> With the presence of cameras, some justices might feel self-conscious and limit their questions, while others might warm to the attention and become more voluble. In either case, behavior could change. Justice Kennedy described the exchange during oral argument as integral to his decision-making and he thought it important to preserve the give-and-take. He also suggested that the absence of cameras in the U.S. Supreme Court keeps the public and legal

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<sup>93</sup> See, e.g., ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS ix-x (American Judicature Society, 1998); Deborah Cassens Weiss, *Indianapolis Court Targets No-Show Jurors*, A.B.A. J., available at [http://www.abajournal.com/news/indianapolis/court\\_targets\\_no\\_show\\_jurors/print](http://www.abajournal.com/news/indianapolis/court_targets_no_show_jurors/print) (Jan. 9, 2008); Judge Joseph A. Colquitt, *Using Jury Questionnaires; (Ab)using Jurors*, JUDGES' JOURNAL, Winter 2008, at 10, 14-15; Marian Gail Brown, *Connecticut Jurors Plead in Absentia*, CONN. POST ONLINE (Bridgeport, Conn. Sept. 23, 2007), available at [http://www.connpost.com/portlet/article/html/fragments/print\\_article.jsp?articleId=698032](http://www.connpost.com/portlet/article/html/fragments/print_article.jsp?articleId=698032). The problem of citizens ignoring their jury summons has become so severe in some jurisdictions that judges have authorized sheriffs to issue summonses to passers-by. One judge in Vermont and another in Colorado engaged in this "roundup method" of summoning bystanders to serve as jurors. Vesna Jaksic, *Beware: A Trip to Store Could Mean Jury Service*, NAT'L L.J., Feb. 4, 2008, at 6. Another judge in Eugene, Oregon ordered a sergeant in the Sheriff's Office to go out on the street and summon the first twelve people he saw, after efforts to use the phone book to call people for jury service failed to elicit a sufficient number of jurors. *Oregon Judge Tries Dialing, Rounding Up Jurors*, SEATTLE TIMES, Aug. 29, 2008, at [http://seattletimes.nwsources.com/html/localnews/2008146325\\_weboregonjury29m.html](http://seattletimes.nwsources.com/html/localnews/2008146325_weboregonjury29m.html).

<sup>94</sup> Charley Roberts, *He's Expert on Celebrity Cases*, L.A. DAILY J., June 23, 1995, at 1, 11 ("Critics of cameras in the courtroom have asserted that attorneys engage in theatrics for the camera . . .").

<sup>95</sup> For example, in the Florida case over custody of Anna Nicole Smith's body, "Judge Larry Seidlin was accused of showboating for the camera. On live, national television, he discussed everything from his wife to his morning swim, then sobbed as he issued his ruling." Matt Apuzzo, *Federal Courts To Test Offering Trial Tapes on Internet*, CHI. DAILY L. BULL., Apr. 21, 2007, at 9.

<sup>96</sup> See, e.g., Mauro, *supra* note --, at 9 ("And by insisting that we perform our functions in a way that we've historically performed it, without the intrusive commentary that follows the camera and without the potential for changing the behavior of the judges and the attorneys that appear before us, I think there is a very strong case for continuing to exclude the cameras from our courtroom.") (quoting Justice Anthony Kennedy).

community appropriately focused on the Supreme Court's written opinions, in which the Justices explain their views, and which cannot be captured by television.<sup>97</sup>

High-profile cases, such as the state criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson and Ron Goldman,<sup>98</sup> serve as warnings for some in the legal community as to the ways in which judges' and lawyers' behavior can change when cameras are present in the courtroom. Even if the judge and lawyers were not aware of the camera at every moment of the O.J. Simpson criminal trial, they were sufficiently aware that their behavior became more exaggerated.<sup>99</sup> As the film director Sidney Lumet observed of the O.J. Simpson trial: "I don't think cameras . . . left anyone's consciousness for one second. This includes Judge Ito. This includes the defense. This includes the prosecution and the witnesses."<sup>100</sup> Indeed, "the OJ Simpson factor" has contributed to many federal judges' concerns that cameras will turn legal proceedings into a "media circus"<sup>101</sup> or "spectacle"<sup>102</sup> and that lawyers and judges are not immune from being drawn into it. There is also the related fear that cameras will "trivialize" the proceedings and make them "ordinary" and insignificant.<sup>103</sup>

Opponents of cameras in federal courtrooms conceive of the camera as affecting behavior, rather than as a neutral, passive, all-seeing eye. As one federal judge observed: "[Cameras] affect peoples' performance and manner of behaving--and it's not always for the

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<sup>97</sup> See, e.g., Linda Greenhouse, *2 Justices Indicate Supreme Court Is Unlikely to Televisе Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16 (explaining "the absence of cameras as a positive," Justice Kennedy said to the House Appropriations subcommittee, "[w]e teach that our branch has a different dynamic . . . . We teach that we are judged by what we write.").

<sup>98</sup> See *People v. Simpson*, No. BA097211 (Cal. Super. Ct. L.A. County 1995).

<sup>99</sup> See, e.g., Abraham Abramovsky & Jonathan I. Edelman, *Cameras in the Jury Room: An Unnecessary and Dangerous Precedent*, in CRIMINAL COURTS FOR THE 21ST CENTURY 314, 320 (Lisa Stolzenberg & Stewart J. D'Allesio eds., 2d ed. 2002) ("For example, the courtroom participants' media awareness reached a disturbing apex in the recent murder trial of O.J. Simpson. During the Simpson trial, the public was treated to the spectacle of attorneys, witnesses, and even the trial judge playing to the cameras despite the extreme seriousness of the business at hand."); Litman, *supra* note --, at 6 ("The O.J. Simpson trial confirmed what we already knew. Courtroom cameras affect the performance of all trial participants.").

<sup>100</sup> *Lights. Camera. Law.*, LEGAL TIMES, May 1, 1995, at 54.

<sup>101</sup> Horn, *supra* note --, at 1B.

<sup>102</sup> Sam Skolnik, *Unlikely Foe Slams Court Cameras*, LEGAL TIMES, July 10, 1995, at 16 (reporting that Chief Judge Gilbert Merritt of the U.S. Court of Appeals for the Sixth Circuit had found that "an increasing number of judges and lawyers have been turned off to cameras in the courtrooms because of the Simpson spectacle") (citation omitted).

<sup>103</sup> *Lights. Camera. Law.*, *supra* note --, at 54 ("And I think it's finally going to be a very corrupt influence, an influence that will reduce the pain, the significance, the importance of what is going on, because it's going to become ordinary, because it's interrupted by commercials, because it is part of your sit-com, and it's going to trivialize it.") (quoting Sidney Lumet).

good."<sup>104</sup> Another federal judge who participated in a pilot study that permitted cameras in some federal courtrooms on a limited basis found that "the camera is likely to do more than report the proceeding--it is likely to influence the substance of the proceeding."<sup>105</sup>

Although opponents of cameras in the courtroom worry about the effects that cameras have on participants' behavior, there have been few studies to date that show any effects on participants, and any effects, if they do exist, are more likely to be of concern in the trial court than the appellate court. The FJC study did not find that cameras had much of an effect on participants. It found that in some federal district courts, some judges thought that the cameras did have an effect on participants' behavior, but only in a small number of cases. For the most part, the judges participating in the pilot programs did not perceive any effect on participants. The FJC research project staff, in light of its evaluation of the pilot programs, recommended that federal courts permit cameras in federal courtrooms,<sup>106</sup> but the Judicial Conference rejected that position with respect to district courts and eventually left the appellate courts to decide on a circuit by circuit basis.<sup>107</sup>

Some federal judges looked at the findings of the FJC study and concluded that *any* effect on participants, no matter how small, should lead federal courts to continue the ban on cameras in the courtroom. Different federal judges interpreted the findings differently. For example, Judge Jan DuBois looked at the findings of a limited effect and concluded that even if a small number of litigants, jurors, or witnesses felt self-conscious or concerned about cameras in the courtroom, that number was sufficient to persuade her that cameras should not be permitted.<sup>108</sup> Other judges, such as Judge Nancy Gertner, thought that the benefits of cameras in the courtroom outweighed the harms, especially if the harms appeared in a limited number of trials.<sup>109</sup>

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<sup>104</sup> Horn, *supra* note --, at 1B (quoting Federal District Court Chief Judge Sandra Beckwith of the Southern District of Ohio).

<sup>105</sup> *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 86-87 (statement of Jan E. Dubois). Cf. Verlyn Klinkenborg, *History and the Problem of Following the Camera's Gaze*, N.Y. TIMES, Nov. 28, 2007, at A26 (observing two photos of the audience gathered to hear Lincoln at Gettysburg and noting that several audience members appeared distracted and offering an explanation for their distraction: "Perhaps, too, it's the way that humans, for all their ability to concentrate, will nearly always behave, if given the chance, like the animals we are -- easily distracted, diverted by a sudden motion, drawn off guard by the glint of light on a camera lens.").

<sup>106</sup> See FJC Study, *supra* note --, at 43-46.

<sup>107</sup> See, e.g., Charles Finnie, *Circuits to Set Own Rules on Camera Bans*, L.A. DAILY J., Mar. 13, 1996, at 1.

<sup>108</sup> See *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 83 (statement of Jan E. Dubois, Federal District Court Judge for the Eastern District of Pennsylvania) (expressing concern that 64% of the judges participating in the pilot program found that cameras made witnesses more nervous; 41% of the judges found that cameras led to witnesses who were distracted; 46% of judges thought the cameras made witnesses less willing to appear; and 56% of the judges found that the cameras violated witnesses' privacy).

<sup>109</sup> See *Sunshine in the Courtroom Act of 2007: Hearing on H.R. 2128 Before the House Judiciary Comm.*, -- Cong. -- (2007) (statement of Nancy Gertner, Federal District Court Judge).

## 2. Dignity of Court Proceedings

Another concern raised by opponents of cameras in federal courtrooms is the need to protect the dignity of court proceedings, particularly for the parties, in both civil and criminal cases. Several of the early cases in which cameras were allowed into courtrooms contributed to a sense that cameras created a circus atmosphere and undermined the seriousness of the matter before the court. Justice Clark, writing for the Court in *Estes v. Texas*,<sup>110</sup> noted that the Texas state court pretrial hearings in Mr. Estes' criminal case "were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled."<sup>111</sup>

Even though developments in technology have led to cameras that no longer require wires, cables, and camera crew everywhere, the presence of a camera, no matter how unobtrusive, can still contribute to a circus-like atmosphere, as several recent high-profile cases in state courts have suggested.<sup>112</sup> Opponents of cameras in federal courtrooms view the state court criminal trial of O.J. Simpson as an example of a case in which the presence of cameras in the courtroom detracted from the dignity of the proceedings. There have been different explanations for the circus-like atmosphere of the O.J. Simpson trial--from the omnipresent commentators on the courthouse steps to the celebrities involved in the case<sup>113</sup> to the personalities of the lawyers and judge<sup>114</sup>--but one recurring explanation was that gavel-to-gavel television coverage<sup>115</sup> led to trial as entertainment rather than serious business. In contrast, Timothy McVeigh, charged with the Oklahoma bombing, received a trial in federal district court before Chief Judge Richard Matsch, which was held up as a model. The dignity of the proceeding was attributed to the absence of cameras (though there was closed-circuit coverage

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<sup>110</sup> 381 U.S. 532 (1965).

<sup>111</sup> *Id.* at 536.

<sup>112</sup> *See supra* text accompanying notes --.

<sup>113</sup> *See, e.g., Broadcast Coverage Banned From Susan Smith's Trial, supra* note --, at 4 ("The actors in the O.J. Simpson case were to a large extent just that, actors, Hollywood people who live in Hollywood because they wanted to be in the public eye . . .") (quoting S.C. Trial Judge William Howard).

<sup>114</sup> *See, e.g., Charley Roberts, Simpson Leads to Rethinking of Cameras in Courtrooms, L.A. DAILY J.*, Nov. 8, 1995, at 1 ("In Simpson, . . . counsel . . . were unable or unwilling to voluntarily restrain themselves, and [Judge Ito] . . . was unable or unwilling to forcibly restrain them.") (quoting Douglas E. Mirell, a lawyer at Loeb & Loeb in Los Angeles).

<sup>115</sup> *See, e.g., Mike Lewis, Panel Calls for Partial Ban on Use of Cameras, L.A. DAILY J.*, Feb. 23, 1996, at 1, 28 ("The breathtaking media swarm at the trials [of O.J. Simpson and Lyle and Erik Menendez] and over the airwaves prompted legal scholars and politicians to question if the unprecedented attention was warping the process it attempted to cover.").

for the victims in Oklahoma City): "[T]he McVeigh trial worked so well, camera foes say, because the judge, lawyers, witnesses, and jury were not performing for a national audience."<sup>116</sup>

Opponents of cameras in the courtroom argue that cameras will compromise the dignity of the courtroom because cameras will transform the proceedings into a "spectacle" or "media circus," or at the very least, cameras will inspire grand-standing by lawyers and judges that will blur the line between entertainment and court proceedings. However, it may be that the presence of cameras in federal courts will reveal the dignity of courtroom proceedings, and thus, teach an important lesson to citizens outside the courtroom. It also may be that cameras will inspire better behavior on the part of judges and lawyers, and thus, contribute to the dignity of the courtroom proceedings.

Federal courtrooms, with their formal setting and judicial symbols, convey a seriousness of purpose. Although federal courtrooms differ in size, style, and capacity, they typically inspire respect for the proceedings. Whether it is the paneling, the formality of the seating arrangements, or the judge a robe, those who enter a federal courtroom immediately sense that they must conduct themselves with decorum akin to entering a house of worship. Were a camera to be installed discreetly in such a setting, one possibility is that it would not detract from the dignity of the setting, but rather it would capture the dignity and convey it to those outside the courtroom.

The formality of the proceedings, in addition to the formality of the setting, contributes to the dignity of the courtroom and also would be captured by the camera (if there were gavel-to-gavel coverage) and conveyed to those beyond the courtroom. When the judge enters the courtroom, everyone rises as a sign of respect. When the jury enters, everyone, including the judge in some courtrooms,<sup>117</sup> rises as a sign of respect. The trial follows a well-established order. Each side makes an opening statement, followed by the plaintiff in a civil case or the prosecutor in a criminal case trying to establish its case through the presentation of evidence. With each witness, there is the opportunity for direct examination, followed by cross-examination and rebuttal. If one party believes the other has asked an improper question, then that party can object, and the judge will rule on the matter. Each side has the opportunity to make a closing argument and the judge provides the jury with instructions. Although such formality is familiar to the judge and lawyers, it is unfamiliar to the public and jurors.

The formality of the proceedings contributes to the dignity of the courtroom. No matter how heinous the crime charged in a criminal case or how devastating the harms in a civil case, the proceedings are conducted in the same manner. The formality serves as a constraint on everyone's behavior and helps to ensure a fair trial in criminal and civil cases alike. A discreetly

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<sup>116</sup> Robert Schmidt, *What's Next For Cameras? Televised Trials Get a Surprise Jolt of Support*, LEGAL TIMES, June 9, 1997, at 1, 6.

<sup>117</sup> Judge Leonard B. Sand, a federal judge in the Southern District of New York, adheres to this practice as a sign of respect for the jury. He explained this practice to me during the year (1988-1989) that I was fortunate enough to serve as his law clerk.

placed camera that captures the formality of the proceedings could reveal the respect that every trial participant is accorded. It could be that those who view the proceedings from afar would observe the dignity of the proceedings, and would take away the same lessons of respect for the judicial process as those who are physically present in the courtroom.

The courtroom where this lesson is most likely to be learned is the U.S. Supreme Court. The physical setting, while not grand, is nonetheless inspiring. As one writer described the effect of the courtroom on those who enter: "Somehow the place casts a spell that brings forth in lawyers and visitors alike a rare sense of belonging to something substantial and appropriate."<sup>118</sup>

The proceedings in the U.S. Supreme Court are even more formal than those in other federal courtrooms, and the formality adds to the dignity. The Justices enter through a curtain and take their assigned seats. Upon the Justices' entry, everyone in the courtroom rises, and the Marshal announces that the Court is in session. With only rare exceptions, the lawyer for each side in a case has a half-hour for argument. The lawyer begins to make her argument, but soon finds herself in a colloquy with the Justices as they seek answers to the questions that trouble them about the case. At the end of the half-hour, a red light goes on and the lawyer must stop. The lawyer on the other side then has an opportunity to present her argument. When all the cases on the docket for that day have been heard, the Marshal announces the end of the session, everyone in the courtroom rises, and the Justices exit the courtroom.

Opponents of cameras in the Supreme Court worry that cameras will alter the dynamics of the oral argument and transform the rigors of the argument into the sound-bite of entertainment, but it could be that cameras will not alter the dynamics and will simply capture the dignity of the proceedings and convey it for all to see. The formality of the setting and the procedures contribute to this dignity. Justices engage in rigorous questioning and lawyers try to answer the questions carefully, quickly, and completely, but the exchange is conducted with civility.<sup>119</sup> All of the participants are committed to the common enterprise of trying to answer the particular legal questions raised by the case. If these lessons could be conveyed not just to those present in the courtroom, but to those even in remote parts of the country, then a vast number of Americans would know more about the judicial system. If ordinary citizens could learn about the U.S. Supreme Court from a broadcast of an oral argument, rather than by gleaning bits and pieces from fictional portrayals in movies and television, then at the very least they would be better informed and would have greater respect for this branch of government.

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<sup>118</sup> ROBERT SHNAYERSON, *THE ILLUSTRATED HISTORY OF THE SUPREME COURT OF THE UNITED STATES* 31 (1986).

<sup>119</sup> Chief Justice Warren's words at the end of the oral argument in *Gideon v. Wainwright*, 372 U.S. 335 (1963), reflect this basic civility:

I want to say that we're always indebted to members of the bar who are willing to undertake cases of this kind as a public service, and we're grateful to you [Mr. Abe Fortas] for having done so for this indigent defendant. We're very grateful to you, General Rankin, for having appeared as a friend of the court in the same cause. And of course, gentlemen of the attorney general's offices of Florida and of Alabama, we realize the great burden that you have in representing your state, and we appreciate the fair, frank, and earnest manner in which you have represented your states here.

We've had a good argument and we thank all of you.

MAY IT PLEASE THE COURT 193 (Peter Irons & Stephanie Guitton eds., 1993).

