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Stephen D. Easton

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WHOSE LIFE IS IT ANYWAY?: A PROPOSAL TO REDISTRIBUTE SOME OF THE ECONOMIC BENEFITS OF CAMERAS IN THE COURTROOM FROM BROADCASTERS TO CRIME VICTIMS

STEPHEN D. EASTON*

* Partner, Pearce & Durick, P.L.L.P., Bismarck, North Dakota. United States Attorney for the District of North Dakota, 1990-93. J.D. 1983, Stanford Law School. The author is indebted to Marivern Easton for her research, editing assistance, and encouragement. In addition, thanks go to Cindi Roberson, Jenell Nilles, and Carol Fricke, who assisted with research; to Julie Oseid and Nicholas Chase, who reviewed drafts of this article; and to Evelyn Froebe, June Hintz, and Berta Martin, who helped with proofreading and word processing. All errors, of course, are solely the author's responsibility.

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I. INTRODUCTION

Sex.[1] Violence.[2] Explicit language.[3] Drug abuse.[4] Scandal.[5] Greed.[6]

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1. In keeping with the tradition of modern American entertainment, televised trials typically involve allegations of sexual and sex-related misconduct rather than normal sexual relationships. *See* Massimo Calabresi, *Swaying the Home Jury*, Time, Jan. 10, 1994, at 56, 56 (statement of Harvard Law Professor Alan Dershowitz) ("Virtually all [Court TV covers] is sex, gore and pornography."). These televised trials often involve rather graphic details of this activity. *See infra* note 3.

Perhaps the first widely watched "gavel-to-gavel" trial was the December 1991 acquaintance rape trial of William Kennedy Smith. *See infra* note 84 and accompanying text; PAUL THALER, THE WATCHFUL EYE: AMERICAN JUSTICE IN THE AGE OF THE TELEVISION TRIAL 38 (1994) (describing the *Smith* trial as "a made-for-television event"); David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 ARIZ. L. REV. 785, 801 n.132 (1993) (noting that the "live television coverage of Smith's trial delivered titillation [and] sex . . . in abundance").

Other televised courtroom dramas that have delivered spectacles of sexual or sex-related misconduct include the "Big Dan's Tavern" gang rape case, THALER, *supra*, at 33-34; the Lorena Bobbitt penile mutilation trial, Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 135 (1994); the New Hampshire trial where Pamela Smart was convicted for sexually luring three students into killing her husband, THALER, *supra*, at 67; and the McMartin Pre-School child sexual abuse trial, *id.* at xxi.

2. Televising trials involving violence is perhaps too common a phenomenon to require documentation. However, the existence of this phenomenon can be easily established by reference to televised murder trials, including those of Joel Steinberg, THALER, *supra* note 1, at xiv; Pamela Smart, *id.* at 67; the Menendez brothers, Christo Lassiter, *TV or Not TV—That Is the Question*, 86 J. Crim. L. & Criminology 928, 966 n.225 (1996); and O.J. Simpson, *id.* at 930 & n.11.

3. The "lurid testimony," THALER, *supra* note 1, at 41, broadcast during the William Kennedy Smith trial included references to ejaculation and penile stimulation. *Id.* at 41-42 (quoting the *New York Post*'s transcript of Smith's explicit, televised testimony about his encounter with his accuser); *see also* Don Kowet, *Courting a Growing Audience on Cable*, WASH. TIMES, Dec. 12, 1991, at E1 (statement of *New York Post* columnist Amy Pagnozzi) ("'All day long words like urination, ejaculate and fellatio had been zinging out . . . .'"). Even the nation's most outspoken advocate of televised trials, Court TV founder Steven Brill, asked the following rhetorical question after the *Smith* trial: "'Can covering a famous family's rape trial, and feasting

Romance.[7] Racial and ethnic tension.[8] Strange and interesting characters.[9] Celebrities.[10] Based-upon-a-true-story realism.[11] Creative, overly enthusias-

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on testimony about parties and panties and bars and bras, be anything other than a good, long profitable leer?'" THALER, *supra* note 1, at 70.

4. CHRISTOPHER A. DARDEN, IN CONTEMPT 331 (1996); Thaler, *supra* note 1, at xiv; Henry L. Gates, Jr., *Thirteen Ways of Looking at a Black Man*, NEW YORKER, Oct. 23, 1995, at 56, 57.

5. THALER, *supra* note 1, at 4-5; *see also* George D. Prentice, II, *Broadcast Cameras in the Courtroom: Window or Peephole?*, CT. MGMT. & ADMIN. REP., Sept. 1992, at 1, 14 ("It seems to many that we have become a nation of voyeurs, content to enjoy the public spectacle of scandal as television entertainment, rather than as a means of furthering the cause of popular democracy.").

6. THALER, *supra* note 1, at 33 (discussing the Claus von Bulow trial, where the defendant was accused of "injecting [his wife] on two separate occasions with potentially lethal doses of insulin" in order to inherit the bulk of her estate).

7. The romances that have found their way into televised criminal trials are often of the twisted or failed variety. Examples include the relationship between teacher Pamela Smart and her students, *id.* at 67; the unhealthy alliance between Joel Steinberg and his live-in companion, Hedda Nussbaum, *id.* at xiv; the John and Lorena Bobbitt marriage, Calabresi, *supra* note 1; and the stormy marriage between O.J. and Nicole Brown Simpson, DARDEN, *supra* note 4, at 332, 365.

8. Although the O.J. Simpson case is often cited as the primary example of a televised courtroom proceeding that highlighted racial tension, Roger Cossack, *What You See Is Not Always What You Get: Thoughts on the O.J. Trial and the Camera*, J. COMPUTER & INFO. L. 555, 562 (1996), it is, unfortunately, far from the sole example. Other televised courtroom dramas that have highlighted racial and ethnic tension include the 1980 Florida trial of policemen charged in the beating death of Arthur McDuffie, THALER, *supra* note 1, at 30, 214 n.47; the state court trial of the Los Angeles police officers accused of beating Rodney King, *id.* at 50-52; and the Los Angeles trial of two African Americans accused of attempted murder in an attack on truck driver Reginald Denny following the Rodney King verdict, *id.* at 52-53.

9. Televised courtroom proceedings have featured such diverse characters as "the most famous necrophilic—necrophagist in American History," serial killer Jeffrey Dahmer, *A Riddle Wrapped in a Mystery Inside an Enigma*, NEW YORKER, Dec. 12, 1994, at 45, 45; THALER, *supra* note 1, at 60-61; Calabresi, *supra* note 1; *Hustler* magazine owner Larry Flynt, George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 424 (1980); the three U.S. Marines "charged with . . . assault for the beating of a [gay bar] patron . . . while shouting 'Clinton must pay!,'" Harris, *supra* note 1, at 823 n.285; and former law student and "'all-American boy'" Ted Bundy, the murderer of at least two college coeds, THALER, *supra* note 1, at 30; David Gelman, *The Bundy Carnival*, NEWSWEEK, Feb. 6, 1989, at 66, 66. However, for an assortment of unusual people, the O.J. Simpson case is difficult to surpass. Its characters included a porn actress, the bitter ex-husband of the lead prosecutor, a racist cop who peppered his screenplay project with racial slurs and later denied ever using them, a marine sergeant/aspiring actor/body builder whose recollections were based upon one of his dreams, and Brian "Kato" Kaelin, a freeloader who lived in Simpson's guest house. DARDEN, *supra* note 4, at 153, 253-55, 286, 289-90, 297-98, 344.

10. Given the American fervor for celebrities, the fact that the William Kennedy Smith acquaintance rape trial and the O.J. Simpson murder trial were not only the most widely watched courtroom dramas, but also among the most widely watched events of any type, should perhaps come as no surprise. *See, e.g.*, TIMOTHY R. MURPHY, A MANUAL FOR MANAGING NOTORIOUS

tic, and downright bizarre strategies.[12] Suspense, mystery, and high drama.[13] The modern American criminal[14] trial has everything that a television

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CASES xiii (1992) (noting the long-standing, "enormous American appetite for celebrity drama"); THALER, *supra* note 1, at 38 (statement of reporter Jeff Greenfield of the ABC news program *Nightline* regarding the William Kennedy Smith trial) ("'When a member of the most celebrated, controversial family in America battles a charge of sexual misconduct [and] when the presence of cameras in the courtroom guarantees that we will see the rich and famous in moments of supreme stress, . . . we are hooked.'"); The Hon. Clarence Thomas, *Victims and Heroes in the "Benevolent State,"* 19 HARV. J.L. & PUB. POL'Y 671, 677 (1996) (observing that "society is preoccupied with celebrities"); Richard Lacayo, *Trial by Television*, TIME, Dec. 16, 1991, at 30, 30 ("No one should have expected that the first court case to claim a huge television audience would center on municipal-bond trading. With a famous name linked to a sordid crime, the rape trial of William Kennedy Smith fits neatly into the usual daytime schedule of leering soap operas."); Betsy Streisand, *Can He Get a Fair Trial?*, U.S. NEWS & WORLD REP., Oct. 3, 1994, at 57, 57 (noting that the O.J. Simpson case "has riveted Americans with its mix of wealth, race, celebrity, science, obsessive love and domestic violence").

While celebrities are generally defendants in televised trials, they are occasionally victims. THALER, *supra* note 1, at 67 (mentioning the televised first-degree murder trial regarding the shooting death of television actress Rebecca Schaeffer).

11. Several commentators have noted that the success of the televised trial is based in part upon the audience's voyeuristic thirst for details of others' private lives. *E.g.*, MURPHY, *supra* note 10, at xiii (noting the "American appetite for . . . pure, unadulterated voyeurism"); THALER, *supra* note 1, at 38 (quoting a television reporter's observation that live courtroom tales of intimate details are addictive); *id.* at 66 (quoting *New Yorker* magazine critic James Wolcott's allegation that Court TV "'is a peephole into a segment of America populated by moral and mental blanks'"); Leslie Gospill & Julia A. Molander, *Cameras in the Courtroom*, DEFENSE COMMENT, Spring 1995, at 7, 8 ("We watch [televised trials], mouths agape, to see if the guy gets kicked in the groin. Only this time, without a laugh track, these kicks deliver life sentences, mistrials or multi-million dollar verdicts."); Jim Morrison, *Law of the Land: The Real-Life Dramas Behind Court TV's Incredible Success*, SPIRIT, Mar. 1996, at 32, 112 ("Like talk TV, you're a voyeur [while watching televised trials], peering into the lives of real-life people.").

12. In what one commentator described as "the first made-for-TV trial," a 15-year-old tried for first-degree murder in Florida for the killing of an 82-year-old widow claimed that he was prone to violence because he was involuntarily intoxicated by television. Joe Kollin, *Reporter Says Let's Ban Cameras from Courtrooms*, EDITOR & PUBLISHER, June 17, 1995, at 48, 48; *see also* Strickland & Moore, *supra* note 1, at 132 (discussing Florida's television coverage of the trial). In a televised Ohio case, a defendant charged with the rape and murder of a nine-year-old girl was hypnotized during his trial testimony. Gerbner, *supra* note 9, at 424. In a Connecticut trial that was covered extensively on both local and national television, a defendant charged with manslaughter after a parking dispute blamed his actions on Vietnam-induced post-traumatic stress disorder. Richard Zoglin, *Justice Faces a Screen Test*, TIME, June 17, 1991, at 62, 62.

In some televised trials, borderline trial tactics by one party beget similar tactics by the other party. For instance, in a New Jersey trial of a police officer charged with shooting a 16-year-old youth, the prosecutor claimed that a former police officer crippled in a shooting was wheeled into the courtroom as a ploy to generate jury sympathy. He responded in kind, dramatically holding up the dead youth's coat to the courtroom and television audiences, thereby exposing a large bullet hole. THALER, *supra* note 1, at 60.

13. "A trial is a story, . . . and that's part of the fascination. It's about people who are in peril. Someone in that courtroom is

producer could possibly desire.[15]

> either in danger of losing his or her life or losing a lot of money. And they're trying to fight off that peril. And there's a result. Do they win? Or do they lose?"

Lassiter, *supra* note 2, at 929 n.5 (quoting Court TV founder Steven Brill).

As any lawyer who has ever conducted a jury trial can attest, few—if any—times in life are as charged with tension as the moments awaiting the announcement of a jury's verdict. *E.g.*, THALER, *supra* note 1, at 60, 66-67 ("'Live verdicts are remarkable moments . . . . I can't imagine anything with more clear and explicit drama that's ever on TV, anywhere, than a verdict.'" (quoting a Court TV critic who admitted that he could not go to bed until he heard the verdict in a trial that he watched)); Lassiter, *supra* note 2, at 929 n.5 ("A trial, when televised live . . . is also a cliffhanger. Nobody knows the end until the end."); Morrison, *supra* note 11, at 112 (statement of Mike Archer, Court TV's executive editor) ("'There's no more dramatic moment in life than when you sit there and watch somebody listen to a jury's verdict.'").