### 3. *Practical Obscurity of Judges*

Opponents of cameras in courtrooms explain that preserving judicial anonymity is another reason to keep cameras out of federal courtrooms. Anonymity in this context simply means that the judge's face or name is not well-known to the public. It does not mean that the judge performs his or her work anonymously because trial judges preside over a public trial and appellate judges hear oral argument in a public courtroom and judges usually issue a published, signed opinion.<sup>120</sup> A more accurate way of describing judges' lack of name and face recognition is that they are "practical[ly] obscur[e]."<sup>121</sup> Justice Stevens, writing for the Court in *United States Department of Justice v. Reporters Committee for Freedom of the Press*,<sup>122</sup> used this phrase, introduced by the government, to describe documents that are available to members of the public, but that are viewed infrequently because the documents are housed in disparate locations that require individual effort to locate.<sup>123</sup> This phrase also could be applied to federal judges who preside over public proceedings and issue public opinions, but who are rarely known by members of the public.

Practical obscurity is important to federal judges for several reasons. One reason is that it helps judges to be impartial and to give the appearance of impartiality. They remain distant figures, not personally associated with a case. A second reason is that federal judges often render unpopular decisions. District court judges stand alone when doing this. Appellate judges decide cases in panels or occasionally en banc. The obscurity of the isolated trial judge or even of the appellate panel affords them greater protection when rendering unpopular decisions. Unfortunately, practical obscurity, while providing some protection to federal judges, does not provide complete protection, as evidenced by the murder of Federal District Court Judge Joan Lefkow's husband and mother by a litigant who was upset with the judge's decision in his

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<sup>120</sup> In the district court or court of appeals, some opinions are unpublished because they do not establish new law, but simply apply accepted law. However, these unpublished opinions, particularly at the court of appeals level, have raised questions as to how public they are if they are unpublished and lack precedential value. A relatively new reporter, *West's Federal Appendix*, is now devoted wholly to unpublished opinions. See Judith Resnik, *Uncovering, Disclosing, and Discovering: How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI-KENT L. REV. 521, 559 n.161 (2006). Sometimes the U.S. Supreme Court has granted certiorari even when there is an unpublished appellate court opinion to remind lower courts that an unpublished opinion does not immunize the case from Supreme Court review. See, e.g., *Terrell v. Morris*, 493 U.S. 1, 3 (1989) (per curiam) ("The Sixth Circuit, by its unpublished opinion, affirmed a decision that the District Court never made, and so never reviewed that court's actual decision. . . . [T]he petition for certiorari [is] granted. The judgment of the Court of Appeals is vacated, and the case is remanded to that Court for further proceedings consistent with this opinion.").

<sup>121</sup> *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 762 (1989).

<sup>122</sup> *Id.* at 749.

<sup>123</sup> *Id.* at 764 ("Plainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations through the country and a computerized summary located in a single clearinghouse of information.").

case.<sup>124</sup> Judges who preside over cases with unpopular defendants or who have to make or enforce unpopular decisions also can be the recipients of threats.<sup>125</sup> There is some government protection that is afforded to judges,<sup>126</sup> but they also depend on their practical obscurity to keep them out of harm's way. Televised trials would mean that judges would lose their practical obscurity and would become identifiable to large audiences. Judges would become even more "exposed" than they already are.<sup>127</sup> The larger the audience, the greater the chance that it includes someone who disagrees with the judge's decision and is willing to act upon that disagreement.

One problem with federal judges' practical obscurity argument is that they are public figures, and several judges are already recognizable, though perhaps not to as many people as would be the case were cameras permitted in the courtroom. Federal judges are assigned to particular cases, and this is public information. When they write their opinions, they sign their name to them. If they have a high-profile case, their photo is likely to accompany the newspaper articles that describe the case. With on-going coverage of a high-profile case, they are likely to appear in the artists' sketches of the courtroom scene. Moreover, as Judge Martin observed, if anyone wants to see what he looks like, all they have to do is "Google" his name.<sup>128</sup> Federal judges can become known to the public even without cameras in the courtroom.

Even if some federal judges are practically obscure and would prefer to remain that way, that does not mean they are entitled to do so, particularly if there is a public benefit to be gained by having them relinquish their practical obscurity. If the choice is simply between permitting

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<sup>124</sup> See, e.g., Kevin Johnson, *Threats Up Against Federal Judges, Lawyers*, U.S.A. TODAY, Mar. 6, 2008, at -- ("The February 2005 murders of a Chicago federal judge's husband and mother . . . helped spur more intensive efforts to monitor judicial security."); James Oliphant, *Report: Efforts Lag To Protect Judges*, CHI. TRIB., Oct. 4, 2007, at 4 ("More than two years after the murders of two family members of a Chicago federal judge, a government report released [Oct. 3, 2007] warned that efforts to improve security for the nation's judiciary are 'languishing' even as threats against judges are rising."). For another state court example, see *Man Is Given 25-Year Sentence for Firing Rifle in a Courtroom*, N.Y. TIMES, Feb. 12, 2008, at A21 (describing a defendant who blamed the judge for delays in his case and who smuggled a sawed-off rifle into a small-town courtroom in New York and fired at the judge, though he did not hit him).

<sup>125</sup> See, e.g., L. Gordon Crovitz, *Judge, Jury, and Executioner*, NAT'L REV., Oct. 14, 1988, at 30, 33 ("One of the most unsettling aspects of this case [the school and housing desegregation case in Yonkers, N.Y.] is the spectacle of personal attacks on Judge Sand himself."); *id.* ("Clearly, the blood is on the judge's hands . . . The revolution has started and working people have to rise up.") (quoting Yonkers Councilman Edward J. Fagan, Jr.)

<sup>126</sup> For example, Judge Julia S. Gibbons, a judge on the Sixth Circuit, in a statement to the Appropriations subcommittees in both the House and Senate, requested \$439.9 million for federal court security for fiscal year 2009, which is a 7.3% increase over the \$410 million the federal judiciary received for court security in fiscal year 2008. John Flynn Rooney, *Judge: Federal Courts Need More Money*, CHI. DAILY L. BULL., Mar. 13, 2008, at 1.

<sup>127</sup> Johnson, *supra* note --, at -- ("Sentelle, who also is chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, says his colleagues have become 'exposed' as court dockets fill with more volatile disputes.").

<sup>128</sup> See Hon. Boyce F. Martin, Jr., *Gee Whiz, the Sky is Falling!*, 106 MICH. L. REV. FIRST IMPRESSIONS 1, 4 (2007), <http://www.michiganlawreview.org/first-impressions/vol106/martin.pdf> ("A quick Google search of my name yields nearly everything I have ever done in my judicial career, complete with photographs.").

judges to remain practically obscure or educating the populace about the judicial process, the latter might outweigh the former. From the judges' perspective, they might view their practical obscurity as a requirement for performing their job effectively and might be reluctant to relinquish it, but from a public perspective, having an informed citizenry might be even more critical, and perhaps judges need to recognize the competing interests. Judges can point to their practical obscurity as a form of protection against those who disagree with their decisions and who want to harm them. Certainly, keeping judges from harm's way is a public benefit, though perhaps there are better ways to protect judges than having them remain practically obscure.

Even if cameras were permitted in federal courtrooms that does not necessarily mean that judges would lose their practical obscurity. State court judges in many states have cameras in their courtroom, and yet, they are not recognizable to most citizens. Even if a judge handles a high-profile case, and is recognizable while that case is in the news, that does not mean that he or she will remain recognizable over time. Those U.S. Supreme Court Justices whose nomination hearings were televised<sup>129</sup> were recognizable to some limited segment of the viewing public during their hearings, but they did not remain recognizable as the years passed. Justice Breyer has said that the longer he is on the Court, the less he is recognized by the public.<sup>130</sup> Justice Stevens, one of the longest-serving justices,<sup>131</sup> had been on occasion mistaken for a tourist walking around the Supreme Court. Other tourists asked him if he would take their picture, not recognizing that he was a Supreme Court Justice.<sup>132</sup> According to polls, very few people can name<sup>133</sup> or recognize a Supreme Court Justice.<sup>134</sup> Justice O'Connor, the first woman appointed to the Supreme Court, had the highest recognition among Supreme Court Justices in a 1988 survey.<sup>135</sup> Twenty-three percent of those polled could identify Justice O'Connor, whereas only nine percent of those polled could identify Chief Justice Rehnquist.<sup>136</sup>

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<sup>129</sup> See *infra* note -- (Levitas & Mitnick).

<sup>130</sup> See 2 ALMANAC OF THE FEDERAL JUDICIARY 9 (2009).

<sup>134</sup> Justice Stevens served as a Justice for 34 1/2 years, having been sworn in on Dec. 19, 1975, and having retired at the end of June 2010. See COMM'N ON THE BICENTENNIAL OF THE U.S. CONST., THE SUPREME COURT OF THE UNITED STATES, ITS BEGINNINGS & ITS JUSTICES 1790-1991, at 274-77 (1992).

<sup>132</sup> See 2 ALMANAC OF THE FEDERAL JUDICIARY, *supra* note --, at 23.

<sup>133</sup> According to a 2003 Findlaw survey, "65 percent of Americans can't name a single member of the Supreme Court." Brian Wommack, *Commentary: Let the People See Justice*, LEGAL TIMES, Dec. 3, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1196417071147>.

<sup>134</sup> See, e.g., James H. Rubin, *High Court Justices Most Private of Public Officials*, CHI. DAILY L. BULL., May 18, 1992, at 2 ("To a large extent, [U.S. Supreme Court Justices] can come and go in without being recognized.").

<sup>135</sup> Rubin, *supra* note --, at 2.

<sup>136</sup> *Id.*

In this media age, some judges are reaching out to the public through means that extend beyond their written opinions. For example, Justices Stephen Breyer, Antonin Scalia, and Clarence Thomas have written books and have worked hard to publicize them.<sup>137</sup> They have appeared on talk-shows<sup>138</sup> and given interviews.<sup>139</sup> The press points to these instances and suggests that these justices are not interested in remaining practically obscure. According to one newspaper account, Justice O'Connor led the way.<sup>140</sup> According to another headline, *Justices Come Off the Bench to Chat*,<sup>141</sup> the Justices have been more willing to speak in public since Chief Justice Roberts became Chief Justice.<sup>142</sup> If they are willing to appear before a camera to describe their books, they also might be willing to appear before a camera during oral argument. They might not place as much value on remaining practically obscure as they once did.<sup>143</sup>

#### 4. Uneven Coverage--Too Little and Too Much

Some opponents worry that coverage will consist of brief, almost meaningless, snippets of trials. Television viewers who see only a minute or two of a trial might think that they know what the case is about and how it should be decided, and yet, they would have an incomplete understanding of the case compared to those in the courtroom.<sup>144</sup> In addition, their understanding of the case is likely to be shaped by the television commentary. A recent example was the case of Casey Anthony, charged with murdering her daughter, Caylee. The commentary provided by Nancy Grace was filtered through her pro-prosecution stance.<sup>145</sup> Yet, because

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<sup>137</sup> See James Oliphant, *Justices Come Off the Bench To Chat*, CHI. TRIB., Apr. 30, 2008, at 4 ("Breyer, Thomas and Scalia have since written books, and their sudden availability to the press has been timed with the release of those books.").

<sup>138</sup> See, e.g., *CNN: Larry King Live: Supreme Court Justice Stephen Breyer Interview* (CNN television broadcast Nov. 23, 2005) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0511/23/lkl.01.html>) [hereinafter *CNN: Larry King Live*].

<sup>139</sup> See, e.g., *A Voice for the Write: Tips on Making Your Case From a Supremely Reliable Source*, A.B.A. J., May 2008, at 37 (interviewing Justice Scalia); *Antonin Scalia Profiled* (CBS, 60 Minutes) (Apr. 28, 2008) (transcript).

<sup>140</sup> See Oliphant, *supra* note --, at 4 ("The new openness may have begun with now-retired Justice Sandra Day O'Connor[.]").

<sup>141</sup> *Id.*

<sup>142</sup> See *id.* (citing Edward Lazarus, a former Supreme Court law clerk, who speculated that Chief Justice Rehnquist "frowned on this a bit more than [Chief Justice] Roberts does").

<sup>143</sup> *But see* 2 ALMANAC OF THE FEDERAL JUDICIARY, *supra* note --, at 21 (describing Justice Souter as "probably the least known of the justices, eschewing the limelight and avoiding public appearance whenever possible").

<sup>144</sup> See, e.g., Litman, *supra* note --, at 6 ("No one can seriously argue that television simulates being present at the trial. . . . Television edits what we see and the editing process frequently has little to do with the balanced presentation of the evidence, and frequently prejudices the accused.").

<sup>145</sup> See Stelter & Wortham, *supra* note --, at A14.

viewers have the immediacy of the image, they feel like they are in the courtroom. Judges worry that television, with its time constraints and "sound bites," will give viewers a superficial understanding of the case, but will leave them confident that they understand it. From this perspective, Court TV, which covers an entire trial, is preferable to network coverage, which provides just a trial snippet.

Other opponents of cameras in courtrooms worry about too much coverage of a particular case. Cases that involve violence, sex, or celebrities<sup>146</sup> are more likely to receive television coverage<sup>147</sup> than cases on dry or complicated issues, even though the latter are more representative of the federal docket. Television viewers will form a skewed idea of the kinds of cases that federal courts decide. Meanwhile, viewers will be bombarded with images from the sensational cases night after night.

According to Professor Sara Sun Beale, the sensational cases lend themselves well to television coverage because a small, inexpensive crew can go to the courthouse for an extended period of time and cover courthouse activity and attorney press conferences, as well as conduct interviews with friends, neighbors, and family members of the victim and perpetrator.<sup>148</sup> Meanwhile, the on-going story generates suspense, which will be heightened by each new development, and will lead to higher television ratings.<sup>149</sup> The emphasis on one story, night after night, also can lead viewers to think the story is important<sup>150</sup> and can influence how viewers think about public officials, policies, and institutions involved in the story.<sup>151</sup> Opponents of cameras in federal courtrooms worry about these effects and that even though the use of cameras in courtrooms can be regulated, as the states' experience illustrates, once the footage is obtained, networks decide how they want to use it.

To assess how much of a problem uneven coverage could be, one starting-point is how

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<sup>146</sup> One study of local television coverage of civil litigation from 2004 through 2007 found that 13% of the news reports involved a celebrity. *See* Kritzer & Drechsel, *supra* note --, at 13. Film director Sidney Lumet explained that the O.J. Simpson trial attracted a huge audience because "it's got everything: race, sex, dope, a national hero." *Lights. Camera. Law.*, *supra* note --, at 54.

<sup>147</sup> *See, e.g.*, Sara Sun Beale, *The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness*, 48 WM. & MARY L. REV. 397, 427 (2006) ("Some cases, such as O.J. Simpson and William Kennedy Smith, involve wealthy or famous defendants. Others, such as the Lorena Bobbitt mutilation case, involve sexual titillation. . . . [T]he majority of cases covered in great detail by the networks had little traditional news value, and they exemplify the shift in content away from hard news.").

<sup>148</sup> *Id.* at 429.

<sup>149</sup> *Id.*

<sup>150</sup> *See id.* at 442 (observing the media's "agenda-setting" function and explaining that it "refers to the media's ability to direct the public's attention to certain issues") (footnote omitted).

<sup>151</sup> *See id.* (describing the media's "priming" function and explaining it as "the media's ability to affect the criteria by which viewers judge public policies, public officials, or candidates for office") (footnote omitted).

much of a problem it has been for states that permit cameras in their courtrooms. In state courts, this has not been a systematic problem--at least not one that has been documented. To the extent that uneven coverage has been a problem, it has been a problem of too much coverage rather than of too little and it has been a problem that has arisen in high-profile rather than run-of-the-mill cases. In these high-profile cases, such as the criminal trial of O.J. Simpson<sup>152</sup> in California and the dispute over Anna Nicole Smith's corpse in Florida,<sup>153</sup> the extensive coverage both in the courtroom and on the courthouse steps led to judges who could not control their courtrooms, judges and lawyers who played to the cameras, and to the branding of these cases as "media circuses" or "media spectacles."<sup>154</sup> These high-profile cases are not representative of most of the jury trials in state courts. Yet, these cases loom large in federal and state judges' minds about what can go wrong when cameras are permitted in the courtroom.

Federal judges view the problem of too much or too little coverage as one over which they have no control, but that is not necessarily the case. As will be discussed more fully in Part V, this potential problem exists if television networks control the cameras in the courtroom. However, if courts control the cameras, then this is less of a problem. If coverage of federal court proceedings were aired on a dedicated network, such as C-SPAN, which covers congressional debates in the U.S.<sup>155</sup> or BBC-Parliament, which covers parliamentary debates in the U.K.,<sup>156</sup> then there is less of a problem of too much or too little coverage. In addition, proponents of cameras in the courtroom point out that because cameras are the exception rather than the rule in federal courtrooms, the coverage is erratic. In their view, if cameras were a required component of every federal courtroom, then the reaction to them would be more matter-of-fact.

## II. UNDERLYING MOTIVATIONS AND ASPIRATIONS

The traditional arguments described and critiqued in Part I are the arguments articulated by proponents and opponents of cameras in the courtroom; however, the traditional arguments do not fully explain each side's position. Rather, there are underlying motivations and aspirations

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<sup>152</sup> See *supra* note 51 (citing O.J. Simpson state criminal trial).

<sup>153</sup> See, e.g., Apuzzo, *supra* note --, at 9 ("[U.S. District Judge Thomas F.] Hogan said the movement to open courts to cameras was hurt by the recent Florida case over custody of former Playboy playmate Anna Nicole Smith's corpse. In that case, Judge Larry Seidlin was accused of showboating for the cameras.").

<sup>154</sup> See *supra* notes 54-55.

<sup>155</sup> See *infra* text accompanying notes -- to --.

<sup>156</sup> Permanent television broadcasting of the House of Commons began in 1991, after an earlier period of experimentation. See Susan Prince, *Cameras in Court: What Can Cameras in Parliament Teach Us?*, 3 CONTEMP. ISSUES L. 82, 84 (1998). The permanent television broadcasting was conditioned on a dedicated station to carry the broadcast, and so, the Parliamentary Channel was created. *Id.* at 92-93. It is non-profit, and provides continuous, unedited coverage of the House of Commons. *Id.* at 93.

that play a significant role in shaping the two sides' respective positions. This Part will identify the underlying motivations and aspirations, which are not articulated, but which are influential nonetheless.

### *A. Media Proponents' Underlying Motivations*

#### *1. Running a Business*

On a practical level, television network executives are proponents of cameras in the courtroom because they are in the business of providing entertainment. They believe that cameras in the courtroom will provide entertainment to their viewers. The network spokesmen highlight the educational value of having cameras in the courtroom,<sup>157</sup> but viewers look for entertainment and network executives try to provide it. Viewers are unlikely to watch if the program is offered as a civics lesson, even though it might be educational. If viewers do not watch, then advertisers will not spend money on advertisements. Not surprisingly, advertisers want their advertisements to reach an audience. Network executives want cameras in the courtroom so that they can cover, with more vivid images than a courtroom sketch can provide,<sup>158</sup> cases that are likely to pique interest; typically, such cases involve sex, violence, or celebrities.<sup>159</sup> Although the networks can cover these cases with a reporter standing on the courthouse steps, the assumption is that coverage from inside the courtroom is more immediate, riveting, and likely to draw viewers into the drama of the case. Viewers who are captivated by the case will watch the television broadcasts day after day to follow the latest developments.

Court-TV, which provides gavel-to-gavel coverage of select cases on television, has a format that depends wholly upon cameras in the courtroom.<sup>160</sup> If Court-TV were not permitted to have cameras in state courtrooms there would not be much of a program or business remaining.

#### *2. Lobbying Congress*

Not surprisingly, Court-TV has been a staunch lobbyist of Congress. Since the 1990s, it

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<sup>157</sup> See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 73 (statement of Barbara Cochran, President, Radio-Television News Directors Association & Foundation; *id.* at 121 (statement of Henry Schleiff, Chair & CEO, Court TV Network).

<sup>158</sup> For an example where the trial judge thought that the court artist's sketch was too vivid and barred the sketch artist from the courtroom, see Molly McDonough, *Judge Bars Sketch Artist From R. Kelly Trial*, A.B.A. J., May 22, 2008, at [http://www.abajournal.com/news/judge\\_bars\\_sketch\\_artist\\_from\\_r\\_kelly\\_trial/print/](http://www.abajournal.com/news/judge_bars_sketch_artist_from_r_kelly_trial/print/).

<sup>159</sup> See Beale, *supra* note --, at 427.

<sup>160</sup> Peter Johnson, *Court TV Pushes for Wider Camera Access in Courtrooms*, U.S.A. TODAY, Oct. 6, 2004, at 3D (“Court TV’s bread and butter is in having its cameras in court, televising cases as they unfold.”).

has lobbied Congress to pass legislation that would allow cameras in federal courtrooms.<sup>161</sup> It supported a bill that was introduced in 1997 that would have allowed television in all federal courts, including the Supreme Court.<sup>162</sup> Steve Brill, the founder and former CEO of Court-TV, and other Court-TV executives have testified before Congress on the need to have cameras in federal courtrooms.<sup>163</sup> Congress considered another bill allowing cameras in federal courts in 2005, but the Senate failed to pass it.<sup>164</sup> In 2008, the Senate Committee on the Judiciary reported favorably on a bill entitled *To Permit the Televising of Supreme Court Proceedings*, which would have allowed, but not required, cameras in the U.S. Supreme Court,<sup>165</sup> but it was not taken up by the Senate.<sup>166</sup> Since the televised Senate Judiciary Committee hearings for Supreme Court nominees, Senators have typically asked the nominee whether they would be willing to have cameras at the Supreme Court, and the nominee has usually expressed some openness to the idea.<sup>167</sup> Although Court-TV defends its lobbying efforts by pointing to the education it provides its viewers, Court-TV rarely mentions that it needs cameras in the courtroom to survive as a business.

The television networks have joined Court-TV in lobbying Congress to pass legislation

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<sup>161</sup> See, e.g., Groner, *supra* note --, at 1, 18 (“Steven Brill, Court TV’s founder and chief executive, who has been lobbying Congress and the Judicial Conference for access to federal courts, says he now envisions a new strategy of persuasion: Get cameras in, one district at a time.”).

<sup>162</sup> See, e.g., Robert Schmidt, *What’s Next for Cameras? Televised Trials Get a Surprise Jolt of Support*, LEGAL TIMES, June 9, 1997, at 1.

<sup>163</sup> See, e.g., *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 119 (statement of Henry S. Schleiff, Chairman and CEO, Courtroom Television Network LLC).

<sup>164</sup> See *supra* notes -- and accompanying text.

<sup>165</sup> See S. Rep. No. 110-448, at 10 (2008).

<sup>166</sup> Sherman, *supra* note --, at 2 (“Both the House and Senate Judiciary committees have passed legislation in the past two years that would authorize, but not require, cameras in federal courts. But neither the full House nor the Senate has voted on the legislation.”).

<sup>167</sup> See, e.g., Richard Brust, *New & Improved Supreme Court 2.0*, A.B.A. J., Oct. 2008, at 38 (“During his confirmation hearings, [John] Roberts hinted that televising arguments might be possible . . . .”); Ralph Lindeman, *Confirmation Hearings*, 78 U.S.L.W. 2048, 2051 (July 21, 2009) (“Asked by [Senator Arlen] Specter whether she thought it was appropriate ‘in a democracy to let the people take a look inside the court through television,’ [Judge Sonia] Sotomayor noted that she has participated in experiments to allow cameras into the U.S. Court of Appeals for the Second Circuit, which she described as generally positive experiences.”); Adam Liptak, *A Seasoned Litigator Holds Sway*, N.Y. TIMES, July 15, 2009, at A15 (“[Judge Sonia Sotomayor] was suggesting [to the Senate Judiciary Committee] that she might be able to persuade the other justices, should she be confirmed, to think about allowing cameras into the Supreme Court.”); Mauro, *supra* note --, at 9 (“[David] Souter and [Anthony] Kennedy both were far less hostile to the idea of cameras when they were questioned at their confirmation hearings.”); David Mark, *New Push to Bring Cameras in Court*, POLITICO, May 11, 2009, <http://www.politico.com/news/stories/0509/22344.html>. (“[The Justices have] all been asked in their confirmation hearings [about cameras at the Supreme Court]. They say they’ll think about it and show some sympathy, and then it dies.”) (quoting Brian Lamb, CEO of C-SPAN).

allowing cameras in federal courtrooms.<sup>168</sup> The networks are not as dependent as Court-TV on cameras in federal courtrooms, but they stand to gain by the practice. Their television coverage will be enhanced if there are images of the courtroom, the trial, and the participants. More dramatic coverage could lead to higher ratings, which in turn could lead to more advertising dollars, as the advertisements reach larger audiences. Neither Court-TV nor the television networks point to the benefits that will inure to its respective businesses if cameras are permitted in federal courtrooms.

### 3. *Protecting Access*

Newspaper editorials on the subject of cameras in the courtroom favor cameras<sup>169</sup> even though newspapers do not stand to gain directly by cameras. However, newspapers do gain indirectly by protecting all media's access--whether print or broadcast--to the courtroom. For newspapers to stay in business, they need access to sources and events.<sup>170</sup>

At first glance, it would appear that newspapers should be against cameras in the courtroom. Reporters have a right to sit in the courtroom, observe the trial, and report on it. The absence of cameras means that all reporters--regardless of the medium--have to rely on their memories, their notes, or their Blackberrys in courtrooms that allow them,<sup>171</sup> so that they can write a story, whether that story is for a newspaper or a radio or television broadcast. The newspaper reporter's story might be accompanied by a single photo--an official head-shot of the judge, a candid shot of participants on the courthouse steps, or a courtroom artist's sketch of the trial--or it might be accompanied by no image at all, as is the radio reporter's story. Only the television reporter will need images because much of the television story is told through images,

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<sup>168</sup> For example, Seth D. Berlin, a lawyer at Berlin, Levine, Sullivan, Koch and Schulz, LLP, spoke in favor of cameras in the courtroom before the Senate Judiciary Committee. His written submission was "substantially derived from various briefs our law firm has submitted on behalf of media organizations seeking camera access to courts" even though he said that the views he expressed were his own and were "not necessarily those of [his] law firm or its clients." *Cameras in the Courtroom: Hearing Before S. Comm. on the Judiciary*, 109<sup>th</sup> Cong. 47 n.1.

<sup>169</sup> See *supra* note 14 (providing a sample of editorials favoring cameras in the courtroom).

<sup>170</sup> Whether newspapers will remain in business is, of course, an open question. See Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, THE NEW YORKER, Mar. 31, 2008, available at [http://www.newyorker.com/reporting/2008/03/31/080331fa\\_fact\\_alterman?printable=true](http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman?printable=true) ("Few believe that newspapers in their current printed form will survive. Newspaper companies are losing advertisers, readers, market value, and, in some cases, their sense of mission at a pace that would have been barely imaginable just four years ago."); *id.* ("Newspapers are dying; the evidence of diminishment in economic vitality, editorial quality, depth, personnel, and the over-all number of papers is everywhere. What this portends for the future is complicated."); Martin, *supra* note --, at A29 ("In many towns and cities, the newspaper is an endangered species. At least 300 daily papers have stopped publishing over the past 30 years.").

<sup>171</sup> See, e.g., Jerry Crimmins, *Ring Around the Media Circus at the R. Kelly Trial*, CHI. DAILY L. BULL., May 21, 2008, at 1, 24 ("Reporters were not allowed to carry their cell phones into the Kelly trial courtroom or to the overflow room . . . . By comparison, . . . [in the] trial of Jack Jordan, the man convicted of stalking movie star Uma Thurman . . . 'the media sat in the front row tapping away on their Blackberrys.'") (quoting Iain MacKenzie of the BBC).

as well as with words. In terms of competition, then, the newspaper and radio reporter seem to be at a competitive advantage compared to the television reporter when there are no cameras in the courtroom. Thus, newspapers and radio stations should want to retain the status quo of no cameras in federal courtrooms.

Yet, all of the media favor cameras in the courtroom, and one reason might be that they all depend on access to report their stories. Newspapers support television networks' access to cameras in the courtroom and to having images with which to report their story just as they support their own right to be present in the courtroom, to take notes, and to cover the case. They want television reporters to be able to do their jobs because it helps ensure that newspaper reporters will be able to do their jobs.

Another reason might be that newspapers, radio, and television are not actually competitors. A member of the public can look to many different sources for news, and can rely on newspapers, television, and radio everyday without relying on one source to the exclusion of others. Thus, it behooves all media to ensure that they have access and can cover events such as trials.

In addition, different types of media, including newspapers and radio, might favor cameras in the courtroom even when they do not stand to gain directly because of common ownership. For example, Rupert Murdoch owns newspapers, radio stations, and television networks.<sup>172</sup> Murdoch would want all of his companies to have access to newsworthy events. If there is common ownership of multiple forms of media, then it makes sense that they would support each other and not see themselves as competitors.

### *B. Media and Other Proponents' Aspirations*

The media's commitment to cameras in the courtroom is consistent with several of its broad goals, such as making government open to public scrutiny and exposing government wrong-doing. Several of these broad goals are shared by proponents who are not members of the media, such as legal academics, federal judges, and members of Congress. Although I will paint with broad brush strokes the media's aspirations below, I note that other proponents of cameras in the courtroom also share these broad goals.

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<sup>172</sup> See, e.g., Johnnie L. Roberts, *Murdoch, Ink.*, NEWSWEEK, Apr. 28, 2008, at <http://www.newsweek.com/2008/04/19/murdoch-ink.html> (“describing Rupert Murdoch’s “media properties, from Los Angeles-based Fox Broadcasting and the Silicon Valley headquarters of MySpace to the United Kingdom’s BSkyB satellite-TV company”); Gene Kimmelman, Op-Ed., *Be Concerned about Rupert Murdoch*, SEATTLE TIMES, Sept. 18, 2007, at [http://seattletimes.nwsource.com/html/opinion/2003889407\\_kimmelman18.html](http://seattletimes.nwsource.com/html/opinion/2003889407_kimmelman18.html) (“With Murdoch’s acquisition of Dow Jones, he will now own a No. 1 TV network, the most successful cable-news channel, two major TV stations in large markets like New York, Los Angeles and Chicago, and single stations in eight mid- to large-sized markets--along with The Wall Street Journal.”).

## 1. *Fostering Open Government*

The media's commitment to cameras in the courtroom is consistent with the broad goal of making government transparent to citizens. Thus, the media are motivated not just by their practical, day-to-day business needs, but also by their broader aspirations. One of these aspirations is to make government processes open to citizens to ensure that there is no government wrong-doing. The media plays a watch-dog role in this process. Cameras in the courtroom could aid in this process. Cameras are one tool, just as Freedom of Information Act (FOIA)<sup>173</sup> requests and court orders<sup>174</sup> are other tools. With these tools, the media try to bring to light information that the government, whether the judiciary, the executive, or the legislature, prefers to keep behind closed doors. The media's view of its job is to bring these government activities into public view so that the public can decide whether government officials are acting properly. Citizens need this information because they live in a democracy; they need to scrutinize actions that are taken by government officials on behalf of the public.

## 2. *Taking a Public-Centered Perspective*

Another way of describing the media's commitment to cameras in the courtroom is that the media takes a “public-centered” view of the courtroom. The trial is a public event and the media is committed to ensuring that the public can observe that event. Cameras in the courtroom can be an aid to public observation. One way that members of the public can observe a trial is by going to the courthouse and sitting through a trial. Another way is by having the media attend the trial, as a representative of the public, and reporting to the public about what they observed. Yet another way is by having the trial broadcast on television, whether in whole or in part, so that members of the public can observe the trial without actually having to be present in the courtroom.

According to this public-centered view of the trial, the media's goal is to protect public access; cameras in the courtroom provide a mechanism for achieving this goal. Although other trial participants, such as litigants and jurors, might have privacy interests that they seek to protect, this does not take priority for the media. Above all, the trial belongs to the public. According to this public-centered perspective, when litigants appear in the courtroom, their privacy interests must give way because their dispute is being resolved in a public forum that should remain open to public scrutiny.<sup>175</sup>

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<sup>173</sup> See 5 U.S.C. § 552 (2000).

<sup>174</sup> See, e.g., David Cay Johnston, *I.R.S. Is Sued on Failure to Release Tax Data*, N.Y. TIMES, Jan. 10, 2006, at A19 (describing the work of Professor Susan B. Long, who sued the IRS several decades ago and obtained a court order to collect audit data, which she has done until the agency stopped providing it).

<sup>175</sup> See Resnik, *supra* note --, at 526 (describing “the need to protect the public dimensions of adjudication and to create ways to vest public aspects into court-alternatives”).

### 3. Distrusting Judges

Although the media's commitment to open government does not require a distrust of federal judges, the media's insistence upon cameras in the courtroom does seem to be inspired by a distrust of judges. Proponents suggest that good judges have nothing to fear from cameras in the courtroom. Cameras will reveal good and bad judges, but only bad judges need to worry.<sup>176</sup> However, proponents of cameras seem to have an underlying distrust of federal judges. The distrust could be explained by any number of reasons: federal judges enjoy lifetime tenure and salary protection;<sup>177</sup> they are appointed rather than elected; trial judges' work, especially during the pretrial phase, is difficult for appellate courts to review;<sup>178</sup> trial transcripts are unable to capture everything that occurs in the courtroom;<sup>179</sup> and many federal judges resist the idea of cameras in the courtroom, thus suggesting that they have something to hide.<sup>180</sup>

Proponents' insistence upon cameras in federal courtrooms suggests a distrust of federal judges. After all, if proponents trusted federal judges and thought they were all doing a fine job, then cameras would not reveal much and viewers would not be drawn to watch. The media do not usually run stories about government officials who perform their jobs well. The underlying view is that judges are doing something wrong, which is why they do not want cameras in their courtroom, and why the media and other proponents feel a pressing need to have them there. Some proponents, especially those in Congress, have been explicit about their distrust of judges, indicating that cameras would reveal "activist liberal judges"<sup>181</sup> and judges who reach decisions with which they disagree.<sup>182</sup> Some proponents hope that cameras in federal courtrooms will lead

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<sup>176</sup> See, e.g., Jerriane Hayslett, *Florida Judge Shouldn't Be Courtroom Cameras' Poster Child*, JUDGES' J., Spring 2007, at 39 ("[I]f judges are competent, they shouldn't fear cameras."); *id.* ("And as for [Broward County, Florida, Circuit Judge Larry] Seidlin, shouldn't people be allowed to see him and decide for themselves if he's the kind of judge they want presiding in their courts?").

<sup>177</sup> See U.S. CONST., Art. III.

<sup>178</sup> See Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376, 403-14 (1982).

<sup>179</sup> See, e.g., Opening Panel: A Constructive Dialogue Between District Courts and the Court of Appeals, Seventh Circuit Bar Ass'n Annual Meeting (May 19, 2008) (noting that what takes place in the courtroom is not always captured by the transcript) (notes on file with author).

<sup>180</sup> See *supra* notes -- and accompanying text.

<sup>181</sup> Schmidt, *supra* note --, at 1.

<sup>182</sup> See, e.g., Tony Mauro, *The Right Legislation for the Wrong Reasons*, 106 MICH. L. REV. FIRST IMPRESSIONS 8, 10 (2007), <http://www.michiganlawreview.org/firstimpressions/vol106/mauro.pdf>. ("[I]n [Senator Arlen] Specter's floor speech . . . he seemed to be arguing for cameras in the Supreme Court as a way of punishing the Justices. . . . Senator Specter complained about several recent Supreme Court decisions that, he said, have shown less than proper respect for the role of Congress in the constitutional scheme.").

federal judges to reach different decisions than the ones they now reach or that those decisions can be used to embarrass the politicians who appointed them.

### *C. Judges' Underlying Motivations*

#### *1. Maintaining Control*

One underlying and unspoken reason for federal judges to resist cameras in the courtroom is that they need to maintain control in the courtroom and they worry that cameras will undermine their control. Certainly, there are legitimate reasons for a trial judge to exercise control in the courtroom. The main reason is to ensure a fair trial. Both sides need the opportunity to argue their case. Neither side can be permitted to introduce irrelevant testimony, to expound at great length, or to badger witnesses. The judge also needs to maintain control so that jurors and witnesses are treated properly. With cameras in the courtroom, judges worry that they will lose control because lawyers will play to the cameras, judges will feel self-conscious, and witnesses, jurors, and parties will become distracted or unnerved.