14. Although civil trials are occasionally televised, this article concentrates on criminal trials, which make up the majority of televised courtroom proceedings. Harris, *supra* note 1, at 786; Prentice, *supra* note 5, at 13.

15. A substantial overlap exists between fictional and actual courtroom television. THALER, *supra* note 1, at 3 (noting that "[i]n the past two decades, 'the court story,' both fictional and real, has become an integral part of television programming—and the national consciousness. If television has tried to distinguish the real from the make-believe, it has failed, and for good reason."). The enormous interest in courtroom drama is underscored by the many successful fictional television programs, including *Perry Mason*, *L.A. Law*, *Law and Order*, and *Murder One*. *See* Harris, *supra* note 1, at 808-10; Steven Keeva, *Circus-Like Trial Colors Expectation*, A.B.A. J., Nov. 1995, at 48c, 48c; *cf.* Harris, *supra* note 1, at 797 (observing that "[l]awyer shows, police shows, courtroom dramas—all have been staples of television broadcasting since its inception, and a part of radio broadcasting before that") (footnotes omitted). In fact, the high level of drama in televised trials has increased the pressure on fictional courtroom dramas to keep pace. See, for example, THALER, *supra* note 1, at 41, stating:

> [T]elevision executives suggested that the lurid testimony broadcast during the [William Kennedy] Smith trial would hardly deter, but rather would encourage prime-time courtroom dramas to present more explicit story lines and language. "Now there is no turning back," said Dick Wolf, the executive producer of an NBC-TV crime series called "Law and Order." "You can't put something that sounds softened to the viewers after they've seen real-life cases like this.

Parallels between televised trials and other entertainment programming are not accidental." Court TV executives have declared that their "'goal is to substitute real law for *L.A. Law*.'" Harris, *supra* note 1, at 807. These advisors aim their daytime trial programming directly at an audience that would otherwise watch soap operas. THALER, *supra* note 1, at 55 (discussing Court TV founder's act of selling a fellow Court TV investor "'on the idea that the new network would be a cross between C-Span and soap opera'"); John Lippman, *We, the (TV) Jury*, L.A. TIMES, June 30, 1991, (Calendar) at 5 (stating that "Brill and his associates think [Court TV] will naturally appeal to people who watch daytime soap operas—whose sex, scandal and double-crossing story lines are not unlike the real-life trials that Court TV hopes to broadcast"); *The Verdict on the Televised Courtroom,* ADWEEK, Oct. 17, 1994, at 18, 18 (noting that Court TV's daytime televised trials attract viewers "who would otherwise be stuck with soap operas and game shows"); *cf.* THALER, *supra* note 1, at 34 (observing that the participants in the Claus von Bulow case "resembl[ed] characters in a dark soap opera"); Gospill & Molander, *supra* note 11, at 8 ("'It's like a soap-opera,' one male viewer told a TV reporter, explaining why he stays home

Even better, the cost of producing these "made-for-television" events is remarkably low. Unlike the high-priced actors who star in fictionalized television dramas, the "talent" in courtroom dramas, including judges, lawyers, defendants, victims, witnesses, and jurors, is never paid by the television executives who profit from the drama generated. After paying for the minimal production expenses of a camera, a microphone, a mile or two of cable, a live remote truck, and an "expert" commentator or two back in the studio,[16] the television network has financed all of its costs.[17]

While a criminal trial has significant profit potential, crime victims generally have nothing to gain—and quite a bit to lose—from their encounters with the criminal justice system. Crime victims often receive little or no compensation for their frequently significant economic and noneconomic losses.[18]

This article documents the disparity of the economic treatment between those who televise trials and those who are unfortunate enough to participate in them as crime victims. As an admittedly small, but nonetheless constructive, step toward correcting this disparity, a portion of the economic gain derived from televising criminal trials should be shifted from television producers to

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from work to watch. 'It draws you in.'").

Real and fictional television courtrooms occupy parallel universes in yet another fashion that further documents the entertainment potential of televised trials. Court proceedings sometimes spawn the semi-fictionalized accounts known as television docudramas. Perhaps the most prominent recent examples of this phenomenon were the three competing docudramas based upon the case of Amy Fisher, a teenager who shot the wife of her alleged lover, Joey Buttafuoco. *See* THALER, *supra* note 1, at 82-84; Harris, *supra* note 1, at 812. In perhaps an even more unusual intersection between the real and the fictional courtroom, Court TV presented a two-hour summary of the San Diego trial of Betty Broderick, accused of shooting her former husband and his second wife, during the same week that CBS presented a docudrama based on the same events. *See* THALER, *supra* note 1, at 67.

16. Despite the low cost to individual producers, the assembled personnel and equipment can be substantial if enough different media outlets cover the same trial. The O.J. Simpson trial coverage accumulated over 1000 reporters and support personnel, over 800 phone lines, 2 transformers, 50 miles of television cable, and 25 media trailers. S.L. Alexander, *The Impact of* California v. Simpson *on Cameras in the Courtroom*, 79 JUDICATURE 169, 169 (1996); *The Simpson Case by the Numbers*, N.Y. TIMES, Oct. 2, 1994, at E2.

17. *See, e.g.*, Gerbner, *supra* note 9, at 418 (stating that "[d]ifferent kinds of programs serve the same basic formula: they assemble viewers and sell them at the least cost"); *id.* at 425 ("It cost ABC an estimated $2 million to field the crew and carry the [Ted Bundy trial], a good investment by program cost and ratings standards."); Gospill & Molander, *supra* note 11, at 12 (observing that "the networks delight at the discovery of this relatively inexpensive new way to sell soap"); Paul Raymond, *The Impact of a Televised Trial on Individuals' Information and Attitudes*, 75 JUDICATURE 204, 204 (1992) (noting "the low production costs associated with televising trials"); Lippman, *supra* note 15, at 75 (quoting a former news director for the principle that the television news industry "'is all about the development of programs at low cost'").

18. *See infra* text accompanying notes 152-202.

crime victims. Part II documents the phenomenal growth of televised trials and argues that, despite claims to the contrary, the primary purpose of televising trials is generating profit through entertainment. Part III discusses the plight of crime victims. Finally, Part IV proposes and defends against certain criticism a system where courts would charge fees for the privilege of televising trials and then forward those fees to crime victims.

II. CAMERAS IN THE COURTROOM

Despite arguments against televised trials and attempts to limit them, televised trials are largely a growth industry. In recent years, television producers have steadily increased their access to state courtrooms, even with vocal and occasionally vehement opposition. As a result, the debate about whether cameras should and will be allowed into state[19] courtrooms is largely

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19. Cameras have had far less access to federal courtrooms, and the debate about whether they should be allowed in these courtrooms continues. The Federal Rules of Criminal Procedure that became effective in 1946 included Rule 53, which excludes cameras from federal criminal trials. FED. R. CRIM. P. 53; ABA STANDARDS FOR CRIMINAL JUSTICE: FAIR TRIAL AND FREE PRESS § 8-3.8 commentary at 54-55 & n.7 (3d ed. 1991) [hereinafter ABA STANDARDS]; Laralyn M. Sasaki, Note, *Electronic Media Access to Federal Courtrooms: A Judicial Response*, 23 U. MICH. J.L. REFORM 769, 771-72 & n.15 (1990). Despite the absence of a similar provision in the Federal Rules of Civil Procedure, the ban has effectively been expanded to both civil and criminal trials. *Id.* at 769 & n.4. On several occasions, federal court policy makers revisited the issue of cameras in federal courts and reaffirmed the ban. *E.g.*, COMM. ON THE OPERATION OF THE JURY SYS., JUDICIAL CONFERENCE OF THE U.S., REVISED REPORT ON THE "FREE PRESS—FAIR TRIAL" ISSUE, 87 F.R.D. 519, 535-36 (1980) [hereinafter REVISED REPORT]; *cf.* Nancy T. Gardner, Note, *Cameras in the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 482-83 (1985) (discussing judicial canons and committee standards upholding the ban).

However, in 1990 the U.S. Judicial Conference's Ad Hoc Committee on Cameras in the Courtroom proposed a three-year pilot project to test the viability of allowing cameras into federal courtrooms. *See Judicial Conference Votes Down Cameras*, NEWS MEDIA & L., Fall 1994, at 3, 3; Prentice, *supra* note 5, at 9. The three year experiment (which actually lasted three and one-half years) permitted cameras in some civil cases in six of the ninety-four federal districts. *Judicial Conference Votes Down Cameras, supra*, at 3; Strickland & Moore, *supra* note 1, at 128. Although the judges who participated reported no ill effects from the presence of cameras in their courtrooms and the Federal Judicial Center recommended expansion of television coverage, the Judicial Conference voted 19 to 6 to terminate the program. *Judicial Conference Votes Down Cameras*, *supra*, at 4; Tony Mauro, *Federal Judges Ban Cameras from Courtrooms*, QUILL, Nov. 1994, at 54; *see also* Strickland & Moore, *supra* note 1, at 128 (describing the vote as nearly two-to-one); *cf.* Alexander, *supra* note 16, at 172 (noting speculation that the O.J. Simpson trial contributed to the termination); Lassiter, *supra* note 2, at 931 & n.17 (reporting judges' concerns that television cameras in courtrooms negatively affect courtroom dignity and the jurors and witnesses); *ABA Backs Test of Televised Trials*, EDITOR & PUBLISHER, Mar. 18, 1995, at 20, 20 (noting effort to persuade Judicial Conference to reconsider its ban).

The Judicial Conference also voted to recommend that the 13 federal circuits adopt orders prohibiting broadcasting of court proceedings. Jonathan Groner & Richard Barbieri,

over. Consequently, public policy recognizing cameras in courtrooms as a fact of modern life should be adopted now.

A. Cameras in Courtrooms: A Brief Historical Perspective[20]

To fully understand the history of cameras in courtrooms, one must start before the dawn of television. At that point in time, cameras were already creating their share of controversy in and around American courtrooms.[21]

1. The Pre-Television Era

In 1917 the Illinois Supreme Court advised trial court judges to bar cameras from courtrooms.[22] Similarly, ten years later the Maryland Court of Appeals affirmed contempt citations of reporters who violated a trial court's prohibition of photographing criminal proceedings.[23]

The first broadcasted trial, albeit through radio, was the 1925 *Scopes* "monkey trial."[24] Following expansion of coverage to include radio broadcasters, newspaper photographers were also given courtroom access,[25] and extensive criticism resulted from the news media's enthusiastic trial

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Federal Judiciary Opens Window to Cameras in Court, RECORDER (San Francisco), Mar. 13, 1996, at 1; John Flynn Rooney, *U.S. Judges Here Vote to Codify Ban on Televising Trials*, CHI. DAILY L. BULL., June 18, 1996, at 1. In March 1996 the Judicial Conference partially withdrew this recommendation by resolving that each circuit could decide for itself whether to allow broadcasts of some appellate arguments. *Four More Circuit Courts Vote Not to Allow Cameras*, NEWS MEDIA & L., Summer 1996, at 22, 22; Groner & Barbiere, *supra*, at 1; Tony Mauro, *Federal Courts Cleared to Use TV Coverage*, USA TODAY, Mar. 13, 1996, at 1. Only the Second and Ninth Circuits have approved televising appellate arguments. *Four More Circuit Courts Vote Not to Allow Cameras*, *supra*, at 22. The 1st, 5th, 7th, 10th, and 11th Circuits have officially rejected cameras. *Id.*; *cf.* John Flynn Rooney, *7th Circuit Bans Cameras in Its Courts*, CHI. DAILY L. BULL., May 31, 1996, at 1 (discussing ban in Seventh Circuit).

For an in-depth review of cameras in federal courts, see generally Sasaki, *supra*.

20. For a more complete history of cameras in the courtroom, see generally Lassiter, *supra* note 2, at 936-59, and Strickland & Moore, *supra* note 1, at 129-35.

21. *Cf.* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-75 (1980) (discussing English and American history of allowing court proceedings to be open to the public and press).

22. People v. Munday, 117 N.E. 286 (Ill. 1917), *noted in* THALER, *supra* note 1, at 19.

23. *Ex parte* Sturm, 136 A. 312, 316 (Md. 1927). The *Sturm* decision demonstrates that press ingenuity and persistence are not recent creations. *Id.* at 313 (discussing how a newspaper photographer relinquished a blank plate, instead of the plate with the defendant's picture, in response to the judge's request for the photographic plate containing the defendant's picture).

24. Gregory C. Read, *Fade to Black: A Defense Perspective on Cameras in the Courtroom*, *in* THE AMERICAN JURY SYSTEM: WORTH PRESERVING 29, 29 (Donald J. Hirsch ed., 1996) (citing Ruth Ann Strickland & Richter H. Moore, Jr., *Cameras in State Courts: A Historical Perspective*, 78 JUDICATURE 128, 130 (1994)).

25. THALER, *supra* note 1, at 20.

coverage.[26]

The full storm of criticism would have to wait for the next "Trial of the Century." In 1935 Bruno Richard Hauptmann was tried for kidnapping and murdering the baby of aviator Charles Lindbergh.[27] A newsreel camera was hidden in the courtroom and soundproofed so well that most trial participants, apparently including the judge, did not discover its existence until trial footage was shown in approximately 10,000 of the nation's 14,000 movie theaters.[28] The newsreel footage made the *Hauptmann* trial "the first to show trial proceedings by audio-visual technology to a remote [viewing audience]."[29] The six-week trial was also covered by 700 reporters and 120 cameramen, four of whom were given courtroom access to take pictures during recesses.[30] The "carnival-like atmosphere"[31] of the trial generated an intense negative reaction from the organized bar and others.[32]

2. *ABA Canon 35*

The backlash against the bedlam caused by reporters and photographers during the *Hauptmann* trial led to the ABA's adoption of Canon 35, which banned all courtroom photography.[33] As originally adopted by the ABA in

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26. *See* Strickland & Moore, *supra* note 1, at 129 (calling the trial "[o]ne of the greatest circuses in the annals of the American judicial process"). In apparent recognition of the potential negative effect of courtroom broadcasts upon attorneys, *see infra* note 68, the attorneys were given the mistaken impression that the broadcast had only a limited range outside the courtroom. THALER, *supra* note 1, at 20.

27. THALER, *supra* note 1, at 22; Read, *supra* note 24, at 29.

28. THALER, *supra* note 1, at 22; *see also* Read, *supra* note 24, at 29 (noting that the trial was broadcast in "approximately 10,000 movie theaters around the country").

29. Lassiter, *supra* note 2, at 936.

30. Read, *supra* note 24; *cf.* THALER, *supra* note 1, at 22 (stating 132 as the number of cameramen present).

31. Lassiter, *supra* note 2, at 936.

32. *E.g.*, ABA STANDARDS, *supra* note 19, at 55 (indicating the occurrence of a "[w]idespread reaction within the organized bar to the apparent disgrace of the system of justice, prompted by the 'carnival' atmosphere of the trial"); THALER, *supra* note 1, at 22 (noting the reaction of "scholars, journalists, and legal authorities . . . to what was widely perceived as a media circus both inside and outside the Hauptmann courthouse" and quoting one woman's description of the courtroom scene as "a 'Roman holiday' where 'photographers clambered on the counsel's table and shoved their flashbulbs into the faces of witnesses'").

33. ABA STANDARDS, *supra* note 19, at 55; Lassiter, *supra* note 2, at 937; *see also* The Honorable John F. Onion, Jr., *Mass Media's Impact on Litigation: A Judge's Perspective*, 14 REV. LITIG. 585, 589 (1995) (noting ban resulted from the way the press "made a sort of mockery of . . . the Lindbergh baby trial"); *cf.* Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 14 (1979) (stating that "the photographers outside the Lindbergh trial—not the ones inside—caused the commotion that led to a total ban on courtroom photography"); Prentice, *supra* note 5, at 1 (noting that a "circus-like atmosphere surrounding the [trial] prompted a ban on televised court proceedings"); Strickland

1937,[34] Canon 35 of the Code of Judicial Conduct prohibited judges from allowing "[t]he taking of photographs in the court room" and "the broadcasting of court proceedings," due to concerns about the "dignity and decorum" of court proceedings.[35] In 1952 Canon 35 was amended to explicitly ban the televising of court proceedings.[36] Most states, with three exceptions,[37] adopted the Canon 35 ban on cameras in the courtroom.[38]

3. *Three States Allow Cameras*

In 1956 Colorado became the first state to explicitly reject ABA Canon 35 and allow televised trials.[39] However, even before Colorado renounced ABA Canon 35, two other states had allowed televised trials. Television cameras were first allowed in courtroom proceedings in a 1953 trial in Oklahoma City to tape proceedings for evening news broadcasts.[40] The first

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& Moore, *supra* note 1, at 130 (noting that "[a]lthough the New Jersey Court of Appeals saw no major problem with the conduct of the Hauptmann trial, the ABA reconsidered the role of cameras in the courtroom due to the reported carnival-like atmosphere of the Hauptmann trial").

34. Prentice, *supra* note 5, at 6.

35. As originally drafted, the complete Canon 35 read:

> Improper Publicizing of Court Proceedings. Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.

62 A.B.A. REP. 767 (1937).

36. ABA STANDARDS, *supra* note 19, at 55; Richard H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 COMM/ENT L.J. 749, 755 (1987); Prentice, *supra* note 5, at 6.

37. The number of states that did not adopt or follow ABA Canon 35 may be two or three, depending upon how one counts. *See infra* note 40 (noting that Oklahoma technically adopted ABA Canon 35, but nonetheless allowed the first televised trial).

38. *See* Frank, *supra* note 36, at 755-56.

39. *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465, 468-69, 472 (Colo. 1956); *see also* Strickland & Moore, *supra* note 1, at 130-31 (summarizing Justice Otto Moore's opinion for the Colorado Supreme Court ruling and emphasizing his position "that citizens should be educated about the functioning of all branches of government"); Carolyn E. Riemer, Note, *Television Coverage of Trials: Constitutional Protection Against Absolute Denial of Access in the Absence of a Compelling Interest*, 30 VILL. L. REV. 1267, 1269 & n.10 (1985) (addressing Colorado's allowance of cameras in state courtrooms before and after due process problems were recognized by the U.S. Supreme Court); Prentice, *supra* note 5, at 6 (discussing Colorado's local rule). In 1968 the Colorado Supreme Court affirmed a first-degree murder conviction, despite the defendant's assertion that a television camera in the courtroom prejudiced his rights. Gonzales v. People, 438 P.2d 686, 687-88 (Colo. 1968).

40. THALER, *supra* note 1, at 25; Frank, *supra* note 36, at 756; Sasaki, *supra* note 19, at 774. Although Oklahoma theoretically followed ABA Canon 35, it did not enforce its ban on televised trials. *See* THALER, *supra* note 1, at 213 n.33.

live televised trial took place two years later in Waco, Texas, "with the approval of the judge, the jury, and even the defendant," Harry Washburn.[41] When asked whether he objected to live television coverage, Washburn inadvertently prophesied, "'Naw, let it go all over the world.'"[42]

4. Estes v. Texas:[43] *The U.S. Supreme Court Speaks*

Some of Washburn's fellow Texas criminal defendants did not share his enthusiasm for television coverage. Former Lyndon B. Johnson aide Billie Sol Estes[44] appealed his swindling conviction to the United States Supreme Court, claiming that television coverage[45] had denied him a fair trial.[46] A sharply divided Court wrote six opinions and reversed the conviction.[47]

Four members of the Court apparently believed that television coverage was inherently prejudicial to a defendant's Fourteenth Amendment due process right to a fair trial.[48] Justice Harlan, who provided the critical fifth vote, agreed that television coverage in the *Estes* trial was prejudicial, but refused to agree to a blanket prohibition of television coverage in state courts.[49]

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41. THALER, *supra* note 1, at 26; *see also* Frank, *supra* note 36, at 756 (noting how reaction to the coverage was favorable); Sasaki, *supra* note 19, at 774 (same). Although the effect of Canon 35 upon the judge's decision to allow television coverage of the *Washburn* trial is unclear, Texas did eventually join Colorado in rejecting Canon 35's ban on televised trials. THALER, *supra* note 1, at 26 & 213 n.33.

42. THALER, *supra* note 1, at xix (citing *Televised Trial, World's Attention Attracted to 1995*, WACO TRIB. HERALD, July 23, 1978, at C1).

43. 381 U.S. 532 (1965).

44. *See* ABA STANDARDS, *supra* note 19, at 55.

45. The extensive coverage of the pretrial proceedings may have been the key to Estes's successful appeal. *See* THALER, *supra* note 1, at 28; Frank, *supra* note 36, at 756-57 & n.39; *cf.* ABA STANDARDS, *supra* note 19, at 55 (noting "more than a dozen cameramen [were] jockeying their equipment about the courtroom" during a pretrial hearing). The live television coverage of the actual trial was limited to the prosecution's opening statement and closing argument and the return of the verdict. *Estes*, 381 U.S. at 537.

46. *Estes*, 381 U.S. at 535-38.

47. *Id.* at 534-617.

48. *Id.* at 534-55.

49. *Id.* at 587 (Harlan, J., concurring) (concluding that the defendant's right to a fair trial was infringed upon in this case by allowing cameras in the courtroom, but asserting that a blanket prohibition of cameras "would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation"); *see also* Chandler v. Florida, 449 U.S. 560, 573 (1981) ("[I]t is fair to say that Justice Harlan viewed the holding as limited to the proposition that '*what was done in this case* infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.'" (quoting Justice Harlan's concurring opinion in Estes v. Texas, 381 U.S. 532, 587 (1965)) (emphasis in *Chandler* opinion)).

5. *The Florida Experiment*

Florida took advantage of the opening provided by Justice Harlan's limited concurrence. In 1977 the Florida Supreme Court sponsored a pilot project allowing the use of television and still cameras without the consent of the participants on an experimental basis.[50] The critical test case was *State v. Zamora*,[51] where a fifteen-year-old boy charged with murdering an elderly neighbor claimed that he suffered from "involuntary television intoxication"[52] that made him prone to violence.[53] Buoyed by the favorable report of the *Zamora* judge, the Florida Supreme Court opened the state's trial courts to television coverage, subject to control by trial judges.[54]

6. Chandler v. Florida:[55] *The Supreme Court Speaks Again*

The Florida Supreme Court's opening of its state courthouses to television coverage[56] led to the next United States Supreme Court challenge to televised trials. The *Chandler* decision arose out of the televised trial of two Florida police officers charged with conspiracy to commit burglary.[57]

The *Chandler* majority held that television coverage of a criminal trial does not automatically render the trial violative of due process.[58] With this

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50. *In re* Post-Newsweek Stations, Fla., Inc., 347 So. 2d 402, 403 (Fla. 1977); *see also* THALER, *supra* note 1, at 29-31 (summarizing the Florida pilot project and its impact on subsequent state proceedings); *cf. In re* Post-Newsweek Stations, Fla., Inc., 327 So. 2d 1, 2 (Fla. 1976) (approving an experimental program involving cameras in one civil and one criminal trial upon the consent of participants).

51. 361 So. 2d 776 (Fla. 1978).

52. Strickland & Moore, *supra* note 1, at 132 (stating the defense attorney "charged that TV has induced his insanity through involuntary subliminal intoxication" (citing George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 424 (1980))).

53. THALER, *supra* note 1, at 29-30; *see also supra* note 12 (suggesting that *Zamora* was ideal for televised coverage).

54. Strickland & Moore, *supra* note 1, at 132; *cf. In re* Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 781 (Fla. 1979) (allowing electronic media access to state courtrooms "[i]n view of the lack of any serious problems of disruption occurring during the term of the pilot program").

55. 449 U.S. 560 (1981).

56. After allowing television coverage of trials, the Florida Supreme Court rejected a defendant's challenge to the televising of his trial. *See* Maxwell v. State, 443 So. 2d 967, 970 (Fla. 1983) ("The televising of a trial does not *per se* impinge on the right to fairness and impartiality. A motion to limit or exclude television coverage must attempt to show with specificity that it will deleteriously affect the trial." (citing Chandler v. Florida, 449 U.S. 560 (1981))).

57. *Chandler*, 449 U.S. at 567-68.

58. *Id.* at 582-83 ("[B]ecause this Court has no supervisory authority over state courts, our review is confined to whether there is a constitutional violation. We hold that the Constitution

ruling, the Supreme Court opened the floodgates to television coverage of state criminal trials.

7. *The Few Become the Many*

From a rather inauspicious beginning in three southwestern states, television cameras have steadily marched into courtrooms in almost every state. Until 1973 only two states had officially adopted rules allowing television coverage of court proceedings.[59] By 1978 the number of states allowing television coverage had increased to six.[60] In 1978 the Conference of Chief Justices almost unanimously adopted a resolution that advocated state court experimentation with televised trials.[61] Just two years after this action, the number of states allowing cameras jumped to twenty-eight.[62] By 1985 at least forty states were allowing cameras in their courtrooms.[63] The total swelled to forty-five in the early 1990s.[64] In 1993 the total reached its current

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does not prohibit a state from experimenting with [televised trials]."). The *Chandler* Court did recognize that "in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter." *Id.* at 575.