Part of maintaining control in the courtroom is creating an environment in which the participants can perform their roles well, so that the judge in a bench trial or the jurors in a jury trial are given the information they need to reach a decision. There is concern among trial judges that even if they maintain control over the courtroom, there will be subtle changes in the dynamics of the courtroom; for example, the tone and give-and-take will be affected once cameras are introduced.<sup>183</sup> Even some appellate judges and Supreme Court Justices share this concern. For example, Justice Kennedy, in his appearance before the Senate Judiciary Committee, explained that the exchange during oral argument was important for the Justices as part of their decision-making process. He worried that the tenor would be ineluctably altered by the introduction of cameras in the Supreme Court.<sup>184</sup>

Although the judge has to maintain control in the courtroom, that control should not become excessive or abusive. Just as lawyers need to be civil, so too does the judge. The need to exercise control does not entitle the judge to denigrate or embarrass lawyers or to indicate a preference for one side or the other. Some proponents of cameras in the courtroom suggest that judges will behave better if they know they are being televised.<sup>185</sup> Even though there are other constraints on a judge's behavior,<sup>186</sup> such as the presence of the press and members of the public

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<sup>183</sup> The tone and participation that judges try to encourage in the courtroom is similar to what professors try to create in their classroom. Just like cameras in the classroom might inhibit or alter classroom discussions, so too, it might affect the dynamics of the courtroom.

<sup>184</sup> See *supra* notes 49 & 50.

<sup>185</sup> Proponents' other theory is that judges, like everyone else in the courtroom, will quickly forget that they are being televised. See *supra* text accompanying note --. If this theory is correct, then cameras in the courtroom will not change judges' behavior, including those judges who behave improperly in the courtroom.

<sup>186</sup> See *supra* note -- and accompanying text.

and the court reporter taking down every word, there are still opportunities for a judge to abuse his or her control. A judge might be able to do this because appellate courts find such behavior, particularly during the pretrial phase, difficult to review.<sup>187</sup> After all, appellate judges are not in the courtroom and cannot see what spectators see. Also, judges can abuse their power, not just by what they say, but also by the way in which they say it, such as through gesture or tone, and these are not reflected in a transcript.<sup>188</sup> Thus, if appellate judges could "see" what those in the courtroom see, then they would be in a better position to constrain those trial judges who abuse their power. Interestingly, in a pilot program in which courtroom proceedings of five federal district court judges and one magistrate were videotaped, appellate judges indicated that they preferred to review appeals based on a transcript rather than a videotape.<sup>189</sup> Videotapes took far more time to review.<sup>190</sup> Some academics have proposed creating visual records of the trial to address particular problems that can arise, such as *Batson*<sup>191</sup> challenges.<sup>192</sup> The theory is that if appellate judges could watch the voir dire, just as the trial judge does, and have a visual record rather than a "cold transcript," then they would be in a better position to identify *Batson* violations. Proponents of cameras in the courtroom predict a similar effect: cameras would capture the problem of judicial control gone awry whereas without cameras these excesses are difficult to detect.

## 2. Avoiding the Limelight

Federal judges also might resist cameras in the courtroom because they are camera-shy.<sup>193</sup> Although they do not generally call attention to this trait, it is a good trait for federal judges to have. Federal judges, unlike many state court judges, are appointed rather than elected. They do not have to become well-known in order to obtain or keep their job, as elected state court judges do. In fact, federal judges often view their practical obscurity as an aid, not a detriment, to

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<sup>187</sup> See Resnik, *supra* note --, at 414 ("Unlike pretrial management, posttrial activity occurs within a framework of appellate oversight, public visibility, and institutional constraints that inhibits overreaching.").

<sup>188</sup> See, e.g., Note, *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985); Note, *Judges' Nonverbal Behavior in Jury Trials: A Threat to Judicial Impartiality*, 61 VA. L. REV. 1266, 1278 (1975).

<sup>189</sup> See John Shapard, Evaluation of Videotape Experiment, May 25, 1993, at 2 (unpublished memorandum written to the Judicial Conference Committee on Court Administration and Case Management) ("A majority [of federal appellate judges] voiced strong opposition to use of videotape in lieu of transcript.").

<sup>190</sup> See Shapard, *supra* note --, at 3 ("By far the most common objection to videotape [by federal appellate judges] was that it is much more time consuming to review a videotape than a transcript.").

<sup>191</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986) (creating a framework to challenge a prosecutor's exercise of peremptory challenges based on race).

<sup>192</sup> See Mimi Samuel, *Focus on Batson: Let the Cameras Roll* (unpublished paper on file with author).

<sup>193</sup> Horn, *supra* note --, at 1B ("[M]ost federal judges here [in Ohio] and across the country remain camera shy.").

performing their job effectively.<sup>194</sup> They can make unpopular but correct decisions because they are not beholden to the electorate.

In fact, much of the work of a federal judge involves solitary tasks, such as researching and writing opinions. This is particularly so for the appellate judge, who spends most of his or her time working in Chambers reading briefs, preparing for oral arguments, drafting opinions, and reading drafts of other judges' opinions. Even trial judges, who interact with lawyers, parties, and jurors, perform most of their work on their own. Trial judges, unlike appellate judges, sit on their own in the courtroom.<sup>195</sup> They do not usually consult with fellow trial judges. Given how much of the work of a federal judge requires solitude, the person who is well-suited to this position is most likely to be one who avoids the limelight and the cameras, though of course there are federal judges who do not fit this description, either because they enjoy the limelight or because the position of federal judge or justice involves more public appearances than they would prefer.<sup>196</sup>

### 3. *Viewing the Courtroom as a Workplace*

Although the courtroom is a public space, it is also a federal judge's workplace, even if most judges do not draw attention to this function. An appellate judge's work is carried out in Chambers and the courtroom. Oral argument is conducted in the courtroom. Although some lawyers are convinced that judges have already made up their minds once they have read the briefs, many appellate judges believe that although they reach a tentative view upon reading the briefs, their views can change over the course of hearing oral argument, drafting an opinion, and reading opinions and memos from other judges on the panel.<sup>197</sup> In one early survey of federal appellate judges, seventy-seven percent of respondents said that they found that they "sometimes" changed their minds after hearing oral argument and eighty-eight percent of respondents described oral argument as "very helpful" or "often helpful."<sup>198</sup>

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<sup>194</sup> See *supra* Part II.B.3.

<sup>195</sup> The exception would be when federal district court judges sit as part of a three-judge district court panel, see 28 U.S.C. § 2284, though these are rare, or when they sit by designation as part of a Court of Appeals panel. See 28 U.S.C. § 292(a).

<sup>196</sup> See, e.g., 2 ALMANAC OF THE FEDERAL JUDICIARY, *supra* note --, at 21 (quoting a note that Justice Souter wrote to Justice Blackmun in 1996, in which he said: "In a perfect world, I would never give another speech, address, talk, lecture or whatever as long as I live").

<sup>197</sup> See *id.* at 25 ("[L]awyers are capable of persuading judges to change their minds. I cannot tell you how often a case seemed perfectly clear when I finished reading the blue brief, equally clear the other way after reading the red brief, and back again to the petitioner's side after the yellow brief and the advocates' oral arguments were digested.") (quoting Justice Stevens in his speech to the Am. Bar Ass'n, Aug. 1996); *CNN: Larry King Live*, *supra* note -- ("I'm holding myself open to being persuaded and if I come out of that oral argument and I change my mind, as I do on occasion sometimes, more often than people think, I don't think, oh how stupid I was. I think how great. You see I'm holding myself open. I want to be persuaded, so persuade me.") (quoting Justice Stephen Breyer).

<sup>198</sup> 2 Federal Courts Study Comm., Working Papers and Subcommittee Reports, July 1, 1990, Survey of the United States Circuit Judges, at 12. This survey, which was compiled in 1989, was based on the responses of 133 of 152

The courtroom is also a workplace for a federal district court judge, particularly for deciding motions, which is how a significant number of cases filed in federal district court are resolved.<sup>199</sup> If they are not decided by motion it is usually because they have settled;<sup>200</sup> only two percent of civil cases and six percent of criminal cases went to trial in federal courts in 2000.<sup>201</sup> Federal judges spend much of their time deciding motions, and they undertake much of the legwork for these decisions in the courtroom.

For the small number of cases that are decided by bench or jury trial, the courtroom again serves as a workplace for the judge. During a bench trial, for example, the judge hears evidence upon which he or she will decide the case. Although the trial judge relies on briefs and cases to draft the opinion, the judge also relies on the evidence that was presented in the courtroom. The point is that currently the courtroom is where the judge gleans much of the information necessary to decide the case. Although writing and research take place in Chambers, much of the fact-finding, assessing of witness credibility, and testing of legal arguments take place in the courtroom.

#### *D. Judges and Other Opponents' Aspirations*

##### *1. Providing a Fair Trial*

Federal judges and other opponents of cameras in the courtroom worry that cameras will interfere with the parties' right to a fair trial. Although states continue to allow cameras in many of their courtrooms, and have not retreated from this practice over the past few decades, the state cases that became media spectacles suggest to federal judges that cameras will compromise the fairness of the trials. The state criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson and Ron Goldman, and the first state criminal trial of the Menendez brothers for the murder of their parents loom large for federal judges.<sup>202</sup> Although these state trials might be outliers, their message about how cameras can interfere with a fair trial is nonetheless powerful.

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federal circuit court judges on active status (88% response rate) and on 23 of 76 federal circuit court judges on senior status (30% response rate).

<sup>199</sup> See, e.g., Galanter, *supra* note --, at 484 (“Comparing a sample of cases in six metropolitan districts over the period 1975-2000, the [FJC] researchers found that the portion of cases terminated by summary judgment increased from 3.7 percent in 1975 to 7.7 percent in 2000.”); *id.* (drawing from figures used by FJC and Professor Stephen Burbank to “suggest that we have moved from a world in which dispositions by summary judgment were equal to a small fraction of dispositions by trial into a new era in which dispositions by summary judgment are a magnitude several times greater than the number of trials”).

<sup>200</sup> See *id.* at 515 (“For a long time, the great majority of cases of almost every kind in both federal and state courts have terminated by settlement.”).

<sup>201</sup> See OWEN M. FISS & JUDITH RESNIK, ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 9, 19 (2003).

<sup>202</sup> See *infra* text accompanying notes – to --.

The right to a fair trial in federal court is rooted in the Sixth Amendment in criminal cases and has been read into the Seventh Amendment in civil cases. Although the press has a First Amendment right to be present at trial, its right is no greater than that belonging to members of the public.<sup>203</sup> When the First Amendment right of the press to be present at trial comes into conflict with a defendant's Sixth Amendment right to a fair trial, the fair trial can take priority depending on the circumstances.<sup>204</sup> Moreover, the press's right to be present does not entail a concomitant right to be present with a camera in tow. The Supreme Court's early cases on cameras in the courtroom made that clear.<sup>205</sup>

Although cameras are unobtrusive and no longer require the lights, wires, and crew that they once did, their presence can still create a media spectacle that could undermine a criminal defendant's right to a fair trial. The images from the courtroom that become ubiquitous on cable television and the Internet twenty-four hours a day can create a new form of media spectacle. State court judges who handle high-profile jury trials are acutely aware of this problem. Their priority is a fair trial, even if the media does not see it that way.<sup>206</sup>

For example, the state criminal trial of R. Kelly, a famous R & B singer charged with violating various child pornography laws, led Cook County Criminal Court Judge Vincent Gaughan to take several precautions to provide R. Kelly with a fair trial, including barring the press from certain hearings and documents, conducting jury selection in the jury room rather than open court, allowing a rotating pool of two journalists to cover jury selection, prohibiting lawyers and employees connected to the case from discussing it, designating certain areas for press interviews, and punishing those who violated his orders.<sup>207</sup> Judge Gaughan was intent upon avoiding the media circus that was likely to accompany a case described by *The New York Times* as "the highest-profile case in the court since the serial killer John Wayne Gacy was tried there in

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<sup>203</sup> See, e.g., *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 608-09 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.").

<sup>204</sup> See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976) ("The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other."); see also Editorial, *R. Kelly and Court Secrets*, CHI. TRIB., Apr. 30, 2008, §1, at 22 ("While a judge may close proceedings in some circumstances, that option is available only when the judge finds there is a compelling interest in the closure and no other feasible way to uphold that interest.").

<sup>205</sup> See *Chandler v. Florida*, 449 U.S. 560 (1981); *Estes v. Texas*, 381 U.S. 532 (1965).

<sup>206</sup> See, e.g., Editorial, *R. Kelly and Court Secrets*, *supra* note --, at 22 ("The judge has an obvious motive; assuring a fair trial and preventing a media spectacle along the lines of the O.J. Simpson experience . . . But they have to be weighed against the right of the public and the press to know what's going on. So far, Gaughan has erred much too far in the other direction.").

<sup>207</sup> See, e.g., David Streitfeld, *Chicago Prepares For Trial of R. Kelly*, N.Y. TIMES, May 20, 2008, at B1 (describing Judge Gaughan as "not taking any chances on a media circus").

1980."<sup>208</sup> Although Judge Gaughan was willing to limit media access at various points in the proceedings, he was unwilling to limit public and media viewing of the videotape, which allegedly showed the singer having sex with an underage girl.<sup>209</sup> Both the singer and the girl denied that they were the people in the videotape.<sup>210</sup> Judge Gaughan denied both the prosecutor's motion to bar the public and the defendant's motion to bar the public and the media from watching the videotape in open court because the videotape was, according to the judge, "the whole crux and linchpin of the case."<sup>211</sup> Judge Gaughan's rulings were never tested on appeal because a jury ultimately acquitted R. Kelly on all counts.<sup>212</sup> The case never became a public spectacle,<sup>213</sup> perhaps because of Judge Gaughan's rulings or perhaps for other reasons,<sup>214</sup> but R. Kelly and his lawyers felt that he had received a fair trial.<sup>215</sup>

## 2. *Taking a Participant-Centered Perspective*

Judges worry not just about providing the defendant with a fair trial, but also about protecting the privacy interests of parties, victims, witnesses, and jurors. The more sensational the case, the more closely the press will want to cover it, and the more closely the judge will have to attend to participants' privacy interests. It might be important for witnesses and jurors to avoid having their faces revealed on a television broadcast in order to ensure their safety or to keep them free from outside influence.<sup>216</sup> It might be imperative for the victim to avoid media exposure so that she does not have to repeat the experience of being a victim both in court and in the media. Whereas proponents of cameras in the courtroom tend to view the trial from a public-

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<sup>208</sup> *Id.* at B1, B6.

<sup>209</sup> *See, e.g.,* Kayce T. Ataiyero, *Public Will See Kelly Tape*, CHI. TRIB., Aug. 22, 2007, at sec. 2, 1.

<sup>210</sup> *See id.* at 14.

<sup>211</sup> *Id.*

<sup>212</sup> *See, e.g.,* Stacy St. Clair & Kayce T. Ataiyero, *Why the Jury Acquitted R. Kelly: Jurors Say Verdict Hinged on Doubt about Identity of Girl on Sex Tape*, CHI. TRIB., June 14, 2008, at 1; David Streitfeld, *Chicago Jury Acquits R. Kelly on All Counts in Child Pornography Trial*, N.Y. TIMES, June 14, 2008, at A19.

<sup>213</sup> Streitfeld, *supra* note --, at A19 ("[A]s a public spectacle the trial was something of a bust"); *id.* ("On most days there was more courtroom security than spectators.").

<sup>214</sup> *See id.* ("The courthouse is in an inconveniently located neighborhood, the charges were old, and allegations of the singer's interest in under-age women are older still.").

<sup>215</sup> *See id.*

<sup>216</sup> *See, e.g.,* Timothy J. McNulty, *R. Kelly Secrecy Weakens System*, CHI. TRIB., May 2, 2008, sec. 1, at 25 ("During the trial of a mob figure, jurors may not be identified to protect them from possible intimidation."). *But see* Shannon P. Duffy, *3rd Circuit Rules Media Has Right to Juror Names*, at Law.com, <http://www.law.com/jsp/pa/PubArticlePA.jsp?id=120242> (Aug. 4, 2008) (reporting that the Third Circuit held "the media has a presumptive right of access to the names of jurors, and that a Pittsburgh federal judge erred when he sought to empanel an anonymous jury in the corruption trial of former Allegheny County coroner Cyril H. Wecht").

centered perspective, opponents, who are largely federal judges, tend to take a more “participant-centered” view of the proceedings. Cameras in the courtroom make it harder for all judges--federal and state--to protect the privacy interests of participants. Although trial participants are involved in a public proceeding, they do not relinquish all privacy interests when they enter the courtroom.

State court judges, who have to balance the presence of cameras and the protection of privacy interests,<sup>217</sup> have done so by imposing various restrictions on the media, but one difficulty is that mistakes can be made. For example, in the state criminal trial of Kobe Bryant, which was ultimately dismissed, the victim was not supposed to be identified by name by the media, yet her name and intimate details were inadvertently posted by the court on the Internet.<sup>218</sup> Earlier in this same case, court clerks had inadvertently sent transcripts of a hearing to several news organizations.<sup>219</sup> In the state court criminal trial of R. Kelly, the judge had instructed the *Chicago Tribune's* sketch artist to use ovals to represent the jurors' faces so that they remained unidentifiable; however, she included sufficient detail that the jurors could be recognized.<sup>220</sup> The judge barred her from the courtroom.<sup>221</sup>

Federal judges recognize that trials are public proceedings, but they also recognize the privacy interests of the participants in the trials and try to protect their interests too. Cameras in the courtroom make the job of protecting privacy interests that much more difficult, as some state court judges have observed, particularly in high-profile cases.<sup>222</sup> Even when state court judges try to balance the public and privacy interests by narrowly tailoring what can and cannot be captured by cameras, mistakes can occur. Once the image has been broadcast, even if done inadvertently, it is out there for all to see.

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<sup>217</sup> See, e.g., *Unlikely Foe Slams Court Cameras*, LEGAL TIMES, July 10, 1995, at 16 (recounting Judge William Howard's decision to bar cameras in the S.C. trial of Susan Smith, charged with drowning her two sons, because “[t]here is an absolute likelihood that broadcast coverage in the courtroom would interfere with the due process of this trial and pose a risk to this case”).

<sup>218</sup> See, e.g., T.R. Reid, *Court Staff Errs Again in Bryant Case*, WASH. POST, July 29, 2004, at A2 (“[T]he court staff posted on the Internet a document that included [the alleged victim's] name and some intimate details about her. It marked the third time that clerks at the small rural courthouse in Eagle, Colo., had mistakenly released sealed information to the public, in violation of court rules designed to protect the woman's privacy.”).