59. ABA STANDARDS, *supra* note 19, at 54 n.3; *see also* Estes v. Texas, 381 U.S. 532, 544 (1965) ("Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom."); Gardner, *supra* note 19, at 475 ("In 1965, only two states permitted photographic and electronic media coverage of courtroom proceedings.") (footnotes omitted). However, although Oklahoma had officially adopted Canon 35's prohibition of cameras in the courtroom, it apparently did not enforce this prohibition. *See supra* note 40. Therefore, the actual number of states allowing cameras in the courtroom through the early seventies was three: Colorado, Texas, and Oklahoma. *See supra* text accompanying notes 39-41.

60. *See* Lassiter, *supra* note 2, at 940 & n.61.

61. ABA STANDARDS, *supra* note 19, at 56 & n.12; *see also* David Graves, *Cameras in the Courts: The Situation Today*, 63 JUDICATURE 24, 25 (1979) (noting 44 of the 46 state chief justices approved the resolution, with South Carolina casting the sole dissenting vote).

62. *See* Frank, *supra* note 36, at 762 n.73; *cf.* Prentice, *supra* note 5, at 5 ("[A]t the time the Court issued its decision in *Chandler v. Florida*, 29 states allowed some form of camera coverage in their courtrooms.") (citation omitted); *Chandler*, 449 U.S. at 565 n.6 ("As of October 1980, 19 states permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only, and the court systems of 12 other states were studying the issue."); REVISED REPORT, *supra* note 19, at 536 (reporting 26 states in 1980). Perhaps the differing reports result from differing interpretations or calculations of rules permanently allowing cameras and rules allowing experiments with cameras. *See, e.g.*, Graves, *supra* note 61, at 24 (noting that as of 1979 "seven states have now adopted permanent rules giving the media the right to photograph courtroom proceedings, and 15 other states have experimented with camera coverage").

63. Riemer, *supra* note 39, at 1294 & n.101; *see also* Gardner, *supra* note 19, at 475 (43 states in 1985).

64. *See* ABA STANDARDS, *supra* note 19, at 54 n.3; MURPHY, *supra* note 10, at 37 (listing 45 states in 1992); Prentice, *supra* note 5, at 6 (listing 45 states in 1991).

level of forty-seven.[65] The only states now that do not allow cameras or broadcasts in their courtrooms are Indiana, Mississippi, and South Dakota.[66] Some of the forty-seven states that allow cameras or broadcasts from their courtrooms limit or prohibit television access to some proceedings, including criminal proceedings.[67]

Nonetheless, the camera is a juggernaut that has forged its way into state courtrooms with considerable force. Although a largely academic debate about the propriety of the camera's presence continues,[68] the camera is a part

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65. THALER, *supra* note 1, at 31; Lassiter, *supra* note 2, at 929; Joseph E. Martineau & Mary B. Schultz, *Cameras in Missouri's Courtrooms: Supreme Court Administrative Rule 16*, J. MO. B., Sept.-Oct. 1993, at 379, 382; Read, *supra* note 24, at 31 & n.21.

66. Read, *supra* note 24, at 31. The District of Columbia also forbids any cameras in its courtrooms. Lassiter, *supra* note 2, at 930.

67. *See, e.g.*, Lassiter, *supra* note 2, at 929 n.8 ("While 47 states permit live television coverage of trials in some form, only about 26 states regularly allow cameras in the courtroom."); Strickland & Moore, *supra* note 1, at 128 ("Televised trials, appellate proceedings, or both are now a reality in 47 states, and 35 allow filming of criminal trials."). For a list of states permitting cameras in the courtroom, see Read, *supra* note 24, at 31 n.21. For charts breaking down the states into categories of permissible television access to courts, see Alexander, *supra* note 16, at 170, and Strickland & Moore, *supra* note 1, at 134. A detailed state-by-state chart is included in Ann J. Reavis et al., *Cameras in the Courtroom*, *in* DRI FIRST ANNUAL MEETING 1, 54-66 (1996).

68. Those opposing cameras in the courtroom have often argued that cameras detract from the dignity of trials; adversely affect lawyers, judges, jurors, witnesses, and other trial participants; make it more difficult for defendants to receive fair trials; add additional burdens to an already overtaxed court system; and can lead to violence outside the courtroom. *See, e.g.*, Lassiter, *supra* note 2, at 965-78 (providing arguments in opposition to cameras in the courtroom based on a lack of reliable coverage, prejudicial impact on the trial participants, and the need to maintain dignity and decorum in the courtroom); Brian V. Breheny & Elizabeth M. Kelly, Note, *Maintaining Impartiality: Does Media Coverage of Trials Need to Be Curtailed?*, 10 ST. JOHN'S J. LEGAL COMMENT. 371 (1995) (arguing that media coverage does not need to be curtailed in order to maintain jury impartiality); Jack G. Day, *The Case Against Cameras in the Courtroom*, JUDGES' J., Winter, 1981, at 18 (discussing why videotaping or televising of trials should remain forbidden); Kenneth L. Pedersen, *Just Say No to Cameras in the Courtroom*, ADVOCATE, Aug. 1996, at 13 (arguing that cameras in the courtroom detract from the accuracy of the judicial system and make justice difficult to attain).

Those who support cameras in the courtroom counter that cameras can educate the public and increase understanding of the court system, *see infra* note 93 and accompanying text; can result in the public being shown the whole story rather than bits and pieces selected by journalists; can increase public confidence in the judicial system; can have either no effect or a positive effect on trial participants; do not cause problems in high-profile trials because the real cause is publicity; and aid the public in its oversight of the judicial system. *See, e.g.*, Eugene Borgida et al., *Cameras in the Courtroom*, 14 L. & HUM. BEHAV. 489, 504-07 (1990) (discussing results of a study examining the psychological effects of cameras in the courtroom); Harris, *supra* note 1, at 818-21 (discussing the benefits of Court TV); Floyd Abrams, *Yes: Cameras Reflect the Process, for Better or Worse*, A.B.A. J., Sept. 1995, at 36, 36 (arguing that cameras in the courtroom accurately present the behavior of judges and attorneys); Charles-Edward Anderson, *Trial by Press?: Pretrial Publicity Doesn't Bias Jurors, Panelists Say*,

of the landscape of state courtrooms, perhaps irretrievably so.[69]

Almost twenty years ago, Washington attorney and former Federal Communications Commissioner Lee Loevinger told ABA delegates who were debating the wisdom of televised trials, "You're fooling yourselves. I don't think we have any choice. We'll continue to get television coverage whether we like it or not."[70] He was right. No state[71] that has approved cameras in its courtrooms has reversed that decision and later banned them.[72]

The strength of the camera's position in the courtroom is best illustrated by the aftermath of the O.J. Simpson criminal trial. In the trial's wake, debate concerning the wisdom of televising trials was prominent.[73] Many doubted

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A.B.A. J., Sept. 1990, at 32, 32 (noting that three panels of judges, lawyers, journalists, psychologists, and social scientists agree jurors are unaffected by pretrial publicity); Stephen E. Nevas, *The Case for Cameras in the Courtroom*, JUDGES' J., Winter, 1981, at 22 (presenting arguments in favor of televising or videotaping trials).

69. *See* THALER, *supra* note 1, at xxi (statement of McMartin Pre-School prosecutor Pamela Ferrero) ("'We don't talk about courtroom cameras anymore—people just accept them as a matter of course . . . .'"); *id.* ("One point remains clear: Once television has infiltrated a critical arena of American sociopolitical life, it seems to find a permanent home."); Gerbner, *supra* note 9, at 426 ("Once televised trials attract a large national following, the process will be irresistible, cumulative, and probably irreversible."); Morrison, *supra* note 11, at 114 ("[T]he controversy over cameras in courtrooms seems to be fading, though a few naysayers remain."); Zoglin, *supra* note 12 ("One of the lessons of the media age is that the TV juggernaut is hard to reverse.").

Television's irreversible force is not solely an American phenomenon. The Honourable Justice MD Kirby, *Televising Court Proceedings*, 18 U. N.S.W. L.J. 483, 485 (1995) ("Every sensible person can see that, the technology of information having moved along, courts and judges can scarcely expect to keep the cameras out of Australian courts forever.").

70. Gerbner, *supra* note 9, at 417 (quoting *Bar Association Again Backs Ban on Television and Radio in Court*, N.Y. TIMES, Feb. 13, 1979, at A16).

71. New York is the only arguable exception. New York's legislature has enacted several statutes allowing television access to the courtroom, each with a sunset clause that eliminated the statutory authority for televised trials on a date certain. On several occasions, the sunset clause has come into play and thereby banned access for short periods of time. However, on each of these occasions the legislature has adopted a new statute that again allowed cameras into New York courtrooms. THALER, *supra* note 1, at xxi, 56-57, 73-79; *cf. Keeping the Cameras On*, BROADCASTING & CABLE, Feb. 6, 1995, at 44 (discussing the recent passage of a New York bill that allows cameras in the courtroom).

72. Daniel Stepniak, *Televising Court Proceedings*, 18 U. N.S.W. L.J. 488, 490 (1995); *see also* Sasaki, *supra* note 19, at 770 n.6 ("No state, having completed access experimentation, has concluded that such coverage should be prohibited."); *cf. Simpson and Cameras*, EDITOR & PUBLISHER, July 1, 1995, at 8 ("We cannot foresee that the legislatures of 47 states are going to rescind their approval.").

73. Lassiter, *supra* note 2, at 930; Bill Kisliuk, *Judicial Council to Weigh Cameras in Courtrooms*, RECORDER (San Francisco), Oct. 30, 1995, at 1; *see also* Alexander, *supra* note 16, at 170 (noting how following the trial, "[California] Chief Justice Malcolm Lucas appointed a 12-member Task Force to Review Photographing, Recording, and Broadcasting in the Courtroom"); Harriet Chiang, *Task Force Debates Merits of Cameras in Court*, S.F. CHRON., Jan. 9, 1996, at A16 (reporting on testimony presented to the task force).

whether states should continue to allow the practice, but these doubts had little practical effect. Only a few trial court judges indicated that the *Simpson* television coverage affected their decisions to deny the televising of particular trials.[74] No state has withdrawn its rule permitting broadcasting of trials since the *Simpson* criminal proceedings began,[75] and some states have even expanded television's access to their criminal trials.[76] In the months following the start of the trial, the leading network televising criminal trials reported greater success in securing court permission to allow televising of trials, increasing to a rate of more than 95%.[77] If the negative attention generated by the *Simpson* criminal trial did not kill, or even wound, the televised American[78] state court trial, probably nothing will.

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74. *E.g.*, Jamie Beckett, *Cameras Barred at Klaas Trial*, S.F. CHRON., Feb. 6, 1996, at 1 (discussing the use of cameras in the *Davis* trial); Elizabeth Gleick, *Sex, Betrayal and Murder*, TIME, July 17, 1995, at 32, 32 (implicitly suggesting that Judge William L. Howard's decision to bar cameras from the Susan Smith child drowning trial resulted from the happenings in the *Simpson* trial); Ken Hoover, *Verdict Still Out on Cameras in Courtrooms: Klaas Case Illustrates Courts' Shift*, S.F. CHRON., Apr. 22, 1996, at A17 (discussing the effect of the *Simpson* case on the use of cameras in the courtroom in the *Davis* trial); Jill Smolowe, *TV Cameras on Trial*, TIME, July 24, 1995, at 38, 38 (discussing the impact of the *Simpson* trial on the Susan Smith trial and the Richard Allen Davis trial involving the murder of Polly Klaas).

75. *Cf.* Alexander, *supra* note 16 (examining state-by-state reactions to the *Simpson* trial and not finding any withdrawn allowances of cameras). The California Judge's Association executive board voted against endorsing a proposed ban on cameras in California's courtrooms. *CJA Board Votes Narrowly to Oppose Ban on Cameras*, RECORDER (San Francisco), Feb. 14, 1996, at 3; *cf.* Alexander, *supra* note 16, at 172 ("The presiding judge in the Simpson case, Lance Ito, after the trial expressed his strong support for courtroom cameras . . . ."). The California study ultimately resulted in changes to, but not withdrawal of, California's rules allowing cameras. *See* CAL. R. 980; *see also* Reavis et al., *supra* note 67, at 25-26 (discussing the revised rule).