<sup>219</sup> See, e.g., Reid, *supra* note --, at A2.

<sup>220</sup> See, e.g., McDonough, *supra* note --.

<sup>221</sup> *Id.*

<sup>222</sup> See, e.g., Sarah Lavender Smith, *Judge Bars Cameras in Polly Klaas Trial*, L.A. DAILY J., Sept. 7, 1995, at 3 (“[Sonoma County Superior Court Judge Lawrence Antolini] listed several factors [in the trial of Richard Allen Davis for the abduction and murder of 12-year-old Polly Klass] that influenced his decision [to ban cameras], including expected testimony from child witnesses, the distracting nature of cameras, widespread media attention to the case and a concern that broadcast coverage would make it difficult for jurors to avoid publicity, which could result in the need for them to be sequestered.”); see also Patricia Jacobus, *Off the Air: Judge in the Polly Klaas Case Wants to Avoid the Problems of O.J.*, L.A. DAILY J., June 14, 1995, at 1 (“There are children as witnesses and a lot of sensitive issues.”) (quoting Judge Antolini's judicial assistant Mary Parry-Jones).

### 3. *Trusting Judges*

Federal judges, many of whom are against cameras in the courtroom, seem to have an underlying trust in the way that they and their colleagues perform their work. Thus, underlying their opposition to cameras is a view that federal judges are, for the most part, performing well, and that cameras will not reveal bad federal judges, but will simply complicate the work of all federal judges. It could be that federal judges trust the job that they are doing, even if they do not trust the job that all of their colleagues are doing, but prefer to maintain the status quo so that they can continue to perform their job well. But like polls of jurors who think that they performed their role as responsibly as possible and who think more highly of the judicial system after having served as jurors,<sup>223</sup> federal judges might think that they perform their role ably and hold a favorable view of the work of the federal judiciary.<sup>224</sup>

In contrast, some federal judges who are proponents of cameras might be motivated by distrust of the power that they and their colleagues wield and view cameras as a way of keeping such power in check. Or, perhaps they have some colleagues whom they think are not performing well and should be exposed. Or, perhaps some proponents believe that federal judges do a good job and that their work should be seen by the public because the public would have more respect for the judiciary and a greater understanding of all three branches of government.<sup>225</sup> Although proponents who are federal judges might or might not be motivated by a distrust of their fellow judges, opponents who are federal judges seem to have an underlying trust in the way that they and their colleagues perform their jobs.

### III. OTHER POLICY CONSIDERATIONS

In addition to the arguments that proponents and opponents make, there are other policy considerations that have not received any attention in the debate. One consideration is that of unintended consequences. The introduction of cameras in the courtroom, particularly if federal

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<sup>223</sup> See, e.g., Stephanie Simon & Amy Dockser Marcus, *Jurors Don't Mind Duty, Survey Finds*, WALL ST. J., July 3, 1991, at B3:

People who serve on juries may grumble about the inconvenience but they end up surprisingly satisfied with the experience, a nationwide survey says. More than 80% said they came away with a favorable view of their service, according to the survey of 8,468 jurors by the National Center for State Courts.

*Id.* ("Almost two-thirds of those surveyed, who sat on state and federal juries in eight states, said they would serve again eagerly.").

<sup>224</sup> One federal appellate court judge has suggested that "[m]ost judges, like serious artists, are trying to do a 'good job,' with what is 'good' being defined by the standards for the 'art' in question." RICHARD A. POSNER, *HOW JUDGES THINK* 12 (2008).

<sup>225</sup> See, e.g., *Allowing Cameras and Electronic Media in the Courtroom: Hearing Before the S. Subcomm. on Admin. Oversight & the Courts of the Comm. on the Judiciary*, 106<sup>th</sup> Cong. 22-23 (2000) (statement of Judge Nancy Gertner).

judges oppose the idea, could reduce federal judges' use of the courtroom and encourage them to decide cases based simply on the briefs. A second consideration is the lack of reliable empirical studies. Before introducing cameras in federal courts, there is a need for reliable data. The Judicial Conference's recent decision to undertake a three-year pilot program will address that concern. A third consideration is the states' experience with cameras in the courtroom: most states have not had problems that they have documented, but there have been a few cases that had a lot of problems and received a lot of attention in the media. Moreover, state courts are sufficiently different from federal courts, particularly in the way in which judges in each system are selected, that state court judges might have embraced cameras for reasons that are inapplicable to federal court judges.

#### A. *Unintended Consequences*

Institutions are not fixed in stone. A change in one practice or procedure can affect others, and not always in predictable ways. If federal judges find themselves having to work in the courtroom under the watchful gaze of the camera, they might shift their work from courtroom to Chambers. This has already happened to some extent, and the trend could be exacerbated by cameras in the courtroom.

Appellate judges in the Courts of Appeals and the Supreme Court hear oral argument, after having read the briefs but before deciding the case. The idea is that the exchange between lawyer and judge can give the judge a chance to seek clarification or to focus on issues of particular concern. The lawyer's brief might not have addressed all of the issues with sufficient clarity, and oral argument gives the judge an opportunity to press the lawyer on facts that might be unclear or precedents that are open to different interpretations. Oral argument also gives the public an opportunity to learn about the case and to hear both sides' presentations as well as the questions raised by the judges.

One possibility is that appellate judges will cut back on oral argument if cameras become fixtures in the courtroom. Currently, appellate panels can decide that oral argument is unnecessary as long as the three panel judges agree that the appeal is frivolous or that the dispositive issues have been decided definitively or that the facts and legal arguments are adequately presented by the briefs and record.<sup>226</sup> Indeed, there is already a trend among the federal circuit courts toward holding fewer oral arguments.<sup>227</sup> In 1997, the federal courts of appeals heard oral argument, on average, in forty percent of all appeals.<sup>228</sup> In 2007, the federal

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<sup>226</sup> FED. R. APP. P. 34(a)(2).

<sup>227</sup> See, e.g., Galanter, *supra* note --, at 529 (“Although the number of appeals has increased, the number subject to intensive full-dress review has declined. More appeals are decided on the basis of briefs alone, without oral argument.”); Nancy Winkleman, *Just a Brief Writer*, LITIG., Fall 2003, at 50, 51 (noting that in 2002, two-thirds of appeals to U.S. Courts of Appeals were decided without oral argument).

<sup>228</sup> ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 1997, at 38 (1998).

courts of appeals heard oral argument, on average, in twenty-seven percent of all appeals.<sup>229</sup> From 1997 to 2007, there was a thirty-two percent decline in the percentage of cases in which there was oral argument.

The decline in oral argument can be seen not just as an average for the circuits, but also in the circuits that held the highest and lowest percentage of oral arguments in the past decade. In 1997, the Second Circuit, which heard oral argument in about sixty-five percent of its appeals, had the highest percentage of oral arguments in any circuit.<sup>230</sup> In 2007, Chief Judge Easterbrook reported that the Seventh Circuit heard arguments in fifty-six percent of its appeals,<sup>231</sup> which was the highest percentage of any circuit.<sup>232</sup> Thus, there was a fifteen percent decline in the percentage of cases in which the highest achieving circuit held oral argument.<sup>233</sup> At the bottom in 2007, the Fourth Circuit heard oral arguments in barely fourteen percent of its appeals.<sup>234</sup> The Fourth Circuit was also at the bottom in 2006, when it heard oral arguments in slightly less than twelve percent of its appeals.<sup>235</sup> In contrast, in 1997, the three circuits (Third, Tenth, and Eleventh) in a tie for the lowest percentage of oral arguments in cases on appeal, heard oral argument in almost thirty percent of appeals.<sup>236</sup> Thus, from 1997 to 2007, there was a decline of fifty-five percent of cases in which oral argument was heard by the lowest achieving circuit or circuits.

Although there are a number of reasons why Courts of Appeals might not hear oral argument in any given case--from concluding that the case is so straightforward that oral argument is unnecessary to being short on judges and cutting back on oral argument for the sake of efficiency<sup>237</sup>--the unwelcome presence of cameras in the courtroom could provide yet another

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<sup>229</sup> *Id.* at 46.

<sup>230</sup> *Id.* at 38.

<sup>231</sup> Ameet Sachdev, *7th Circuit's Caseload Tails Off Again*, CHI. TRIB., May 20, 2008, § 3, at 3.

<sup>232</sup> *See* ADMIN. OFFICE OF THE UNITED STATES COURTS, 2007 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 (2008).

<sup>233</sup> In 2007, the Seventh Circuit disposed of 746 appeals after oral arguments, whereas in 2006 it disposed of 839 appeals after oral arguments; thus, there was a 11.1 percent drop in appeals after oral arguments between 2007 and 2006. Patricia Manson, *Federal Trial, Appellate Judges See Value in Role-Swapping*, CHI. DAILY L. BULL., May 20, 2008, at 1, 24.

<sup>234</sup> *Id.* at 1.

<sup>235</sup> Mark Hansen, *Logjam*, A.B.A. J., June 2008, at 38, 43.

<sup>236</sup> ADMIN. OFFICE OF THE U.S. COURTS, *supra* note --, at 38.

<sup>237</sup> *See, e.g.*, Hansen, *supra* note --, at 42 ("Despite the judicial shortage, the 4th Circuit continues to dispose of cases quicker than almost any other circuit. But it does so while granting oral argument in fewer cases than its counterparts, and by issuing fewer substantive opinions explaining its decisions.").

reason. In addition to the phenomenon of the "vanishing trial,"<sup>238</sup> there is now the phenomenon of the "vanishing oral argument." Cameras are likely to exacerbate this trend.

Federal district court judges, in response to cameras in the courtroom, also could cut back on the work that they conduct in the courtroom. Cases are not going to trial for any number of reasons, including: the parties have chosen to settle; they have agreed to some form of alternative dispute resolution (ADR); or the judge has resolved the case on motion. In deciding the case on motion, the federal district court judge can decide the motion just on the briefs or with the aid of oral argument. In the district court, as in the court of appeals, oral argument is not required. Thus, if a federal district judge is uncomfortable with cameras in the courtroom, the work can shift from courtroom to Chambers. The work will still get done, but it will get done outside the public purview. Thus, cameras, which were supposed to allow court proceedings to reach a broader audience could, in effect, curtail the audience because there is nothing to stop district court or courts of appeals judges from shifting some of their work from courtroom to Chambers.

### *B. Lack of Reliable Empirical Studies To Date*

Another policy consideration is that there are few reliable empirical studies documenting the effects of cameras in the courtroom. Individual states have conducted their own surveys, but many of them are unreliable, as the Federal Judicial Center (FJC) study<sup>239</sup> suggested.<sup>240</sup> The FJC study remains the best study to date in spite of its methodological limitations.<sup>241</sup> In addition, the FJC study, which covered a period that began in 1991, was conducted in a pre-Internet world. Federal judges today might be more technologically savvy than they were in the early 1990s, just as jurors are,<sup>242</sup> but they also might have greater reservations about how far and how fast images travel on the Web compared to what was possible when there were only a few major television networks.

Even though the FJC study is the best of the studies that have been done to date, it has several methodological limitations. One limitation is that it involved only judges who wanted to

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<sup>238</sup> Galanter, *supra* note --, at 459.

<sup>239</sup> FJC Study, *supra* note --.

<sup>240</sup> *See id.* at 38 n.33 ("A handful of state studies other than those mentioned here address juror and witness issues; we did not include all of them, however, because some reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for this evaluation (e.g., a judge polling one jury after a trial about whether cameras affected them).").

<sup>241</sup> *See id.* at 8.

<sup>242</sup> *See* Hon. Donald Shelton et al., *An Indirect-Effects Model of Mediated Adjudication: The CSI Myth, the Tech Effect, and Metropolitan Jurors' Expectations for Scientific Study*, 12 VANDERBILT J. ENTERTAINMENT & TECH. L. 1 (2009) (finding a "tech effect," rather than a "CSI effect," among jurors who watched television crime shows).

participate, rather than randomly selected judges.<sup>243</sup> These self-selected judges might have had a more favorable response to cameras in the courtroom than randomly selected judges.<sup>244</sup> Another limitation is that the FJC study asked judges to complete a questionnaire in which they indicated *their* perceptions as to whether cameras had any effect on the participants, including lawyers, jurors, witnesses, and the judges.<sup>245</sup> The FJC study, then, could only report on judges' perceptions, rather than on any actual effects. Also, the FJC study did not consider what effect the broadcasting of these trials—on television and the Internet—might have on participants. However, the problem for participants is not simply that there is a camera in the courtroom, but rather where the images are posted and for how long.

The federal courts' three-year pilot program, begun in July 2011, will at least provide a recent study.<sup>246</sup> Even though judges volunteered for the pilot program, they include supporters and skeptics of cameras in the courtroom.<sup>247</sup> The challenge for this pilot program will be to address some of the methodological problems of the earlier FJC study as well as some of the new challenges posed by today's technology. We no longer live in a world with just a few television stations that can agree to abide by certain conditions. What happens to courtroom participants when images from the courtroom are eventually broadcast on television, cable, and the Internet, and can remain available to viewers without an end in sight?

### *C. The States' Experiences*

Another policy consideration is the states' experiences with cameras in the courtroom. State court surveys suggest that the states' experiences have generally been positive, but the evidence is more anecdotal than empirical. Most of the state surveys rely on participants' perceptions or self-perceptions, rather than on actual effects, and the surveys are often based on a small number of participants.

#### *1. Surveys*

State courts, with varying degrees of rigor, have conducted their own surveys to

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<sup>243</sup> FJC Study, *supra* note --, at 8.

<sup>244</sup> *Id.*

<sup>245</sup> FJC Study, *supra* note --, at 8.

<sup>246</sup> *See supra* note – (describing the new three-year pilot program).

<sup>247</sup> *See, e.g.,* Dan Horn, *Federal Courts Testing Cameras: Pilot Program To Determine If a Long-Standing Ban Is Worth Keeping*, July 17, 2011, available at <http://news.cincinnati.com/article/20110716/NEWS010702/107170325/Federal-courts-test>. (“The latest experiment involves about 100 judges nationwide, including those who favor cameras in court and those who are wary of them.”).

determine the perceived effects of cameras in their courtrooms.<sup>248</sup> A number of states, including Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia, conducted surveys to see whether cameras left jurors and witnesses feeling distracted, nervous, or fearful.<sup>249</sup> The FJC study summarized these states' findings and found that in general the majority of witnesses did not feel distracted by cameras.<sup>250</sup> In addition, a New York survey of jurors, though undertaken over twenty years ago, found that jurors did not think that witness credibility was affected by cameras.<sup>251</sup> Florida and New Jersey surveys indicated that over ninety percent of jurors did not think that cameras affected their ability to assess the credibility of witnesses,<sup>252</sup> and in California, consultants who were questioned indicated that witnesses were equally effective at communicating whether there were cameras or not.<sup>253</sup> The state surveys also indicated that witnesses did not find it more difficult to testify in front of cameras and that cameras did not affect their willingness to participate; however, a minority reported that cameras left them feeling more fearful that they could suffer harm.<sup>254</sup>

Although state guidelines prevent jurors' faces from being captured on camera, states were still concerned about whether jurors were distracted by cameras or felt more reluctant to serve as jurors because of cameras. In California, the jurors who were surveyed indicated that they felt they were more attentive when there were cameras in the courtroom; they said they were not distracted, or were distracted only initially by the cameras.<sup>255</sup> Four state surveys asked jurors whether they felt under public pressure to reach a particular verdict when there were cameras in the courtroom; the majority of jurors indicated that they did not feel under pressure.<sup>256</sup> Some state courts worried that jurors would give more weight to witnesses or cases captured on camera, but only a minority of jurors indicated that they thought that cameras made the case (but not the witnesses) seem more important.<sup>257</sup> State courts also worried that cameras might make jurors more unwilling to serve, but according to the surveys, jurors said that cameras would not

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<sup>248</sup> I use "perceived" because none of these studies compared trials with cameras and trials without cameras. Rather, they relied on surveys in which judges or lawyers were asked about their perceptions of jurors and witnesses or jurors and witnesses were asked about their own perceptions.

<sup>249</sup> See FJC Study, *supra* note --, at 38.

<sup>250</sup> See *id.* at 39.

<sup>251</sup> See *id.*

<sup>252</sup> See *id.*

<sup>253</sup> See *id.*

<sup>254</sup> See *id.* at 40.

<sup>255</sup> See *id.* at 41.

<sup>256</sup> See *id.*

<sup>257</sup> See *id.*

affect their willingness to serve in the future.<sup>258</sup> The FJC study concluded that the majority of respondents did not experience the negative effects anticipated, and that only a minority indicated that the negative effects occurred to a slight extent. The FJC study found that these state surveys, "to the extent they are credible,"<sup>259</sup> gave support to the FJC study's findings;<sup>260</sup> however, the FJC study did not rely on some state surveys because they were too anecdotal, such as one in which a judge simply polled a jury after a verdict and asked jurors whether they thought that cameras had affected them.<sup>261</sup>

State surveys after high-profile trials provide the strongest indication that cameras have caused harms in state courts. In a survey of 600 judges, prosecutors, and public defenders in California, conducted after the state criminal jury trial of O.J. Simpson, the results suggested that cameras had compromised the dignity of the courtroom and left the public with qualms about the state court system.<sup>262</sup> Fifty-five percent of those surveyed thought that cameras should be banned, sixty-three percent believed that cameras impaired judicial dignity, and seventy percent said that it affected the parties' right to a fair trial.<sup>263</sup>

## 2. *Outliers*

Although most state court cases, even those with cameras in the courtroom, proceed without incident, occasionally there are cases that turn into media spectacles. These cases are the exception rather than the rule, but they garner a lot of attention and subject state court judges to criticism. These cases, though outliers, nevertheless serve as warnings to federal court judges about what can go wrong when there are cameras in the courtroom. The message of these cases is that when things go wrong with cameras in the courtroom, they go very wrong.

The cases that serve as warnings are cases like the state criminal trial of O.J. Simpson for the murder of Nicole Brown Simpson and Ron Goldman in California,<sup>264</sup> the dispute over the

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<sup>258</sup> *See id.* at 42.

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *See id.* at 38 n.33 ("[S]ome reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for this evaluation . . .").

<sup>262</sup> Mike Lewis, *Survey Reveals Wide Support for Camera Ban*, L.A. DAILY J., Feb. 26, 1996, at 1.