76. According to a published report on the effect of the *Simpson* trial:

> Four states reported changes in the status of courtroom cameras since the advent of the Simpson trial: Idaho . . . began a one-year experiment with cameras in trial courts on February 15, 1995. Missouri . . . made permanent the rules allowing cameras in trial courts on July 1, 1995—the same date North Dakota . . . also made trial court coverage permanent. And Tennessee voted in December to experiment with broadening camera access.

Alexander, *supra* note 16, at 170.

77. Betsy Streisand, *And Justice for All?*, U.S. NEWS & WORLD REP., Oct. 9, 1995, at 47, 51 ("Since the Simpson trial started, Court TV . . . has been granted access to 47 of the 49 trials for which it has applied—a batting average higher than normal.").

78. American states are not the only governments that have studied, debated, and struggled with the camera's role in trials. For discussions of cameras in courtrooms outside the United States, see Kirby, *supra* note 69 (Australia); Lassiter, *supra* note 2, at 932-33 & nn.21-25 (Canada, England, Ireland, Scotland, and Italy); A. Wayne MacKay, *Framing the Issues for Cameras in the Courtrooms: Redefining Judicial Dignity and Decorum*, 19 DALHOUSIE L.J. 139 (1996) (Canada); Stepniak, *supra* note 72 (Australia); Stephen A. Metz, Comment, *Justice Through the Eye of a Camera: Cameras in the Courtrooms in the United States, Canada, England, and Scotland*, 14 DICK. J. INT'L L. 673 (1996) (Canada, England, and Scotland);

B. The Modern Televised Trial

With relatively rare exceptions, television cameras in courtrooms used to be utilized only to secure snippets for the evening news.[79] While this practice continues,[80] many trials are now televised at length to regional[81] or national audiences.

The televised trial helped launch a successful cable television network, Court TV,[82] and generated widely watched programming for other networks. Court TV's daytime programming consists almost entirely of live coverage of trials from across the country.[83] In fact, Court TV and other networks often televise highly publicized trials gavel-to-gavel.[84] For instance, CNN televised

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D'Arcy Jenish & Sharon Doyle Driedger, *Legal Lesson or Soap Opera?*, MACLEAN'S, Mar. 13, 1995, at 35, 35 (Canada); Michael S. Serrill, *Murder Most Depraved: The Prosecution of Accused Schoolgirl Killer Paul Bernardo Is Canada's Trial of the Century*, TIME, June 19, 1995, at 25, 25 (Canada); *cf.* W.H. & Hillary Kessler, *Tadic Trial Primer*, AM. LAW., Sept. 1995, at 59, 59 (noting Court TV's plans for coverage of the International Criminal Tribunal for the Former Yugoslavia in The Hague, Netherlands).

79. *See supra* text accompanying note 40.

80. *See* Kollin, *supra* note 12, at 37 ("No pictures for your 6 o'clock newscast? Go to the courthouse and shoot a trial or hearing. It's easy, available and cheap. It may not be important, but with the voice of an authoritative-sounding reporter it will sound cataclysmic.").

81. *See infra* text accompanying note 86 (noting regional coverage of the Big Dan's Tavern gang rape case); *see also Court TV Mulls Regional Coverage*, ADWEEK, Oct. 10, 1994, at A11, A11 ("Court TV founder/ceo Steven Brill said he is considering adding regional feeds in several states to Court TV's national service."); *Court TV's Steve Brill: Witness for a Nation*, BROADCASTING & CABLE, Feb. 6, 1995, at 43, 47 [hereinafter *Court TV's Steve Brill*] (considering statewide Court TV for some cases).

82. Court TV founder Steven Brill claims that the idea for the network came to him in a taxi when he heard a report about local television coverage of the Joel Steinberg murder trial. THALER, *supra* note 1, at 55; Lippman, *supra* note 15, at 65; Morrison, *supra* note 11, at 111. "As presently constituted, Court TV is a joint venture of four companies . . . : Time Warner, Inc., Liberty Media Corp., Cablevision Systems Corp., and the National Broadcasting Company." Harris, *supra* note 1, at 800-01 (footnote omitted); *see also* Prentice, *supra* note 5, at 3 (listing the three companies that launched Court TV). In February 1997, when his effort to buy back Court TV from Time Warner failed, Brill left the network. *See* Richard Turner, *Sudden Exit of a Would-Be Mogul*, NEWSWEEK, Mar. 10, 1997, at 74, 74.

When Court TV started on July 1, 1991, it was broadcast in about four million homes with cable television. Morrison, *supra* note 11, at 112. It is now available in about half of the nation's households. *Id.* at 116.

83. Harris, *supra* note 1, at 802 (noting that in addition to 11 hours of live coverage daily, Court TV replays lengthy trial excerpts during the overnight hours).

84. Court TV has televised hundreds of trials. Cossack, *supra* note 8, at 556 ("By the time the Simpson trial started, Court TV had already televised some 200 trials in its short history . . . ."); Lassiter, *supra* note 2, at 928 & n.3 (noting more than 340 trials were televised by Court TV as of June 1994); Read, *supra* note 24, at 30 ("[B]y 1996 Court TV had broadcast almost 500 court proceedings . . . ."). *But see* THALER, *supra* note 1, at 64 ("Court TV is not entirely gavel to gavel, nor is it necessarily live television.").

the four-month Claus von Bulow trial;[85] and when CNN covered the Big Dan's Tavern gang rape case, a local cable television system joined in the coverage.[86] Both CNN and Court TV televised the William Kennedy Smith date rape trial.[87] The O.J. Simpson trial exceeded the coverage of all these trials by generating live coverage for months on CNN, Court TV, and E! Entertainment Network.[88]

Nationally televised trials generate much more than just live coverage. Network and local newscasts increase their viewer appeal with dramatic episodes from not just the famous trials, but other televised trials as well.[89] Television "news magazines," such as *Inside Edition, Current Affair, 48 Hours*, and *Prime Time Live*, cover notorious cases at length. Highly publicized trials sometimes spawn evening shows featuring panels of legal experts discussing courtroom events of the day.[90] Excerpts from televised

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As television critic David Bianculli noted regarding the William Kennedy Smith trial, "'The CNN coverage isn't so much gavel-to-gavel, actually, as gavel-to-commercial-to-gavel, with former CNN Gulf War correspondent Charles Jaco acting more as ringleader than reporter.'" *Id.* at 48.

85. *Id.* at 34.

86. *Id.* at 36.

87. *Id.* at 39, 48.

88. Read, *supra* note 24, at 30 & n.11; Gospill & Molander, *supra* note 11, at 8; Steven Brill, *ACLU Should Support Cameras in Court*, FULTON COUNTY DAILY REP., June 30, 1995, at 9. CNN, Court TV, and E! Entertainment Network combined for 2000 hours of live trial coverage. Alexander, *supra* note 16, at 169.

In an interesting example of the "where I stand depends upon where I sit" phenomenon, Court TV's Steven Brill roundly criticized E!'s coverage of the trial:

> I would hope that [E!'s Lee Masters] would want to think twice before he again allows something calling itself the Entertainment Network to televise gavel to gavel a double-murder trial.
>
> While I would join Masters in court to fight for E!'s right to share in the Court TV camera feed from the O.J. Simpson trial, I sure would love to have a drink with Lee one night and ask him why it doesn't further coarsen society and cheapen tragic events when a channel that calls itself the Entertainment Network carries a double-murder trial gavel to gavel, anchored by a diet-food pitchwoman, and complete with gossip reports and commentary from hair stylists and a dog psychologist.
>
> It's not illegal, and shouldn't be. It's just wrong.

Brill, *supra*, at 9. Given Court TV's prurient quest for ratings and advertising sales, *see infra* notes 104-05 and accompanying text, Brill's protestations ring rather hollow.

89. *See, e.g.*, THALER, *supra* note 1, at 39 (noting that excerpted versions of the testimony of alleged William Kennedy Smith victim Patricia Bowman dominated newscasts); Harris, *supra* note 1, at 811 ("Given the demands of the typical half-hour newscast, even top news stories on television seldom get more than 'tiny bites' of air time. . . . In these constraints, . . . those producing television news programs naturally pick the most dramatic slice of the day's events that they can.") (footnote omitted); *The Simpson Case by the Numbers*, *supra* note 16, at E2 (noting that *NBC Nightly News with Tom Brokaw* contained a story on the O.J. Simpson criminal case on 73 evenings).

90. THALER, *supra* note 1, at 65; Bill Carter, *After the Verdicts, Will Case Still Sell?*, N.Y.

trials even find their way into programs aimed toward children.[91] In a real sense, these rather frequent megatrials seem to generate television-driven industries of their own.[92]

C. *That's Entertainment (and Big Business)*

Advocates of continued and expanded presence of cameras in courtrooms primarily argue that televised trials educate the public about the judicial system.[93] Notwithstanding this oft-cited justification, the most likely motiva-

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TIMES, Feb. 6, 1997, at A15 (describing numerous court-related television shows started during the O.J. Simpson trial); Morrison, *supra* note 11, at 114 (describing Court TV's program, *Prime Time Justice*).

91. Joe Mandese & Jeff Jensen, *'Trial of Century,' Break of a Lifetime*, ADVERT. AGE, Oct. 9, 1996, at 1, 1 ("[O]n Oct. 8, Nickelodeon was scheduled to run a half-hour news program about the Simpson trial and all its possible ramifications as they pertain to children.").

92. *See* Wendy Kaminer, *No: Tabloid Television Does Not Belong at Trial*, A.B.A. J., Sept. 1995, at 37, 37 ("[T]he Simpson case is an industry worth more than the gross national product of a small country."); Carter, *supra* note 90, at A15 (describing the O.J. Simpson trial as "the greatest gravy train in media history").

93. *See, e.g.*, THALER, *supra* note 1, at xxii ("[T]he camera helps the nation construct a clearer 'reality' of the American courts, which can only enhance and legitimize the processes of law and renew faith in the justice system."); *id.* at 68 ("[Court TV founder Steven] Brill maintains that Court TV is 'going to help people understand the important legal issues that affect their lives . . . .'"); Gospill & Molander, *supra* note 11, at 8, 10 ("[T]here's a certain educational factor to Court TV. 'Probably 75 percent of the public now knows about preliminary hearings,' [Rob Bunzel] says."); Harris, *supra* note 1, at 818 ("[I]t seems safe to say that viewers of Court TV will be educated by the experience, at least to some degree."); Frank, *supra* note 36, at 795 ("The potential educational value of electronic access is frequently suggested as one of its primary benefits."); Gardner, *supra* note 19, at 492 ("Televised trials, if broadcast in an undistorted fashion, can educate the public about its judicial system, thus satisfying the public's constitutional 'right to know.'"); Abrams, *supra* note 68, at 36 ("The presence of the camera . . . seemed likely . . . to better inform the public about what was happening in a particularly celebrated case."); Hoover, *supra* note 74, at A18 ("[A] news media attorney argued that television coverage of Davis' trial could help educate the public about the criminal justice system."); Strickland & Moore, *supra* note 1, at 135 ("Public knowledge of the operation of the courts, distorted by television shows and movies, can be enhanced by television in the courtroom, allowing viewers to become better educated about the cumbersome as well as sensational aspects of the judicial process."); *see also* Harris, *supra* note 1, at 817 (describing the results of a study whereby viewers of television trials became more knowledgeable than non-viewers about the judicial process); Raymond, *supra* note 17, at 209 (same).

Opponents of televised trials do not concede that television educates viewers about the justice system. *See, e.g.*, THALER, *supra* note 1, at 80 ("[R]esearch concluded that public knowledge, or lack of it, about the judicial process was the same whether court cameras were present or not. . . . It concluded that televised coverage of trials had no effect whatsoever on the level of public knowledge of the judiciary."); Lassiter, *supra* note 2, at 973 ("[I]t is by no means certain that actual viewing of courtroom performance gavel-to-gavel has achieved substantial educational or confidence-inspiring results."); Gardner, *supra* note 19, at 491 ("According to the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom, media coverage of state

tions for televised trials suggest that an idealistic or altruistic desire to educate television audiences has very little to do with the growth of the televised trial industry. Instead, two other longstanding American values, entertainment[94] and capitalism,[95] are driving this growth.