<sup>263</sup> *Id.*

<sup>264</sup> *See People v. Simpson*, No. BA097211 (Cal.Super.Ct.L.A. County 1995).

burial of Anna Nicole Smith in Florida,<sup>265</sup> and the first state criminal trial of Lyle and Erik Menendez for the murder of their parents in California.<sup>266</sup>

In each of these cases, the camera was omnipresent and seemed to alter the behavior of judge and lawyers alike. For example, in the O.J. Simpson trial, Judge Lance Ito lost control of the courtroom. Many thought it was because he tried to burnish his image for the television cameras. The more lenient and understanding he appeared to be, the more the lawyers took advantage in the courtroom. The trial became a "media circus" and left the judge the subject of "scrutiny" and "even ridicule."<sup>267</sup> The "dancing Judge Itos" on late-night television did not add to respect for the judge or the court system.

In the burial dispute involving Anna Nicole Smith's body, Judge Larry Seidlin became so focused on the cameras that he began to confide to his television audience in ways that were entirely inappropriate for a judge. His behavior detracted from the dignity of the court. One commentator described the hearings as "out of control" and explained Judge Seidlin's behavior by suggesting that he "had prepared a demo and was shopping it around in hopes of getting his own televised court show."<sup>268</sup> Another reporter agreed that "Judge Larry [was] looking to become Judge Judy"<sup>269</sup> and observed that there was "a media circus at the courthouse."<sup>270</sup> In spite of his inappropriate remarks and his disregard of proper court procedure and decorum, "he became an instant celebrity" with the proceedings "playing out live on Court TV, and replayed at night on cable news channels."<sup>271</sup>

In the trial of Lyle and Erik Menendez, which was "thoroughly televised"<sup>272</sup> and rife with "theatrics" and "polarized emotions,"<sup>273</sup> the two juries eventually deadlocked. In the retrial, the lawyer for Lyle Menendez moved to ban cameras from the courtroom,<sup>274</sup> and the judge agreed,

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<sup>265</sup> See *infra* notes – to – and accompanying text.

<sup>266</sup> See *infra* notes – to – and accompanying text.

<sup>267</sup> Editorial, *R. Kelly and Court Secrets*, *supra* note --, at 22.

<sup>268</sup> Marianne Paskowski, *Seidlin's 15 Minutes of Fame*, TV Week (Feb. 26, 2007), at [http://www.tvweek.com/blogs/marianne-paskowski/2007/02/seidlins\\_15\\_minutes\\_of\\_fame.php](http://www.tvweek.com/blogs/marianne-paskowski/2007/02/seidlins_15_minutes_of_fame.php).

<sup>269</sup> *CNN Larry King Live: The Latest On Anna Nicole Smith* (broadcast on Feb. 20, 2007) 5 (citing transcript).

<sup>270</sup> *Id.* at 5.

<sup>271</sup> Jean Heller, *It's Hard To Tell Who the Star Is at Anna Nicole Smith Hearing*, ST. PETERSBURG TIMES (Fla.), Feb. 23, 2007, at 1A.

<sup>272</sup> Seth Mydans, *Emotional Divide in the Menendez Trial*, N.Y. TIMES, Jan. 15, 1994, at 19.

<sup>273</sup> *Id.*

<sup>274</sup> Seth Mydans, *Judge Bans Television Cameras in Retrial of Menendez Brothers*, N.Y. TIMES, Oct. 7, 1995, at 9.

reasoning that the ban was needed to "protect the rights of the parties, the dignity of the court and assure the orderly conduct of the proceedings."<sup>275</sup> Although there are no studies proving that cameras "caused" these effects, the view of many in the legal community is that they did. And although these and a few other cases should be seen as outliers, the damage they did was far-reaching and disproportionate to their numbers.

The recent case of Casey Anthony, who was tried for the murder of her daughter, suggests that televised trials can affect the perceptions and behavior of the public, not just of judges and lawyers. The trial was shown on cable television, and hosted by Nancy Grace, who had decided that the defendant was guilty.<sup>276</sup> Viewers, who numbered about 1.2 million, watched the trial through the lens of Nancy Grace, and reinforced these views through Twitter and Facebook.<sup>277</sup> When the jury acquitted Anthony of the murder charge because it did not think the prosecution had established its case beyond a reasonable doubt, viewers were outraged. Many sent "tweets" hoping for her death. When Anthony was released from prison, having already served more time than her conviction for a misdemeanor entailed, she was whisked away to an undisclosed location so that her life would not be in danger. One social media analyst observed about this trial: "The O.J. trial may have had broader media attention; however, social media platforms were not in place at that time, so the collective echo chamber has been unprecedented."<sup>278</sup> His suggestion was that this trial "makes for a good case against cameras in the courtroom."<sup>279</sup>

### 3. *Differences Between State and Federal Judges*

Although state court judges might accept cameras in the courtroom,<sup>280</sup> the reasons that motivate them to take this position are not necessarily shared by federal judges. State court judges' acceptance does not necessarily mean that federal court judges should respond in the same way.

One of the main differences between federal and many state court judges is how they obtain and retain their respective positions. Federal court judges are appointed by the President,

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<sup>275</sup> *Id.*

<sup>276</sup> Stelter & Wortham, *supra* note --, at A14.

<sup>277</sup> *Id.*

<sup>278</sup> *Id.* (quoting Brent Idarola, an analyst for Frost & Sullivan).

<sup>279</sup> *Id.*

<sup>280</sup> Not all state court judges want cameras in their courtroom. One state court judge in Texas, for example, suggested that cameras in the courtroom made a judge's job more difficult. She found that cameras in the courtroom made it more difficult to provide a defendant in a high-profile case with a fair trial than if there were no cameras. *See* Panel Discussion, "Visual Media and the Law," Annual Meeting of the Association for the Study of Law, Culture & the Humanities Conference, Boalt Hall, Berkeley, California, Mar. 29, 2008 (notes on file with author).

with the advice and consent of the Senate,<sup>281</sup> and they hold their position for life.<sup>282</sup> In contrast, in many states, state court judges face some form of election.<sup>283</sup> Although judicial elections can take different forms in different states, and can be used in some situations and not in others, state court judges in these states must seek the support of voters to obtain and/or retain their position.<sup>284</sup>

State court judges who face elections need to become known to the voting public. Cameras in the courtroom provide one vehicle for doing so. If there are cameras in the courtroom, then a state trial judge with a high-profile case is likely to appear on the local news night after night. Voters can learn that judge's name, identify that judge by sight, and become familiar with that judge's work. Because state court judges are limited in the ways that they can campaign for their office and what they can say about their work, this on-going broadcasting can reach voters in ways that a judge might otherwise be unable to do. For example, a judge would not be able to comment on an on-going case. With cameras in the courtroom, however, a judge does not have to comment; the trial speaks for itself.

Even if there are some state court judges who think that cameras in the courtroom cause more trouble than they are worth, it is difficult for them to take that position publicly because cameras are already in their courtroom and have been there for some time. In addition, elected state court judges must consider the effects on the voting public. A state court judge who wants to speak out against cameras in the courtroom would face at least two obstacles. First, the judge would have to challenge the status quo, which is always hard to do. Second, a state court judge who challenges cameras would have to answer to the electorate who would view the judge as trying to hide something. Moreover, voters might wonder how they would be able to distinguish one name on the ballot from another if they could not also see the judge in action.

Federal court judges are in a different position than state court judges with respect to cameras in the courtroom. First, the rule in federal district courts is that no cameras are permitted in the courtroom (except for those fourteen district courts that will amend their local rules to

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<sup>281</sup> U.S. CONST. art. II, §2.

<sup>282</sup> U.S. CONST. art. III, §1.

<sup>283</sup> *See, e.g.*, David B. Rottman & Shauna M. Strickland, U.S. Dep't of Just., State Court Organization 2004, at 23 (2006) ("State court judges are likely to face an election as a part of their selection process and to serve fixed terms . . .").

<sup>284</sup> For example, in Alabama, those seeking a full term as appellate judges face a partisan election, and to remain in office, they also face a partisan election, whereas a replacement for an appellate judge whose term has not expired is appointed by the governor. The chief justice of the Alabama Supreme Court is selected by a non-partisan election, whereas the chief justice of the Court of Civil Appeals is selected by the court and the chief justice of the Court of Criminal Appeals is selected based on seniority. Rottman & Strickland, *supra* note --, at 25 (Table 4). In contrast, in Illinois, those seeking a full term as appellate judges face a partisan election, but once having obtained their position, they face retention elections. The governor appoints a supreme court justice if there is an unexpired term on that court and the court of last resort appoints to fill an unexpired term on the Appellate Court. The Appellate Court and the Supreme Court select their own chief justices. *See id.*

allow for participation in the federal court pilot program beginning July 2011).<sup>285</sup> Currently, only the Second and Ninth Circuits provide the option of cameras in appellate courtrooms. Thus, federal judges do not need to challenge the status quo, but simply to maintain it. Second, federal judges do not have to seek recognition and approval from voters because they do not run for office. Moreover, their practical obscurity might enable them to perform their job more effectively, particularly when rendering an unpopular decision.<sup>286</sup> For example, Justice Blackmun received death threats as the author of *Roe v. Wade*.<sup>287</sup> Yet, he was able to walk outside the Supreme Court building amidst abortion protesters who had “branded him a villain” and remain unrecognized by the crowd.<sup>288</sup> Similarly, Chief Justice Warren, the author of *Brown v. Board of Education*,<sup>289</sup> was “not popular nor were his colleagues.”<sup>290</sup> But as Justice Breyer explained, “You’re an independent judge; that’s why you’re entrusted with this. Opinion polls are not to the point.”<sup>291</sup> A state court judge, who is beholden to voters and whose courtroom is open to cameras, might feel under more pressure than a federal judge to reach a popular decision.<sup>292</sup> Third, the cases that end up in federal court are not likely to attract the same general interest as cases that end up in state court. A case involving ERISA or admiralty law in federal court is unlikely to elicit the same public interest as a murder case in state court, particularly if the murder involves a scandal, a celebrity, or both. Thus, while state court judges might feel that cameras allow them to reach a broader audience, it is less clear whether that would be true for federal judges. Their docket might preclude widespread appeal. The reasons that state court judges have embraced, or at least accepted, cameras in the courtroom are not necessarily applicable to federal court judges.

#### IV. LESSONS FROM OTHER CONTEXTS

Because a change in one practice, such as placing cameras in federal courtrooms, can affect that institution in unpredictable and unintended ways, it is useful to look at other contexts

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<sup>285</sup> See Judicial Conference Committee on Court Administration and Case Management Guidelines for the Cameras Pilot Project in the District Courts, *available at* [http://www.uscourts.gov/news/NewsView/11-06-08/Courts\\_Selected\\_for\\_Federal\\_Cameras](http://www.uscourts.gov/news/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras).

<sup>286</sup> See *supra* Parts I.B.3 & II.B.3.

<sup>287</sup> 410 U.S. 113 (1973).

<sup>288</sup> Rubin, *supra* note --, at 2.

<sup>289</sup> 347 U.S. 483 (1954).

<sup>290</sup> CNN: *Larry King Live*, *supra* note --.

<sup>291</sup> *Id.*

<sup>292</sup> There are many drawbacks to electing judges, as many federal judges have suggested. Justice O’Connor is one of the strongest critics of an elected judiciary, see DVD: Supreme Court and Selecting Judges, Aspen Ideas Festival (C-SPAN July 1, 2009) (on file with author), and criticizes the practice in no uncertain terms.

and to see what lessons can be drawn from these other institutions' experiences with cameras. In at least two other contexts--U.S. Supreme Court nominee hearings and congressional debates--the introduction of cameras meant that actual decision-making or genuine debate moved elsewhere, beyond the gaze of the camera, or it largely disappeared. The same might be true if cameras are introduced in federal courtrooms. In looking to other countries' practices, most do not permit cameras in the courtroom, but the few that have allowed cameras on an ad hoc basis did not encounter problems. Drawing from these ad hoc experiences, it could be that opponents have less to worry about than they believe or that the methods of evaluating these programs were not rigorous enough to reveal underlying effects.

#### A. Televised U.S. Supreme Court Nominee Hearings

U.S. Supreme Court nominees have appeared at live televised hearings before the Senate Judiciary Committee since 1987.<sup>293</sup> Ostensibly, the hearings are televised to make the nominee's views known to the viewing public. Over time, however, less has become known about the nominee's views than if there had been no cameras. Nominees have become more reticent about what they say in front of the cameras.<sup>294</sup> They have learned from the experience of Judge Bork that it is better to say too little than too much.<sup>295</sup> At the same time, Senators have become more vocal about expressing their own views. The televised hearings provide an opportunity for Senators to address their constituents.

The epitome of reticence before the camera was Judge Samuel A. Alito Jr., who has since become a Supreme Court Justice. He appeared at the Senate Judiciary Committee hearing, which was televised, and said little; meanwhile, the Senators said much. Several writers who covered the hearings noted these two tendencies. Headlines such as *But Enough About You, Judge; Let's Hear What I Have to Say*,<sup>296</sup> *The Blog House; Alito Hearings: So Many Words, Yet So Little*

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<sup>293</sup> See, e.g., Elliott H. Levitas & John Marshall Mitnick, *Constitutional Theory in the Liberal Tradition Versus the Republican Ideal*, 38 EMORY L.J. 779, 779 (1989) (reviewing MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW (1988)) ("Judge Bork's Senate confirmation hearings were unique in a number of respects. They were the first confirmation hearings of a Supreme Court nominee televised live in their entirety on a national network (Cable News Network)."); 2 DAVID G. SAVAGE, GUIDE TO THE U.S. SUPREME COURT 835 (4th ed. 2004) ("The nomination of Robert H. Bork by President Reagan in 1987 . . . set off one of the most intense and vociferous confirmation battles in history.").

<sup>294</sup> See Editorial, *Questioning Judge Sotomayor*, N.Y. TIMES, July 14, 2009, at A20 ("Recent nominees have made an art of refusing to answer questions about the law.").

<sup>295</sup> See, e.g., Editorial, *The Sotomayor Nomination*, N.Y. TIMES, July 21, 2009, at A18 ("Since the fevered battle over Judge Robert Bork's judicial nomination in 1987, the goal for judicial nominees has been to skate through saying as little as possible as politely as possible.").

<sup>296</sup> Elisabeth Bumiller, *But Enough About You, Judge; Let's Hear What I Have to Say*, N.Y. TIMES, Jan. 11, 2006, at A1 (including a chart that showed that "[a]ll but two senators used more words than Judge Samuel A. Alito Jr. during their allotted 30 minutes of questions yesterday [January 10, 2006]").

*Said*,<sup>297</sup> and *The Wrong Questions from the Wrong Questioners: With All the Posturing, Platitudes and Pandering, We Learned Nothing About Alito*<sup>298</sup> made the point clear.

Judge Alito might have tried to reveal little about his own views even if his hearings had not been televised. But if he had been questioned behind closed doors and had not responded to the Senators' questions, they could have probed without wondering how they appeared to a television audience. They could have pressed him to answer their questions without worrying that an audience might think they were badgering the nominee.<sup>299</sup> In addition, they could have asked questions about legal issues without worrying that the questions were too technical for a general audience.<sup>300</sup> They would not have been distracted quite as much by their own political interests if they had not been performing for their constituents, as they were before the cameras.<sup>301</sup>

The televised proceedings were intended to make the nominee's views known to a broad audience, but instead, they altered the behavior of nominee and Senators alike. The nominee spoke little and the Senators spoke a lot. The nominee revealed little about his views on the law, and that meant that the Senators and the public learned little of substance. If the nominee had appeared at a hearing at which no cameras were present, the Senators might have at least gleaned more about the nominee's views, which they could have then shared with the public. The Senate Judiciary Committee, in an effort to persuade television viewers that it was performing its job well, might have actually performed its job less well than if it had held hearings behind closed doors. Although the Senate Judiciary Committee had other routes to find out about Judge Alito's

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<sup>297</sup> Tim O'Brien, *The Blog House; Alito Hearings: So Many Words, Yet So Little Said*, STAR TRIB. (Minneapolis, MN), Jan. 14, 2006, at 15A ("The Senate confirmation hearings for Supreme Court nominee Samuel Alito were illuminating only if you wondered what Sen. Joseph Biden thought of Princeton (he hates it) or what Sen. Arlen Specter calls e-mail ('computer letter') . . . Alito will be confirmed because he was successful in saying nothing. Not that he could have said much, with the senators using up all the oxygen in the hearing room.").

<sup>298</sup> Alan Dershowitz, Op-Ed, *The Wrong Questions from the Wrong Questioners*, CHI. TRIB., Jan. 20, 2006, at 21 ("[T]oo many senators view the hearings as a campaign opportunity instead of as a confirmation hearing. Almost the entire first day was taken up with committee members' 'opening statements,' which would be more accurately described as stump speeches.").

<sup>299</sup> See, e.g., Adam Nagourney, *From the Left, Calls to Press Alito Harder*, N.Y. TIMES, Jan. 12, 2006, at A20 ("[Opponents of Judge Alito's nomination] said Republicans had been effective in trying to put Democrats on the defensive for being harsh, particularly after television shots showed Judge Alito's wife, Martha-Ann, crying and leaving the room.").

<sup>300</sup> See Adam Nagourney et al., *Glum Democrats Can't See Halting Bush on Courts*, N.Y. TIMES, Jan. 15, 2006, at 1 ("[Democratic m]embers of the [Senate Judiciary C]ommittee, while defending their performance, said they had been hampered because many of the issues they needed to deal with--like theories of executive power--were arcane and did not lend themselves to building a public case against Judge Alito.").

<sup>301</sup> See Dershowitz, *supra* note --, at 21 ("[T]oo many senators view the hearings as a campaign opportunity . . . "); Editorial, *Sotomayor and the Senate*, CHI. TRIB., July 13, 2009, at 14 ("With [former Senator Joseph Biden] on the Senate Judiciary Committee, these occasions were a priceless opportunity to learn everything you wanted to know about the star of the show—which invariably was Biden.").

views, such as the written questionnaire that he completed, it wasted an important opportunity--the hearing.

There are several lessons from the televised Supreme Court nominee hearings that could have applicability to cameras in federal courtrooms. One lesson is that cameras at nominee hearings have encouraged different behaviors over time and different behavior than exhibited behind closed doors. When the hearings were first televised live in 1987, they were robust. According to David Savage, who covers the Supreme Court for the *Los Angeles Times*, the hearing for Judge Bork "set off one of the most intense and vociferous confirmation battles in history";<sup>302</sup> the media, "both broadcast and print, covered the battle intensely,"<sup>303</sup> and the three and one half month debate eventually resulted in the defeat of Judge Bork's nomination.<sup>304</sup> The more Judge Bork spoke, the less the public liked him.<sup>305</sup> Former Senator Joseph Biden, then Chairman of the Judiciary Committee, observed that "after Judge Bork's televised testimony, public opinion turned against him."<sup>306</sup> One lesson that subsequent nominees drew from Judge Bork's experience is the less said, the better.<sup>307</sup> Although cameras at the nominee's hearing meant that a viewing audience could watch, they were able to learn less about a nominee's views as nominees learned to say little.<sup>308</sup> Putting cameras in federal courtrooms could have a similar effect. Cameras are intended to allow viewers to watch court proceedings, but if judges conduct more of their work outside of the courtroom, then there will be less for viewers and the public inside the courtroom to see.

Another lesson that subsequent nominees drew from Judge Bork's experience was the need to rehearse and prepare for the hearings and to treat them as the television performance they had become. With the hearings for Judge Bork, viewers were able to see Judge Bork

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<sup>302</sup> SAVAGE, *supra* note --, at 835.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* ("The television networks covered the confirmation hearings [of Judge Bork], and the more viewers saw of this precise, intellectual man, the less they liked. Newspaper and radio coverage was also intense, and the more Bork said, the more citizens found to complain about.").

<sup>306</sup> *Id.*

<sup>307</sup> David G. Savage, *Nominee's Familiar Tack: The Less Said, the Better*, CHI. TRIB., July 17, 2009, §1, at 15 ("Ever since [the Bork hearings], Supreme Court nominees have assumed it is more dangerous to explain too much, rather than too little, when talking about what they think about the Constitution and the law."); Steve Chapman, Op-Ed., *The Virtues of Supreme Silence*, CHI. TRIB., JULY 19, 2009, § 1, at 25 ("So [Judge Bork's] successors learned to use as many words as possible to say as little as they could.").

<sup>308</sup> After four days of Senate Judiciary Committee hearings on the nomination of Judge Sonia Sotomayor to the U.S. Supreme Court, "several prominent lawyers loudly complained that absolutely nothing about either the law or Judge Sotomayor was learned . . ." Jill Abramson, *Women on the Verge of the Law*, N.Y. TIMES, July 19, 2009, Week in Review, at 1.

"unfiltered" and decide what they thought.<sup>309</sup> Subsequent nominees, however, learned the importance of projecting an image. Although viewers were able to watch the nominees, they watched nominees who had been coached and prepped.

Before live televised hearings, such image-intensive preparations were not needed. Justice Stevens, for example, who was nominated by President Ford in 1975, simply prepared for his hearings by working with one of his law partners. Although the viewing public did not watch these hearings, at least the Senate heard from then Judge Stevens as he answered all of their questions. He focused on the law, as did they. Behind closed doors, Senators and nominee could focus on the task at hand, without wondering how it was playing to a larger television audience. The Senate ultimately approved Judge Stevens' nomination by a vote of 98-0.<sup>310</sup> If cameras are added to federal courtrooms, as they have been to the Supreme Court nomination process, then all of the participants in the courtroom, like the nominee and Senators in the nomination process, will have to worry about their images on television.

### *B. Congressional Speeches on C-SPAN*

Television coverage of congressional speeches began in 1979 by a private, non-profit cable company, which covered the speeches on Cable-Satellite Public Affairs Network (C-SPAN). The coverage was offered as a public service. The idea was to introduce viewers to the political process. C-SPAN, which followed in the wake of Watergate, was one effort to bring transparency to the workings of the federal government. Viewers just had to turn on their television sets to see Congress at work. They could observe their Congressman give a speech and see if his position accorded with their own. Proponents of cameras in the courtroom hold up C-SPAN as an example: If cameras can focus on the legislature, than why not on the federal judiciary too? Indeed, C-SPAN offered to provide such gavel-to-gavel coverage of the Supreme Court. In 1988, Brian Lamb, CEO of C-SPAN, made that offer to Chief Justice Rehnquist, who declined it.<sup>311</sup> In 2005, Lamb renewed the offer to Chief Justice Roberts, who also declined it.<sup>312</sup>

Although C-SPAN does bring congressional speeches to a viewing audience, it has several limitations. One is that the camera is focused on the speaker, not the audience.<sup>313</sup> The speaker might be addressing an empty Chambers, and the viewers cannot tell. Even if the speaker is addressing colleagues, the viewer cannot tell what these colleagues are doing--whether

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<sup>309</sup> SAVAGE, *supra* note --, at 836 (quoting Sen. Joseph Biden, Chairman of the Senate Judiciary Committee).

<sup>310</sup> THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 976 (Kermit L. Hall, ed.-in-chief, 2d ed. 2005).

<sup>311</sup> Bruce D. Collins, *C-SPAN's Long and Winding Road to a Still Un-Televised Supreme Court*, 106 MICH. L. REV. FIRST IMPRESSIONS 12, 13 (2007), <http://www.michiganlawreview.org/first-impressions/vol106/collins.pdf>.

<sup>312</sup> *Id.* at 15.

<sup>313</sup> Editorial, *A Dose of Reality TV for Congress*, N.Y. TIMES, Dec. 20, 2006, at A26 ("The speaker's office has been wary of allowing free-ranging cameras since coverage was permitted 28 years ago.").

they are taking notes or completing a crossword puzzle--or what their reactions are to the speaker's remarks.<sup>314</sup> The speeches are prepared in advance and delivered to a viewing audience, and perhaps to some colleagues in Congress, though that remains unknown.

An even more serious limitation of C-SPAN's coverage is that while it gives members of the viewing audience the sense that they are observing Congress at work, it is clear that no decisions are being made in the presence of the camera. Rather, the real debate takes place elsewhere, whether in committee meetings, hallways, or behind closed office doors. But the point is that while C-SPAN claims to provide an eye into the workings of Congress, it provides only a superficial glimpse. Viewers can hear the speech of the Congressman, just like they can read it in the *Congressional Record*. Although C-SPAN provides a record of the Congressman giving a speech, it goes no further. The viewing audience does not see the decision-making process. The presence of the camera has shifted the decision-making from Chambers to elsewhere. The same is likely to be true of cameras in courtrooms. Cameras are likely to shift the decision-making away from the courtroom and toward more private workspaces in the courthouse, such as Chambers and the robing-room.

### *C. Other Countries' Experiences*

Most countries do not allow cameras in their courtrooms. England and Wales have a statute that bans electronic media coverage of court proceedings,<sup>315</sup> and Northern Ireland has a statute that applies the same restrictions.<sup>316</sup> Scotland, which does not have a statutory prohibition like England, Wales, and Northern Ireland, allowed a pilot program with numerous restrictions, but the media found it difficult to gain the consent of all of the participants, and so it did not provide a workable model.<sup>317</sup> Canada's Judicial Council opposes cameras in the courtroom, but there have been some cases where cameras have been allowed.<sup>318</sup> Cases before the Canadian Supreme Court are broadcast on CPAC, a subscription television channel that covers parliamentary proceedings as well, but those cases can be broadcast only in their entirety and only if the parties agree.<sup>319</sup> Nova Scotia, which undertook a two-year pilot program of

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<sup>314</sup> *Id.* (“Visitors to the chamber galleries can plainly see scenes denied to TV watchers—sideline wheeling and dealing; the representative more interested in the newspaper than the debate; the senator nodding off, understandably perhaps; and the near-empty chamber surrounding the orator speaking for the stationary camera.”).

<sup>315</sup> DANIEL STEPNIAK, ELECTRONIC MEDIA COVERAGE OF COURTS: A REPORT PREPARED FOR THE FEDERAL COURT OF AUSTRALIA xix (1998) (citing § 41 of the Criminal Justice Act 1925).

<sup>316</sup> Dep’t for Const. Affairs, Broadcasting Courts: Consultation Paper, Nov. 2004, <http://www.dca.gov.uk> (citing § 29 of the Criminal Justice (Northern Ireland) Act 1945).

<sup>317</sup> *See* STEPNIAK, *supra* note --, at xx-xxi.

<sup>318</sup> *Id.* at xxi.

<sup>319</sup> Dep’t for Const. Affairs, *supra* note --, at 106.

broadcasting Court of Appeals cases only, has extended the program.<sup>320</sup> Korea does not permit cameras in the courtroom, but one judge suggested that there is a growing popular interest in introducing cameras in the courtroom.<sup>321</sup> Although countries such as Australia are intrigued by the question, they have not adopted the practice of cameras in the courtroom. Australia has televised cases, but this has been on an ad hoc basis rather than because of a change in policy.<sup>322</sup> New Zealand undertook a pilot program from 1995-1998 that permitted filming of High Court cases.<sup>323</sup> UMR Insight Surveys conducted an evaluation of the pilot in each of the three pilot years, and a team from Massey University undertook a case-by-case evaluation. Among the findings were that “most judges were distracted by the cameras,” though lawyers were not, and that fifty-eight percent of the public thought that they would be less willing to appear as a witness if there were cameras, but that the case-by-case evaluation did not find any witnesses unwilling to appear.<sup>324</sup> Interestingly, while public support for cameras rose from 25% in 1996 to 38% in 1998, 67% of the public polled in 1998 did not think that the experiment had educational value.<sup>325</sup> In spite of the mixed results, the program has been extended.

Of the few countries that permit cameras, one of the most unusual arrangements is found in Brazil. Brazil permits cameras not only in the Brazilian Supreme Court, but also in the room where the Justices deliberate. Although the Chief Justice of Brazil noted that this arrangement works in Brazil, she thought that it was unlikely to work in any other country; indeed, she was unaware of any other country that followed this practice.<sup>326</sup>

Most countries have been reticent to introduce cameras in the courtroom. Although they have citizens who watch American television shows and have an interest in learning about courts, the American cases, such as O.J. Simpson, give them pause. These same cases give pause to federal judges in the United States. A number of countries have introduced cameras in the courtroom on an ad hoc basis or as part of a pilot program. The pilot programs that have been extended have usually been limited to appellate courts.

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<sup>320</sup> *Id.* at 107.

<sup>321</sup> Conversation with Judge Young Hye Kim, Seoul Central District Court, at the Annual Meeting of Law & Society, in Montreal, Canada (May 31, 2008).

<sup>322</sup> *See, e.g.*, STEPNIAK, *supra* note --, at xxvi (“Between 1994 and 1996 television cameras were permitted into Victorian Magistrates’ Courts on a number of occasions.”); *id.* at xxviii (“The most notable New South Wales developments have concerned the electronic media coverage of quasi-judicial proceedings.”); *id.* at xxix (“Television cameras have been permitted to record Tasmanian court proceedings on at least one occasion.”).

<sup>323</sup> Dep’t for Const. Affairs, *supra* note --, at 109.

<sup>324</sup> *Id.*

<sup>325</sup> *Id.* at 110.

<sup>326</sup> Ellen Gracie Northfleet, President of the Supreme Court of Brazil, Joint Luncheon of AALS and Conference of Chief Justices Workshop and AALS Committee on International Cooperation, AALS Annual Meeting (Jan. 3, 2008) (notes on file with author).

## V. MOVING INCREMENTALLY IN A MORE OPEN DIRECTION

Cameras may eventually become commonplace in federal courtrooms, but it seems wise to proceed with caution before making such a policy change. The decision to conduct a three-year pilot program to study cameras in federal courtrooms is an important step and suggests waiting until the results are known. Of the three branches of government, the public holds the federal judiciary in the highest regard.<sup>327</sup> The Executive Branch was at a record low in the public's esteem before President Obama took office,<sup>328</sup> and Congress' approval rating was even lower than that of the Executive.<sup>329</sup> It would be a shame for the federal judiciary to lose the public's respect. The federal judiciary should proceed slowly under the theory that "if it ain't broke, don't fix it." Another reason to proceed slowly is that once cameras enter federal courtrooms, they will be difficult to remove, as the state court experience teaches, and if it proves to be a mistake, the damage will be difficult, if not impossible, to undo. Yet, at the same time, it is important that the work of courts remains accessible to the public. How to accommodate these competing concerns is the challenge that federal judges face.

### A. Considerations

There are a number of considerations that federal judges should keep in mind as they confront the conundrum of cameras in the courtroom. These should form the backdrop as they take steps to open up their courtrooms as much as possible, as proponents urge, without sacrificing the fairness and dignity of the proceedings that judges need to protect. These considerations can help federal judges to develop solutions that accommodate competing values without one set of values completely trumping the other.

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<sup>327</sup> Compare Patricia Manson, *ABA Chief Urges Justices To Allow Cameras*, CHI. DAILY L. BULL., Feb. 24, 1999, at 1 (reporting on the results of a survey, commissioned by the A.B.A., in which 1000 adults were asked to rate their confidence in seventeen different institutions in society, and in which "the U.S. Supreme Court came out on top with 50 percent saying they are either extremely confident or very confident of the high court"), with *id.* ("Only 18 percent expressed strong confidence in Congress . . .").

<sup>328</sup> See, e.g., Dan Balz & Jon Cohen, *Most Voters Worry About Economy; Majority Consider Situation a Crisis*, WASH. POST, Oct. 1, 2008, at A1 ("[President] Bush's approval rating has now dropped to an all-time low in Post-ABC polling, with 26 percent [of a random national sampling of adults polled] giving him positive marks for his performance and 70 percent giving him negative reviews.").

<sup>329</sup> See, e.g., David S. Broder, *Credibility Test for Congress*, WASH. POST, Sept. 25, 2008, at A19 ("From the high hopes that greeted the Democratic takeover of the Senate and House in November 2006, there has grown, month by month, a sense of disillusionment with the performance of Congress. [President] Bush has a roughly 30 percent job approval rating; Congress is at least a dozen points below that."); Laura Meckler, *Campaign '08; McCain Portrays Himself as a Buffer to Congress*, WALL ST. J., Oct. 18, 2008, at A4 (referring to a poll that "found just 13% approved of the job Congress was doing, [which is] lower than Mr. Bush's 29% approval rating").

## 1. *The Power of the Image*

One consideration that judges need to keep in mind is the power of the image. “[U]nlike words on the page, visual images on the screen are far more likely to directly stimulate heightened emotional responses.”<sup>330</sup> For example, advertising is based on the emotional appeal of an image. Consider the image that Lyndon Johnson relied on in his presidential campaign against Barry Goldwater in 1964. Johnson's campaign advertisement, the “Daisy Girl” spot, featured an innocent young girl plucking the petals off a daisy.<sup>331</sup> The pastoral scene erupted into a mushroom cloud, suggesting that Goldwater, with his extreme views, posed a threat to our very existence. The young girl, the flower, and the mushroom cloud presented charged images that spoke to viewers' fears.

Images also can have an enduring effect, lasting far longer than words uttered or recorded on a transcript. Just recall the beads of sweat and five o'clock shadow on Richard M. Nixon's face during his debate with John F. Kennedy in 1960.<sup>332</sup> That image has outlasted anything that Nixon actually said during the debate. The enduring effect of images is one reason to be wary about releasing images of participants in a trial, whereas a release of an audio recording or a written transcript does not have the same long-lasting effect.

With the advent of the Web, the image is not only long-lasting, but also easy to distort. The images that appear in photos and videos, shared via e-mail or social networking websites, can be manipulated in ways that are difficult for viewers to discern. Moreover, as eyewitness testimony studies have shown, there is a human tendency to believe what we see. Jurors believe eyewitness testimony more than any other testimony.<sup>333</sup> In spite of studies demonstrating the unreliability of eyewitness testimony,<sup>334</sup> we cling to the view that our eyes do not deceive us. Given our trust in the veracity of an image, and the technology that now makes it so easy to distort that image, judges need to be reticent about releasing images of courtroom participants. They need to consider that images are likely to end up on the Web and are susceptible to manipulation and widespread dissemination.

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<sup>330</sup> Sherwin, *supra* note --, at 725.

<sup>331</sup> Lynda Lee Kaid, Political Processes and Television, <http://www.museum.tv/archives/etv/P/htmlP/politicalpro/politicalpro.htm> (last visited July 25, 2011).

<sup>332</sup> See *supra* text accompanying notes -- to --.

<sup>333</sup> See, e.g., ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY § 1.03, at 25-26 (1979) (describing a study in which mock jurors found eyewitness testimony more persuasive than other forms of evidence, including testimony of handwriting, fingerprint, and polygraph experts); John C. Brigham & Robert K. Bothwell, *The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identifications*, 7 LAW & HUM. BEHAV. 19, 27 (1983) (noting that jurors find eyewitness evidence extremely persuasive).

<sup>334</sup> See, e.g., LOFTUS, *supra* note --, at 35-51 (1979) (conducting empirical studies and finding several factors that contribute to the unreliability of eyewitness testimony); Brigham & Bothwell, *supra* note --, at 27 (same).

## 2. Control of the Image

Another consideration for judges is who controls the image. If the television networks have control, then they can decide how much or how little of a trial to show to the public. In contrast, the British Parliament allows its debates to be shown on television, but only on a dedicated network. Congressional debates in the U.S. work in a similar way on C-SPAN, and Nancy Pelosi, when she was Speaker of the House, like her Republican predecessors, declined to relinquish the lawmakers' control over the images.<sup>335</sup>

One of the lessons that the social networking website Facebook teaches is that once an image ends up on the Web, it is difficult to remove.<sup>336</sup> People who sought to remove their accounts from Facebook learned this lesson the hard way. It was easy to post photos and entries, but it was difficult to withdraw them. For people who posted revealing or embarrassing photos only to discover that potential employers could view them, it was important that the photos not remain on Facebook in perpetuity.

With each new development in technology, there is a move to embrace it, without always thinking about the consequences. This is true for people posting their personal lives on Facebook and for judges considering cameras in the courtroom. Judges need to consider who controls the image. Ideally, it would be the courts, as it is with the federal judiciary's three-year pilot program,<sup>337</sup> but if not, then judges need to consider whether there is a dedicated network that could offer gavel-to-gavel coverage so that the problems of too little or too much coverage can be avoided. However, even if courts control the images, judges still have to worry about the effect of widespread broadcasting. The pilot program will be able to study this issue because the civil trials that are filmed will be posted on the court's website several hours later, and then the media can re-broadcast them on television and the Internet.<sup>338</sup>

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<sup>335</sup> Mark, *supra* note -- ("When Democrats captured congressional majorities in 2006, [Brian] Lamb[, CEO of C-SPAN,] asked incoming Speaker Nancy Pelosi to revise camera rules for the House floor so that images would no longer be controlled by lawmakers but rather by independent camera operators. Like her Republican predecessors, she politely but firmly declined."); Editorial, *A Dose of Reality TV for Congress*, N.Y. TIMES, Dec. 20, 2006, at A26 ("If Democratic leaders truly want to put some nip into the new Congress, they should finally free up television coverage of floor debates so citizens can see the unvarnished state of the people's forum. Current TV restrictions allow only static head-on shots of whoever has the floor, lending chamber proceedings all the excitement of a postage stamp.").