Although the trial as a television profit center may be a relatively recent phenomenon, the trial as an entertainment vehicle is nothing new. Even before the birth of the United States, judicial proceedings were spectacles.[96] When the United States was a rural, slower-paced nation, trials would draw large audiences to crowded courtrooms.[97] The modern public fascination with

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court proceedings has not resulted in increased public understanding of the courts. Rather than educating the public, the manner of televising has often resulted in miseducation and a distortion of the trial."); Lincoln Caplan, *Sport TV*, NEW REPUBLIC, Oct. 23, 1995, at 18, 20 ("Followers of the new legal journalism may pick up lawyerly lingo, but they get little guidance in understanding the significance of the events reported or even in following the narrative of those events."); Gerbner, *supra* note 9, at 420 ("The problem is that the opaque reality of the courtroom is less illuminating of the judicial process than is translucent fiction. One must go behind the scenes to see how things really work. Surface appearances are more likely to conceal than to reveal how the judicial system operates."); Prentice, *supra* note 5, at 13 ("One could argue that broadcast cameras in the [Rodney King] courtroom did little, if anything, to educate and inform the public about how trials are really conducted.").

Some commentators even maintain that trials are not and should not be designed to educate the public. *See, e.g.*, THALER, *supra* note 1, at 58 (statement of William Kennedy Smith's defense attorney Roy Black) ("'The whole purpose of the trial is not to educate people. It's to decide whether or not a citizen in this community is guilty of a crime and should be punished by going to prison.'"); Sasaki, *supra* note 19, at 789-90 ("Judge Nauman S. Scott of the Western District of Louisiana echoed many respondents' views: 'The purpose of the courts . . . is to dispense justice; not to educate the public.'"); Day, *supra* note 68, at 19 ("The judicial process is not designed or intended to educate, inform, or entertain the public. It is a search for truth."); Hoover, *supra* note 74, at A18 ("'The purpose of this trial is not to educate the public about anything,' snapped the [Richard Allen Davis trial] judge."); *cf.* Lassiter, *supra* note 2, at 973 ("[T]he claims made for confidence-inspiring and general education-building can be served without sacrificing courtroom autonomy by providing extensive news coverage, expert commentary, and panel discussions *outside the courtroom*."); Day, *supra* note 68, at 20 ("[T]he media's educational goals are poorly defined. Do they want to explain the judicial process, clarify court procedures, or let the public know that justice is being done?").

94. *See* Susanne Roschwalb, *Does Television Belong in the Courtroom?*, USA TODAY MAG., Nov. 1994, at 69, 69 ("That the chief appeal [of the O.J. Simpson criminal trial] lay in its entertainment value may not be a very high-minded conclusion, but it seems inescapable when entertainment has become the primary force in American media.").

95. *See infra* notes 119-25 and accompanying text.

96. Of course, the history of judicial proceedings includes well-attended events that are no longer part of the modern criminal justice system, such as public executions. *See* Gerbner, *supra* note 9, at 421 ("The most widely frequented shows in London just emerging from the Middle Ages were public executions . . . ."); *cf.* Gilbert Geis, *A Lively Public Issue: Canon 35 in the Light of Recent Events*, A.B.A. J., May 1957, at 419, 421 (quoting an editorial comparing the first trial covered on live television to public executions); Antoinette Bosco, *Murder as Entertainment*, LADIES HOME J., Nov. 1994, at 144, 148 ("They used to throw Christians to the lions. Now they watch court trials.").

97. Gerbner, *supra* note 9, at 421-22 (statement of Chief Justice Warren) ("'In early frontier

televised trials is simply an extension of this centuries-old public interest in high stakes courtroom drama.[98] However, drama[99] is predominantly a form of entertainment, not education.[100]

America, when no motion pictures, no television, and no radio provided entertainment, trial day in the country was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum . . . .'"); Strickland & Moore, *supra* note 1, at 129 ("When the United States was less populous, predominantly rural, and more homogeneous, . . . [p]eople could . . . travel in a leisurely manner to the county seat to participate in the judicial process. Court days were festive days, with the trials as the center of the community's interest.") (footnote omitted); Frances Kahn Zemans, *Public Access: The Ultimate Guardian of Fairness in Our Justice System*, 79 JUDICATURE 173, 173 (1996) ("In the early days of our country, we were made up of a number of small towns. . . . [I]n those days trials were truly public forums. They were attended by the public.").

98. *See* Morrison, *supra* note 11, at 112, 114 ("Once courtrooms provided entertainment, civic lessons, and expiation for communities. Court TV allows anyone to become a courthouse buff from the comfort of a couch, without worrying about incurring a judge's wrath by talking, eating, or cheering for one side.").

Similar to the long-held value of trials as sources of entertainment, cases of great notoriety are also "not a new phenomenon." MURPHY, *supra* note 10, at xiii (listing "[t]he Salem witch trials, the trial of Aaron Burr, the Scopes trial, the Lindberg kidnapping case, the Sacco and Vanzetti trials, as well as the trials of Alger Hiss, Dr. Sam Sheppard, the Chicago 7, Roxanne Pulitzer, and the Watergate defendants" as examples).

Even the "trial of the century," an event that seems to take place about once a decade, dates back to the first of this century. Onion, *supra* note 33, at 588-89 ("In 1906 . . . there was the trial of Harry Thaw, accused of killing Stanford White, the most famous architect that New York had ever produced. . . . Well, there was a love triangle and some of the testimony in the trial was rather spicy. . . . It was quite sensational. It was billed then as the 'trial of the century.'").

99. Even when the leaders of Court TV have espoused the alleged educational value of televised trials, they admit that the drama of the courtroom is a critical element of the network's programming. Gospill & Molander, *supra* note 11, at 8 (statement of Court TV spokesperson Lynn Rosenstrach) ("'Certainly the public's interest (in courtroom drama) has always been there—based on the numerous successful TV shows, movies and books. So, the entertainment value may draw viewers to us, too.'"); Morrison, *supra* note 11, at 114 ("Why do people watch? Brill suggests a combination of entertainment and civic interest. . . . '[I]t's dramatic. Courtrooms are places where people have combat.'").

Observers outside Court TV have noted that entertainment is a critical part of its product. THALER, *supra* note 1, at 5 ("[Court TV] may be successful if Brill can effectively convert judicial proceedings into a sort of television theater imbued with typical entertainment values."); Chris Petrakos, *Television Robs Courtroom of Jurisdiction*, QUILL, Jan.-Feb. 1995, at 42, 42 (describing Court TV as "that strange blend of entertainment and justice").

100. Steven Kay, *Playing Their Part*, LAWYER, Mar. 7, 1995, at 17 ("However the argument is dressed-up, be it in educational clothes or the right of the public to see justice done, it comes down to entertainment."); *cf.* Petrakos, *supra* note 99, at 42 ("[I]n the rush to cover these [trials]—and many times, to try to justify the coverage as an act of service to the public—the media have created a hunger for sensation that will entirely supersede people's thirst for information and knowledge."); Prentice, *supra* note 5, at 3 ("The public's right to know and its need to be educated about the legal system will become secondary to television's only real skill—to entertain its viewers."); *id.* at 13 ("Even ABC's Ted Koppel, in describing the media

Television is largely an entertainment medium,[101] and viewers watch trials primarily for entertainment purposes.[102] When network executives decide which trials to televise gavel-to-gavel, they look not for the trials that will best educate their viewers, but for those that will draw the most viewers.[103] Televised trials often feature at least one, if not some combination, of the three pillars of American entertainment: sex, violence, and celebrities.[104] When television reporters choose trial excerpts for newscasts and

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excitement over the Smith case, conceded 'if there is any public interest that is being served here, it is first, last, and foremost our prurient interest.'").

Other countries have covered U.S. trials, *see, e.g.*, THALER, *supra* note 1, at 39, and American networks have televised coverage of foreign trials, *see, e.g.*, *id.* at 71. Because believing that citizens of various countries are tuning in to educate themselves about the nuances of other countries' judicial systems is difficult, the more likely motivation is to be entertained.

101. NEIL POSTMAN, AMUSING OURSELVES TO DEATH: PUBLIC DISCOURSE IN THE AGE OF SHOW BUSINESS 87 (1985) ("Entertainment is the supra-ideology of all discourse on television. No matter what is depicted or from what point of view, the overarching presumption is that all is there for our amusement and pleasure."); *see also* THALER, *supra* note 1, at 4 ("Simply stated, we watch television because it is entertaining."); Prentice, *supra* note 5, at 11 (discussing Postman's book).

102. Kaminer, *supra* note 92, at 37 ("The televising of sensational cases . . . . often is billed as educational, but the public's interest in them seems mostly prurient. People who claim they watch the Simpson case to educate themselves about the system remind me of people who say they buy *Playboy* for the articles."); Mark Whitaker, *Whites v. Blacks*, NEWSWEEK, Oct. 16, 1995, at 28, 29 ("For the past 16 months [of television coverage of the *Simpson* criminal proceedings], most Americans had consumed the proceedings as entertainment . . . .").

103. *Cf.* Chandler v. Florida, 449 U.S. 560, 580 (1981) ("Selection of which trials, or parts of trials, to broadcast . . . will be governed by such factors as the nature of the crime and the status and position of the accused—or of the victim; the effect may be to titillate rather than to educate and inform."); Gerbner, *supra* note 9, at 420 ("Trials will be picked and edited to fit . . . dramatic ritual.").

One of the first nationally televised megatrials, the William Kennedy Smith date rape prosecution, demonstrates aptly that entertainment—not education—is the primary goal for network executives. They featured this trial not because of the need to focus public attention on the problems of date rape, but because it involved a member of a famous (and infamous) American family. *See* THALER, *supra* note 1, at 45 ("In a 'Nightline' report, Ted Koppel stated, 'Indeed, if you wanted to argue that televising a rape trial raises public sensitivity on the issue, you could find a dozen rape cases on any given day which would do the job more effectively and with far fewer distractions.'"); *cf. id.* at 44 (quoting television reporter Jeff Greenfield's observation that the trial was "'of no conceivable importance as a legal landmark'").

104. Prentice, *supra* note 5, at 13 (stating that the trials that television networks broadcast "usually involve at least one of three elements: sex, graphic violence, or a celebrity participant"); *see also* THALER, *supra* note 1, at 67 ("Of the [first 76] trials selected [by Court TV], more than half focused on crimes of violence, with 30 trials involving murder or homicide and 14 dealing with assault, police brutality, sexual abuse, or rape."); Alan M. Dershowitz, *Yes: Its Commercialism Hides Its Potential*, A.B.A. J., May 1994, at 46, 46 ("Court TV seems to specialize in the salacious, the violent and the emotional. Its choices of trials to televise could as easily have been made by the producers of Oprah, Sally, Phil and Geraldo."); Eileen Libby, *No: Tacky or Not, It Helps Bring the Law to Life*, A.B.A. J., May 1994, at 47, 47 ("Like a carnival

magazine shows, they look for clips loaded with drama, conflict, or controversy.[105] Television is a highly competitive business where programming decisions are made to boost ratings, not to impart knowledge.[106]

The packaging of televised trials further demonstrates that they are an entertainment enterprise. Dramatic music and graphics open many broadcasts.[107] Trials are covered like sporting events, complete with expert analysts reporting on which side is "scoring points" in the courtroom.[108]

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barker who lures the public into the tent with glimpses of flesh, Court TV often must appeal to baser human instincts. For old-fashioned, all-American entertainment, nothing beats the real thing: That's why trials about patricide, sexual mutilation or baby buying draw the largest numbers."); *cf.* THALER, *supra* note 1, at 13 ("[A] trial may simply be showcased because of the singularly lurid and sensational aspects attached to the case.").

105. THALER, *supra* note 1, at 4 ("Video clips from trial proceedings are not unlike the television commercial itself, or other types of entertainment programming. The visuals are chosen to excite the senses . . . ."); *id.* at 81 ("'We're journalists and we're not necessarily historians or educators,' [Fox News executive producer Paul Smirnoff] said, candidly, 'We're in the commercial news business here.'"); Emilio Viano, *Victims, Crime and the Media: Competing Interests in the Electronic Society*, COMM. & L., June 1995, at 41, 45 ("Quantitively, the media present a considerable amount of violence, both as entertainment and as part of the news.").

Sensational trial excerpts often displace coverage of more traditional news events. *See* THALER, *supra* note 1, at 39 ("Macro issues, such as widespread unemployment and a deeply entrenched recession, took a back seat on the media agenda [during the William Kennedy Smith trial]."); *cf.* DARDEN, *supra* note 4, at 262 ("*Spy* magazine reported that one poll showed that more Americans could identify Lance Ito (64 percent) than Newt Gingrich (52 percent). In another poll, Kato Kaelin was recognizable to 75 percent of those who responded, while Vice President Al Gore was identified by only 25 percent.").

106. As Justice Clark predicted in 1965, "realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship." Estes v. Texas, 381 U.S. 532, 545 (1965).

Recent experience with televised trials has proven him right. *See* Kaminer, *supra* note 92, at 37 ("If television executives are given general access to the nation's courts, what proceedings will they choose to cover? . . . High-profile cases that can be most profitably televised, appealing to the most advertisers, will enjoy the most attention."); Lassiter, *supra* note 2, at 977 ("[W]hen rating wars for televised trials commence, commercial television inevitably slides toward the tabloid marketing lure of sex, power, and the perverse.") (footnotes omitted); *cf.* THALER, *supra* note 1, at 64 ("Ads have not readily poured in [during Court TV's early months], placing pressure on the network to promote and cover more sensational trials to boost ratings and ad revenues."); *id.* at 67 ("[C]learly the network has commercial interests in mind as it chooses among the most dramatic trials to boost its appeal."); Harris, *supra* note 1, at 788 ("Court TV selects the trials it televises for their appeal to viewers."); Prentice, *supra* note 5, at 3 (noting that "[Court TV founder Steven] Brill proudly proclaimed that the broadcast coverage of the Smith trial in Florida 'easily outdistanced most of the competing soap operas and talk shows.'").

107. *See* Robert C. Lind, *Defender of the Faith in the Midst of the Simpson Circus*, 24 SW. U. L. REV. 1215, 1223-24 (1995) (reviewing REX S. HEINKE, MEDIA LAW (1994)).

108. *See* THALER, *supra* note 1, at 74; *see also id.* at 42 (comparing a newspaper's conduct during the William Kennedy Smith trial to a "race-track handicapper"); Lind, *supra* note 107, at 1223 n.22 ("Commentators attempt to make it a sporting event by discussing which side has

Also instructive is the fact that televised trials are often described in terms borrowed from entertainment industries. Televised trials have been called circuses,[109] carnivals,[110] soap operas,[111] morality plays,[112] and even bull-fights.[113] After all, the coverage is designed to attract viewers, not to educate them.[114]

By this standard, televised trials are enjoying spectacular success. Ratings for the most celebrated trials have been astronomical. Millions of Americans watched portions of the O.J. Simpson criminal proceedings,[115]

'won' at the end of the day."); Caplan, *supra* note 93, at 20 ("Legal journalism is increasingly like sports and political reporting, a form of play-by-play."); Joshua Lazerson, *Court TV: Can It Increase Understanding of Law and the Legal Process?*, 76 JUDICATURE 57, 57 (1992) (comparing the value of the commentary of Court TV to that of *Monday Night Football*); Lippman, *supra* note 15, at 5 (stating that a legal expert's method of giving television commentary regarding a witness's testimony was similar to "delivering color commentary on a football game"); M.L. Stein, *O.J. Media Circus Threatens Trial Access*, EDITOR & PUBLISHER, May 27, 1995, at 16, 16 (statement of Gerald F. Uelmen, a member of the Simpson legal team) ("'The trial is reported like a football game, and we're told how far each play moved the ball up or down the field.'").

109. *E.g.*, MURPHY, *supra* note 10, at 42; THALER, *supra* note 1, at 40; Stepniak, *supra* note 72, at 490; Gospill & Molander, *supra* note 11, at 10; Keeva, *supra* note 15, at 48c; Henry J. Reske, *Courtroom Cameras Face New Scrutiny*, A.B.A. J., Nov. 1995, at 48d, 48d; *Simpson and Cameras, supra* note 72, at 8; M.L. Stein, *Disturbing Pattern*, EDITOR & PUBLISHER, Sept. 9, 1995, at 11, 11; Whitaker, *supra* note 102, at 35; Bill Ainsworth, *Assembly OKs Court Cameras Bill*, RECORDER (San Francisco) Apr. 26, 1996, at 3.

During the Claus von Bulow trial, reporters went even further, by referring to the trial as "The Greatest Show on Earth." THALER, *supra* note 1, at 34. Perhaps they would do well to remember the admonition of reporter Jeff Greenfield during the William Kennedy Smith trial: "'[W]hen a member of the press calls an event like this a media circus, he is overlooking the fact that he, too, is probably one of the clowns.'" *Id.* at 44.

110. *E.g.*, THALER, *supra* note 1, at 28, 67; Lassiter, *supra* note 2, at 936, 938; Deborah Graham, *In the Simpson Spotlight*, A.B.A. J., Nov. 1995, at 49, 49; Stein, *supra* note 108, at 16.

111. *E.g.*, Calabresi, *supra* note 1, at 56; Gates, *supra* note 4, at 60; Rikki J. Klieman, . . . *But a Camera in the Courtroom Should Not Take the Blame*, CHI. TRIB., Oct. 10, 1995, at § 1; Stein, *supra* note 109, at 33.

112. Stein, *supra* note 108, at 16; *cf.* Chandler v. Florida, 449 U.S. 560, 580 (1981) (stating televised trials can often resemble "'Yankee Stadium' 'show trials'"); THALER, *supra* note 1, at 66 (referring to "the real-life transmission of current trials . . . as . . . 'the cinema verité of due process'"); Gates, *supra* note 4, at 60 (referring to the *Simpson* trial as theatre).

113. Geis, *supra* note 96, at 421.

114. *Cf.* Caplan, *supra* note 93, at 20 ("[I]n NBC's broadcast last Tuesday, . . . anchorman Tom Brokaw counted down the minutes until the Simpson verdict as if it were the dropping of the New Year's ball in Times Square or the last moments of a football game.").

115. About one in four homes watched Simpson's preliminary hearing. *Simpson on TV in 1 of 4 Homes*, N.Y. TIMES, July 2, 1994, at L20 (statement of David Poltrack, an audience researcher for CBS) (noting additionally that "'[the statistic] would be supplemented, of course, by a significant out-of-home audience, since it ran in the lunch hour for most of the country'").

and an astounding 150 million people watched the verdict live.[116] Other televised trials have also generated huge audiences.[117] Even less notorious trials generate significant viewership.[118]

Large television audiences lead to significant profits. The *Simpson* trial contributed "about $25 million in incremental revenues" to CNN's coffers.[119] Although Court TV does not release its revenue figures, it presumably earned significant additional revenue during the trial[120] because it had roughly twice as many daytime viewers as CNN.[121] Even outside the highly publicized *Simpson* trial, networks that televise trials have generated significant revenue from advertising sales.[122] Commercial television networks, like

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The *Simpson* trial has been described as "the longest-running live television event in history." Brill, *supra* note 88, at 8. It generated both unprecedented coverage and tremendous audiences, including foreign audiences. *See* Lassister, *supra* note 2, at 930 & n.10; *cf.* DARDEN, *supra* note 4, at 260 (detailing an enormous amount of press coverage); Alexander, *supra* note 16, at 169 (noting extensive television coverage in the United States); Caplan, *supra* note 93, at 20 ("CNN's ratings increased five-fold when it televised the Simpson proceedings.").

116. Alexander, *supra* note 16, at 169; Read, *supra* note 24, at 30; Whitaker, *supra* note 102, at 31; *cf.* ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 11 (1996) ("The world seemed to stand still for a moment in time. Everyone would remember where they were when the verdict was announced in the case of *The People of the State of California v. Orenthal James Simpson.* They were either watching television or listening to radio."); Cossack, *supra* note 8, at 556 (stating that 96% of all people watching television at the time saw the verdict); Mandese & Jensen, *supra* note 91, at 41 (stating that "50% of U.S. TV households were tuned to their sets [during the verdict], compared with a daytime average of about 30%"). Indeed, the *Simpson* verdict was probably "the 'most watched event in TV history.'" Read, *supra* note 24, at 30.

117. *See TV Trials Captivate Viewers, Educate Our Juror Pool*, DEFENSE COMMENT, Spring 1995, at 13 ("[F]ully 43% of the American public watched at least four of five of the most sensational trials aired on TV within the past few years."); *see also* THALER, *supra* note 1, at 39 ("CNN reported that 3.2 million viewers—nine times what the network draws during those hours—tuned in [to the William Kennedy Smith trial] to watch the two-day-long testimony of the alleged victim, Patricia Bowman."); *id.* at 58 ("Brill . . . noted that his primary competitor, CNN, more than tripled its usual audience [during the *Smith* trial] and that Court TV typically outdistanced CNN where both were broadcast."); Lacayo, *supra* note 10, at 30 (discussing the *Smith* trial); Gerbner, *supra* note 9, at 424 ("Ratings [for the *Zamora* "involuntary subliminal intoxication" murder trial] reportedly exceeded those of the *Johnny Carson Show.*").

118. *Cf.* Calabresi, *supra* note 1, at 56 ("In the first Nielsen survey of [Court TV's] viewership in October, the channel ranked No.4 during the day among cable viewers who receive it."); *TV Trials Captivate Viewers, Educate Our Jury Pool, supra* note 117 (44% of those surveyed watched Court TV "regularly" or "sometimes").

119. Mandese & Jensen, *supra* note 91, at 1.

120. *Id.* ("[Court's TV's] ratings are known to have increased multi-fold from the trial and so—presumably—have its revenues.").

121. *See* Morrison, *supra* note 11, at 109. Additionally, one reporter has estimated that rates for advertising aired during the *Simpson* verdict announcement "command[ed] up to ten times the normal rate." Read, *supra* note 24, at 30 n.12.

122. In mid-1995, Court TV boasted viewership in almost 18 million cable homes, helping

other businesses, are driven to increase revenue.[123] In addition to generating revenue by selling advertising, networks also profit by selling other products and services, including courtroom feeds sold to other networks[124] and trial videotapes sold to lawyers.[125]

The profit motive does not necessarily render televising trials improper or distasteful.[126] However, policies regarding televising trials should recognize the reality that producers televise trials to generate revenue through entertainment. They are not engaging in a self-sacrificing endeavor to educate the public.

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it to break even less than five years after it went on the air. *Court TV's Steve Brill*, *supra* note 81, at 46; Gospill & Molander, *supra* note 11, at 8; *cf.* Morrison, *supra* note 11, at 117 ("'I can't say I planned it this way,' Brill says. 'But it happens we are the only consumer name when it comes to law.'").

> Advertising sales have been key to this commercial success. As one commentator noted: Court TV is not a public service venture or a broadcasting outlet devoted to educating the public without regard to profits. Rather, it is a commercial venture, just like traditional broadcast and cable networks; it airs advertising. It differs from traditional networks in what it offers viewers—trials and other proceedings in real courts. Court TV may help educate and inform the public, but it does so with the aim of selling of its advertisers' products. This is how it makes money, and what will determine, in large part, whether or not it stays on the air.

Harris, *supra* note 1, at 801; *see also* THALER, *supra* note 1, at 64 (noting that eight minutes of every hour on Court TV are reserved for national and local advertising); *Court TV's Steve Brill*, *supra* note 81, at 46 (stating that in 1995 "advertising will be about 35% of revenue"); *cf.* Dershowitz, *supra* note 104, at 46 ("[Court TV's] commercial goal is to sell advertising time for cereal, soap and suppositories. And it is doing a fairly good job—by that standard.").

The need to increase advertising revenue undoubtedly affects a network's selection of trials to televise. *See* Estes v. Texas, 381 U.S. 532, 549-50 (1965) ("The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases . . . . Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit."); Prentice, *supra* note 5, at 5-6 (stating that critics of Court TV "fear that the network's for-profit status will inevitably result in the broadcasting of only the most commercially profitable cases, those involving high publicity content").

123. *See* Lassiter, *supra* note 2, at 999 ("The media is business. Big business."); Sasaki, *supra* note 19, at 797-98 (quoting a Pennsylvania federal court judge who argued that "'electronic access to the media is *not* a law reform issue at all. It is not even administrative reform but business.'"); *cf.* Nevas, *supra* note 68, at 24 (noting that many would argue that the news media "are sure to exploit and distort the legal process for crass commercial purposes").

124. THALER, *supra* note 1, at 59 (stating that Court TV generated fees during the William Kennedy Smith trial by charging other networks per diem fees for the use of trial feeds created by its exclusive pool camera).

125. *Court TV's Steve Brill*, *supra* note 81, at 46.

126. Harris, *supra* note 1, at 801 n.129.

Similarly, the fact that networks televise trials for entertainment purposes does not diminish the network's free speech protection. *In re* Hearings Concerning Canon 35 of the Canons of Judicial Ethics, 296 P.2d 465, 469 (Colo. 1956).

Of course, the networks are not the only ones profiting from televised trials. The "legal experts" who provide commentary receive income and publicity.[127] When a trial is televised, the trial attorneys receive both fees and tremendous free publicity.[128] Free publicity also helps state court judges who must seek re-election.[129] Additionally, jurors from highly publicized televised trials sometimes write books that generate significant royalties.[130] Tabloids and others sometimes pay witnesses to tell their stories.[131] Even criminal defendants are sometimes able to turn trial publicity into an opportunity to generate income.[132]

III. THE CRIMINAL JUSTICE SYSTEM'S TREATMENT OF VICTIMS

With relatively rare exceptions,[133] crime victims are not fortunate enough to reap these same economic benefits from trials. Instead of compen-

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127. Graham, *supra* note 110, at 49; Carter, *supra* note 90, at A15.