<sup>336</sup> See, e.g., Maria Aspan, *Caught in Facebook's Web*, CHI. DAILY L. BULL., Feb. 14, 2008, at 5 ("Some users have discovered that it is nearly impossible to remove themselves entirely from Facebook, setting off a fresh round of concern over the popular social network's use of personal data.").

<sup>337</sup> See Courts Selected for Federal Cameras in Court Pilot Study, *supra* note -- ("The recordings will be made publicly available on [www.uscourts.gov](http://www.uscourts.gov) and on local participating court websites at the court's discretion.").

<sup>338</sup> See, e.g., Tony Mauro, *Restrictive Rules Announced for Federal Courts Camera Experiment*, THE BLT: THE BLOG OF LEGAL TIMES, June 8, 2011, available at <http://legaltimes.typepad.com/blt/2011/06/restrictive-rules-announced-for-federal-courts-camera> ("The media will be able to draw footage for its coverage from the courts' online video file, which could also be streamed from start to finish on media web sites.").

### 3. *The Medium is Not Neutral*

Judges need to recognize that neither television nor Internet images are neutral or objective. What viewers see is shaped by the way cameramen or individuals frame, light, and focus on the subject and the way that producers—professionals or amateurs--put together the story. The traditional view of cameras is as the all-seeing eye: They are turned on and they simply record what is before them. What is missing from this account is that the placement of the camera, the focus on a particular subject to the exclusion of all others, the editing of the images, and the voice-over that accompanies the images, give shape to the story. Because images are powerful and the story is woven seamlessly, it is easy to lose sight of what has been omitted and what choices have been made in the process. As Professor Richard Sherwin explained:

[B]ecause images appear to offer a direct, unmediated view of the reality they depict, they tend to be taken as credible representations of that reality. Unlike words, which are obviously constructed by the speaker and thus are understood to be at one remove from the reality they describe, photograph, film, and video images . . . appear to be caused by the external world, without the same degree of human mediation and hence interpretation; images thus seem to be better evidence for what they purport to depict.<sup>339</sup>

### 4. *The Proceedings as Public*

Judges recognize that trials are public proceedings, and that members of the public are permitted to be present in the courtroom, but another consideration is whether the notion of public has taken on a new meaning in light of developments in technology.

Trials and oral argument are already open to the public in several different ways. Members of the public can enter the courtroom and watch a trial or argument. They can even report on the trial as citizen-journalists who make their observations available to the public by online posts to blogs or social networking sites. Members of the media, who are also representatives of the public, are also present in the courtroom. They also serve as conduits by which reports of the proceedings reach a much larger audience than those sitting in the courtroom. Their reports can take a variety of forms, including newspaper articles, radio and television stories, posts on a blog or “tweets” on Twitter. There is also a court reporter whose task is to take down what is said and to produce a transcript of the proceedings. The transcript is available to the public, if not on a daily basis then when an appeal is filed and it becomes part of the record. If the trial was before a jury, then the jury serves as representatives of the community. If the trial was before a judge, then there will be an opinion signed by the judge and published in a reporter. Thus, there are many senses in which courtroom proceedings are public. The

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<sup>339</sup> Richard K. Sherwin, *Popular Culture and Law*, in INTERNATIONAL LIBRARY OF ESSAYS IN LAW AND SOCIETY (2006), available at SSRN: <http://ssrn.com/abstract=1004740>.

consideration for judges is whether there must be camera images--not just written words, audio versions, or even artists' sketches--in order for a trial to be considered "public" today.

### *B. Where To Begin?*

There are a number of steps that federal courts can take at this time that would make court proceedings more accessible to the public without having to take the ultimate step of allowing cameras in the courtroom. On the one hand, courtroom proceedings are meant to be public so making them more accessible would address proponents' main concern. On the other hand, stopping short of having cameras in the courtroom would address federal judges' main concern. Courtroom proceedings can be made more accessible, but cameras--with their powerful, enduring, and uncontrollable images--should only be a last resort because they can undermine several of the strengths of the federal court system, including the fairness and dignity of its proceedings. At the very least, appellate courts rather than trial courts seem a more likely place to start given the effect that cameras can have on trial court participants, including criminal defendants, witnesses, and jurors.

#### *1. Taking Incremental Steps*

##### *a. Posting a Transcript*

One step that federal courts at all levels can take is to post transcripts of court proceedings on the court's website. This step would allow interested members of the public to have access to court proceedings from their home, and yet, it would not create the problems that cameras in the courtroom potentially pose. Also, it would not impose much of a burden on federal courts. Court reporters already take down every word that is uttered in the courtroom. They usually prepare a transcript of the proceedings. That transcript is a public document and becomes part of the public record of a case. Traditionally, the transcript was available to anyone who went to the courthouse and requested a case file. With courts already making so many documents available on their website, the posting of a transcript is a small step to take. In fact, many courts already make filed documents in a case available on the court's website. Admittedly, the transcript of a trial could be very lengthy. It may be that not all transcripts can be posted to a website until websites are able to handle an enormous quantity of material. But meanwhile, there are many court proceedings that take a limited amount of time and for which transcripts could be readily posted without great burden to courts. The posting of transcripts on the court's website would make court proceedings available to researchers and other members of the public without raising the same concerns posed by cameras.

A starting point could be the posting of transcripts of oral argument in appellate cases. Oral arguments are of limited duration and transcripts would not create length problems. Court reporters typically produce transcripts of these arguments, and so, they could be posted on the court's website, as is already done by several courts. For example, transcripts of Supreme Court arguments can be found on the Court's website. In the past, one had to go to the Supreme Court Library and request the transcript of an oral argument that was kept in a bound volume, but this is

no longer the case. Even the Supreme Court posts these transcripts online soon after oral argument.<sup>340</sup>

*b. Posting an Audio Recording*

Another incremental step that courts could take, and some already have taken,<sup>341</sup> is to post an audio recording of the court proceeding on the court's website. Like the posting of a transcript, this would allow the court proceedings to reach a wider audience than those in the courtroom, without raising the same problems as cameras in the courtroom. Although it takes more time to listen to an audio recording than to read a transcript, an audio recording provides more nuance than is captured in a transcript. The listener can hear the various participants and their tone of voice and inflection. There are subtleties and emotion that can be captured by voice that are not expressed just through word choice as it appears on a page.

Not all courts make audio recordings of their proceedings, but some do. For example, the Supreme Court makes an audio recording of its oral arguments. It has been recording oral arguments since 1955. Traditionally, the Court's audio recordings were available only to the Justices and researchers. The latter had to request the Court's permission and obtained it only if they needed access for purposes of their research. This arrangement was altered after Peter Irons, a law professor, requested audio recordings from the Court, but then packaged an abridged version under the title *May It Please the Court*,<sup>342</sup> which he made available to the public for a price. After this episode, the Court made its audio recordings available to the public. Today, audio recordings are available online.<sup>343</sup> In fact, in *Bush v. Gore*,<sup>344</sup> the Court made the audio recording available on the same day as the argument given the importance of the case to the nation.<sup>345</sup>

For those courts that do not make audio recordings of their proceedings, it would take a small investment to do so. These audio recordings could then be posted to the court's website. In 2007, the federal judiciary approved a pilot program that allowed federal courts to post audio

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<sup>340</sup> See, e.g., *The Supreme Court Club*, *supra* note --, at -- (“The Supreme Court began two years ago [in 2006] making transcripts of oral arguments promptly available on the court’s Web site.”).

<sup>341</sup> See Gene Policinski, *What Reporters Want*, JUDGES’ J., Spring 2007, at 22, 24 (quoting Tony Mauro, Supreme Court correspondent for *Legal Times*, who noted that “some courts at various levels now routinely post the audio of arguments online.”).

<sup>342</sup> *MAY IT PLEASE THE COURT* (Peter Irons & Stephanie Guitton eds., 1993) (containing edited transcripts and recordings of 23 landmark Supreme Court cases).

<sup>343</sup> Brust, *supra* note --, at 43 (“Now audios of arguments are released usually within hours, as are transcripts with the names of the justices before their statements—an innovation in itself.”).

<sup>344</sup> 531 U.S. 1060 (2000).

<sup>345</sup> See, e.g., Mark Sherman, *Not Coming Soon to High Court: TV Cameras*, CHI. DAILY L. BULL., Dec. 12, 2008, at 2.

recordings of their proceedings online, though it was a voluntary program.<sup>346</sup> As of 2008, five federal courts had posted some audio files online and had found that there was “substantial” public interest in them.<sup>347</sup> The recordings allow members of the public to hear the speakers without actually going to the courtroom. While the recordings provide more detail than a cold, hard transcript, they admittedly provide less detail than a camera. At the same time, audio recordings do not run the risk of producing the same harms as images. U.S. District Judge Thomas F. Hogan described the pilot program as “a compromise between allowing no recording and turning the court into a set for a TV show.”<sup>348</sup>

### *c. Allowing Cameras in Appellate Arguments*

If cameras were to enter any federal courtrooms, then the appellate court rather than the trial court is a more appropriate starting-place. Although cameras could affect the dynamics between lawyers and judges during appellate oral argument, the potential harms are more limited than in trial court, where many more participants could be adversely affected, including parties, witnesses, and jurors.

One approach, which the Judicial Conference has already taken, is to allow those federal circuits that want cameras in their courtroom to have them assess the experience. Currently, only the Second and Ninth Circuits permit cameras during oral argument. For example, in the Ninth Circuit, there is a small, unobtrusive camera that provides the Ninth Circuit with a video of oral argument. The video is available for internal use. If the media want access to that camera, they must make a request of the Ninth Circuit. Although most requests are granted,<sup>349</sup> the decision remains with the circuit. Some judges have reported that the experiment has worked well.<sup>350</sup> In one recent case before the Second Circuit, one of the lawyers thought the camera made no difference to him because he had to convince the judges, not the public, whereas another lawyer thought the advocates argued more to the public than to the appellate panel.<sup>351</sup>

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<sup>346</sup> Matt Apuzzo, *Federal Courts to Test Offering Trial Tapes on Internet*, CHI. DAILY L. BULL., Apr. 21, 2007, at 9.

<sup>347</sup> Pilot Project Update: Digital Audio Recordings Online, The Third Branch, June 2008, <http://www.uscourts.gov/News/TheThirdBranch/TTBViewer.aspx?doc=uscourts/News/TTB/archive/2008-06Jun.pdf?page=7>.

<sup>348</sup> *Id.*

<sup>349</sup> Judge O'Scannlain, who sat on the Ninth Circuit, reported that between 1986 and 2005, he ruled on 44 requests for camera access, and that the panel voted to grant access in 35 instances, or about 80% of the time. *See* Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APPELLATE PRACTICE & PROCESS 323, 325 (2007).

<sup>350</sup> *See id.* at 330 (“Notwithstanding these preliminary cautions, my own experience on the appellate bench with cameras in the courtroom has been overwhelmingly positive.”).

<sup>351</sup> Sherman, *supra* note --, at 2.

## 2. *Developing a Technology Etiquette*

One reason for proceeding slowly and incrementally is that technology is changing rapidly and an etiquette about the proper use of that technology has lagged behind. By proceeding slowly with the decision about which technology to allow in the courtroom, federal judges will give the etiquette a chance to catch up to the technology.

Advances in technology have been substantial. In 1965, when *Estes v. Texas* was decided,<sup>352</sup> cameras were large, cumbersome, and distracting. Today, over four decades later, cameras are small, unobtrusive, and omnipresent. In fact, most people have a camera in their cell-phone. Similarly, in 1965, there were three major television networks and only a limited number of stations. Today, there are hundreds of television stations with many cable stations providing round-the-clock coverage of news. Moreover, people get their news not just from television, but also from the Web, where they turn to a variety of sources such as websites, blogs, and social networking sites.

One problem is that we often embrace the new technology before we figure out when and where it should be used. For example, public telephone calls used to be made in an enclosed booth. The conversation, though made in public space, was nevertheless private because it could not be overheard. In contrast, today's cell-phone user speaks everywhere--walking down the street, sitting on a bus or train (and sometimes even while driving one),<sup>353</sup> in public restrooms, at the theater, and even in houses of worship. No place is sacrosanct. It cannot be that private conversations, from which others cannot escape, should take place everywhere, and yet, that is exactly what has happened. We await the development of an etiquette about when and where it is appropriate to conduct a private conversation in public. Currently, a laissez-faire attitude prevails. Cell-phones became ubiquitous before a norm about when and where to use them developed. It may be that laws, rather than norms, are required to eliminate some of the more unsafe practices that people have acquired, such as talking on a cell-phone while driving. However, in situations in which safety is not an issue and a norm is appropriate, there are signs that the pendulum has begun to swing in the other direction. One sign was the protest against cell-phones on airplanes when airlines considered changing their rules and allowing such conversations to take place.<sup>354</sup> Another sign was the development of "quiet cars" on some trains.

Similarly, an etiquette is needed to limit when and where it is appropriate to use cameras in a world in which almost everyone has a camera, whether on a cell-phone, laptop, or smart-

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<sup>352</sup> 381 U.S. 532 (1965).

<sup>353</sup> See, e.g., *Massachusetts: Subway Operator Pleads Not Guilty*, N.Y. TIMES, July 21, 2009, at A13 ("The former Boston subway operator who the authorities say was typing a text message during a crash that injured more than 60 people has pleaded not guilty in the case.").

<sup>354</sup> See, e.g., Joe Sharkey, *A Race to Provide Wi-Fi (But Not the Voice Part)*, N.Y. TIMES, July 21, 2009, at B6 ("One big question surrounding the proliferation of smartphones and other Wi-Fi enabled devices on planes is whether they will soon lead to in-flight phone calls.").

phone, and in a world in which many post their photos online. There are some signs that a technology etiquette is beginning to develop. One sign has been the practice at some parties where guests are told that if they want to attend they must agree not to take photos or report about the party on any social networking site.<sup>355</sup> Another sign has been clubs that prohibit guests from taking photos of others out of fear that the photos will end up on someone's Facebook page and deter patrons from returning or clubs that make members sign a statement that they will not post photos or comments about the club on a blog or social networking site.<sup>356</sup> According to one observer, "there is an electronic evolution of manners, with still-developing rules about when using social media is appropriate and when it isn't."<sup>357</sup> The etiquette for cameras, like the etiquette for cell-phones, will take time to catch up to the technology. As other venues try to pull back and curtail the use of technology through "voluntary civility codes" or explicit rules that prohibit cameras and the posting of photos on social networking sites,<sup>358</sup> federal courts, which have not allowed cameras in the courtroom in the first place, do not have to backtrack.

Until there is a camera etiquette, courts should continue to proceed slowly because everyone is a potential cameraman and a potential subject on the Web. Courts are no longer dealing with just three major television networks that would abide by certain rules. If federal courts make missteps along the way, the repercussions will be enormous. Cameras, like cell-phones, are ubiquitous, and users, even when told that cameras are prohibited in certain venues, such as theaters and concert halls, flout the rules. The Web is replete with sites in which even the quotidian appears on camera and is transmitted for all to see. Moreover, once photos or videos appear on the Web, they can remain there forever. As one headline warned, "Online is Forever, and It's Usually Not Private."<sup>359</sup> Thus, it behooves federal courts to proceed slowly and to await the development of a camera etiquette before allowing cameras in the courtroom.

### 3. *Awaiting a Generational Shift*

For those who worry that judges have been resistant to new technology and that they are unlikely to introduce cameras on their own, one counterweight to this tendency is the next generation of judges. The next generation--those who grew up with social networking sites like Facebook and YouTube--will probably not have the same reservations as today's judges. They will be more comfortable putting their personal lives on the Web for all to see,<sup>360</sup> and they will

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<sup>355</sup> Allen Salkin, *Party On, But No Tweets*, N.Y. TIMES, Aug. 9, 2009 (Styles), at 1.

<sup>356</sup> *Id.*

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Online is Forever, and It's Usually Not Private*, NEWS TRIB. (Tacoma, Wash.), June 14, 2008, <http://www.thenewstribune.com/2008/06/14/v-printerfriendly/388898/online-is-forever-and-its-usually.html>.

<sup>360</sup> See, e.g., *A Note to the Wise on MySpace Helps*, N.Y. TIMES, Jan. 6, 2009, at D6 ("Teenagers often use social networking sites like MySpace to post intimate personal information they come to regret, as it lets future employers . . . learn about sex activity and substance abuse.").

assume that others will feel the same way. The reservations that an older generation has about preserving individual privacy are less likely to be shared by the younger generation. The next generation of judges will make fewer distinctions between public and private and they will have greater reliance on technology. This combination is likely to make them more open than today's judges to having images from the courtroom appear on the Web, or whatever the next version of the Web is.

## CONCLUSION

I urge federal judges to proceed cautiously and I hope that incremental steps, such as posting transcripts and audiotapes of court proceedings online, will allow them to make courts more accessible without admitting cameras into courtrooms until a camera etiquette has developed. It is likely that the allure of technology and the comfort level of the next generation of judges with that new technology will lead new federal judges to allow cameras in the courtroom at some point. But until that generational shift occurs, federal judges should proceed slowly and incrementally and stop short of allowing cameras in federal courtrooms, especially in federal district courts.

Justice O'Connor, after she had left the Court, was asked about introducing cameras in the Supreme Court, and she responded that it is better for the Court to be "sure than sorry."<sup>361</sup> She pointed out that Cass Gilbert, the architect of the Supreme Court building, had included tortoises at the base of the lamps in the courtyards of the Supreme Court as a reminder that "justice moves slowly."<sup>362</sup> The tortoises also should remind us that any change in the courtroom should be undertaken only with great care and much deliberation because every change has the potential to interfere with a court's main function, which is to do justice.

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<sup>361</sup> DVD: Supreme Court and Selecting Judges, *supra* note --.

<sup>362</sup> *Id.*; see also District Att'ys Off. V. Osborne, 129 S.Ct. 2308, 2340 (2009) (Souter, J., dissenting) ("[T]he beginning of wisdom is to go slow.").