128. *Cf.* Lassiter, *supra* note 2, at 992 ("Television is a godsend for lawyers competing for business . . . ."). Network executives sometimes hire lawyers from high-profile cases to host television shows. *See* Carter, *supra* note 90, at A15 (discussing O.J. Simpson prosecutor Marcia Clark's syndicated television show *Lady Law*); *Cochran Moves Beyond Shadow of the Simpson Criminal Trial*, USA TODAY, Jan. 20, 1997, at 3D (discussing O.J. Simpson defense attorney Johnnie Cochran's new Court TV program entitled *Cochran and Grace*). Lawyers also occasionally turn to that certain income generator—the tell-all book. Deirdre Carmody, *In the World of Books, a Rush to Publish*, N.Y. TIMES, Oct. 4, 1995, at A10; Carter, *supra* note 90, at A15.

129. *See* Gerbner, *supra* note 9, at 426 ("About 10 per cent [sic] of the electorate can now identify any judicial candidate during an election. A television trial can easily multiply that recognition factor for a candidate."). *But cf.* Lassiter, *supra* note 2, at 991-92 & n.333 (noting how the commercial appeal of producing a screenplay raised questions about a judge's impartiality).

130. *Cf.* Stein, *supra* note 109, at 33 (noting that some believe jurors will choose "to sell their thoughts" to book publishers rather than freely interviewing with reporters post-trial).

131. *See, e.g.*, DARDEN, *supra* note 4, at 236-37; THALER, *supra* note 1, at 69; *cf.* Lassiter, *supra* note 2, at 989-91 (discussing problems associated with witness marketing); Nina Burleigh, *Preliminary Judgments*, A.B.A. J., Oct. 1994, at 55, 60 ("Equally intrusive to the trial procedure has been the 'cash for trash' phenomenon of potential witnesses selling their stories to tabloid newspapers and television shows."); Jeffrey Toobin, *Cash for Trash*, NEW YORKER, July 11, 1994, at 34, 34 (labeling the selling of stories by witnesses as "one of the newest specialties in the legal market—the brokering of interviews to the tabloid media").

132. *See Laws That Make Sure Crime Doesn't Pay*, CQ RESEARCHER, July 22, 1994, at 632, 632 (discussing books written by criminals and other products arising from their activities); Jennifer Seter et al., *Simpson Trial & Trivia*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 42, 42-43 (estimating the revenues received by O.J. Simpson from the sale of phone cards and football cards signed by Simpson while in jail).

133. Crime victims rarely exercise the option to write a book. To write a profitable book, a crime victim would necessarily give up even more privacy than is surrendered during a trial. *See infra* notes 147-51 and accompanying text.

sating victims for financial losses, the trial process simply adds to the likely emotional and often physical pain that accompanies the actual crimes. Even when televised trials generate substantial income for networks and others, victims often leave courtrooms empty-handed.

A. Revictimization Through Trial

Unlike many trial participants,[134] the crime victim does not choose to participate in the proceedings.[135] Instead, she[136] is dragged, sometimes literally, into the limelight by the perpetrator of the crime.

The victim's problems do not end with the completion of the crime. Instead, the criminal justice system itself[137] revictimizes[138] crime victims

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134. The attorneys, the judge, and the television crews all participate in televised trials by choice—presumably to earn their living. Those who might argue that the defendant does not participate willingly in a criminal trial overlook the fact that any criminal defendant who has actually committed the crime charged has made a voluntary choice to engage in the activity that results in the trial. Both the preliminary hearing and the grand jury indictment procedures provide criminal defendants with due process protection against being wrongfully forced to participate in trials. *See* DAVID FELLMAN, THE DEFENDANT'S RIGHTS TODAY 42-49, 67-71 (1976); MARVIN E. FRANKEL & GARY P. NAFTALIS, THE GRAND JURY: AN INSTITUTION ON TRIAL 3 (1975). Crime victims lack similar protection against involuntary trial participation. Only witnesses subpoenaed against their will and citizens summoned to jury duty share the crime victims' status as involuntary trial participants.

135. In addition to the fact that the crime victim is brought into the criminal justice system by the acts of the perpetrator of the crime, the victim does not always have the right to decline participation in the investigation and trial. *See, e.g.*, Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850, 1851-52 & n.6 (1996) (describing a Duluth, Minnesota practice of interviewing domestic violence victims during investigations and subpoenaing such victims to testify at trial—even if they do not want the investigation and prosecution to proceed).

136. Females are often the victims of the crimes of violence that are the staple of televised trials, while males constitute the vast majority of those who commit crimes. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, tbl. 5.20 (Kathleen Maguire & Ann L. Pastore eds., 1995) (stating that 84% of those convicted in U.S. District Courts in 1992 were male); *see also* FBI, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1994, tbl. 2.6, at 16 (1995) (stating that 65.2% of murder offenders were male, only 6.7% were female, and the remaining 28% were unknown in 1994).

137. Although defense attorneys receive much of the blame for the revictimization of crime victims, they are not the sole source of these problems. *See* Maxine D. Kersh, Note, *The Empowerment of the Crime Victim: A Comparative Study of Victim Compensation Schemes in the United States and Australia*, 24 CAL. W. INT'L L.J. 345, 348 (1994) ("The crime victim was simply a prosecutor's tool. In addition to the suffering caused by the actual crime, she often had to endure the added trauma of prolonged interrogation."); Andrew L. Sonner, *Are New Laws Needed to Protect Crime Victims' Rights?: No*, CQ RESEARCHER, July 22, 1994, at 641, 641 ("In some jurisdictions, prosecutors, police and judges—not to mention defense attorneys—treat victims callously."); *cf.* Charles S. Clark, *Crime Victims' Rights*, CQ RESEARCHER, July 22, 1994, at 627, 631 (describing the police act of delivering a blood-stained wallet to a widow

because this system recognizes rights for the criminal defendant, but not rights for the crime victim.[139] In many cases the defense attorney puts the victim

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one year after her husband's death "with no letter of explanation").

138. *See* John Albrecht, *The Rights and Needs of Victims of Crime: The Judges' Perspective*, JUDGES' J., Winter 1995, at 29, 30 (discussing the "unintentional adverse effects" of crime caused in part "by criminal justice agencies"); Laurie Eisenbeiss, *Cameras in the Courtroom—The Victim's Perspective*, ADVOCATE, Aug. 1996, at 14, 14 ("Many victims feel they are victimized first by the offender and then by an insensitive criminal justice system. Unfortunately, the news media provides a third source of victimization."). *See generally* THALER, *supra* note 1, at 36 (analogizing the media's error in publicizing a victim's name to that of a second rape); Viano, *supra* note 105, at 41 ("Within the last decade, crime victims and others have begun to ask whether crime reporting is actually victimizing the victims again.").

139. *See* Linda F. Frank, *The Collection of Restitution: An Often Overlooked Service to Crime Victims*, 8 ST. JOHN'S J. LEGAL COMMENT. 107, 107 (1992) ("[C]rime victims continue to be mistreated and neglected within the very system that should provide them with support, information, and assistance."); Clark, *supra* note 137, at 627 ("Crime victims, because they lacked legal standing under state law and the U.S. Constitution, have long been known as the justice system's 'forgotten people.'"); *cf.* JAMES GAROFALO & L. PAUL SUTTON, U.S. DEP'T OF JUSTICE, COMPENSATING VICTIMS OF VIOLENT CRIME: POTENTIAL COSTS AND COVERAGE OF A NATIONAL PROGRAM 11 (1977) ("[T]he victim of crime in the United States has commanded only nominal recognition by the criminal justice system.").

In fact, the judicial system sometimes even allows crime victims to be excluded from trials and sentencing hearings. For instance, when defense attorneys want victims and their families to be excluded from trials, they list them as potential witnesses and invoke the procedural rule requiring sequestration of witnesses. *See* Clark, *supra* note 137, at 629; *see also* Sens. Jon Kyl & Dianne Feinstein, *Yes: Victims Deserve Justice No Less Than Defendants*, A.B.A. J., Oct. 1996, at 82, 82 (discussing various ways victims' access to trials has been limited). Exclusion from trial and sentencing and restrictions on displays of emotion are galling to many victims' families. *See* Clark, *supra* note 137, at 629 (statement of Ann Read, associate director of Parents of Murdered Children) ("'[T]he criminal justice system is all geared to justice for the criminal. The parent of the murderer can flop all over the court and scream, but if you're the parent of the murder victim, you can't even blow your nose without the judge calling you into his chamber . . . .'"). The victims themselves particularly find the limited access and restrictions on behavior to be frustrating.

> "When a person is convicted and sentencing recommendations are made, the defense can bring in 50 character witnesses, including his clergyman. Why shouldn't the victim make a statement? Why can't a father hold a picture of his dead child to show that this child existed and now will never graduate from high school and will never get married?"

Id. at 631 (quoting activist John Walsh); *see also* Kyl & Feinstein, *supra*, at 82 ("[T]he presence of victims' families could inflame the jury, making it sympathetic to the prosecution. Yet no one argues that defendants' families should be kept out of court.").

In response to this criticism, many states have passed victims' rights amendments to their constitutions. *See, e.g.*, ARIZ. CONST. art. II, § 2.1; CAL. CONST. art. 1, § 28; COLO. CONST. art. II, § 16a; FLA. CONST. art. 1, § 16; ILL. CONST. art 1, § 8.1; KAN. CONST. art. 15, § 15; MICH. CONST. art. 1, § 24; MO. CONST. art. 1, § 32; N.J. CONST. art. 1, § 22; N.M. CONST. art. 2, § 24; R.I. CONST. art. I, § 23; TEX. CONST. art. 1, § 30; WASH. CONST. art. 1, § 345; WIS. CONST. art. 1, § 9m; *see also* Albrecht, *supra* note 138, at 34 n.1 (listing 14 states which had adopted such amendment as of 1995); *cf.* 1996 S.C. Acts 469 (proposing a victims' rights

on trial to deflect criticism from the defendant's actions.[140] Defense attorneys also often use the victim's mistakes to their client's advantage.[141]

Victims and their families also experience other kinds of emotional distress as a result of the media and the judicial system. In many murder cases, the victim's family is forced to watch the defense attorney demonize the murdered victim.[142] In rape cases, the victim's social and sexual history are often explored at length in news reports and in defense efforts to establish consent.[143] Additionally, for many years judges contributed to the demoralization of rape victims by giving "Hale" instructions, which cautioned that rape "'is an accusation easily to be made and hard to be proved, and harder

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constitutional amendment); Larry Yackle, *No: The Costs Would Be Too High*, A.B.A. J., Oct. 1996, at 83, 83 (discussing negative implications of a proposed victims' rights amendment to the United States Constitution). These constitutional amendments and victims' rights statutes often state that victims have the right to present victim impact testimony to the court at sentencing. *See* Albrecht, *supra* note 138, at 33. However, many judges and prosecutors oppose and therefore limit victim impact statements. *Id.*; Clark, *supra* note 137, at 630.

140. GEORGE P. FLETCHER, WITH JUSTICE FOR SOME: VICTIMS' RIGHTS IN CRIMINAL TRIALS 107 (1995) ("In one way or another, defense counsel puts [the victims] on trial. The blame shifts from one side of the courtroom to the other."); Bosco, *supra* note 96, at 146 (statement of Margaret DiCanio, author of THE ENCYCLOPEDIA OF VIOLENCE) ("'Trying the victims as the guilty ones has become very common . . . .'"); *cf.* Joe Saltzman, *Who's the Real Victim?: Television Coverage of Violent Crime*, USA TODAY MAG., July 1994, at 49, 49 ("Slowly, the original victim is forgotten and the accused—a human being crying out to be understood—becomes a more sympathetic victim trying to set things right.").

141. The term "mistakes" must be interpreted broadly enough to include any behavior that deflects criticism away from the defendant and toward the victim—even legal and socially acceptable actions. *See* Margaret Carlson, *The Victim, You Say?*, TIME, July 4, 1994, at 27, 27 (noting that some would sympathize with O.J. Simpson as a result of publicity that murder victim Nicole Brown Simpson entertained her boyfriend in a living room paid for by Simpson).

142. Sometimes the revictimization through the exclusion of murder victims' families from trial is even more difficult to bear. *See supra* note 139.

The news media often utilize the same tactics as the defense; they pry into murder victims' backgrounds, exposing their foibles and mistakes. *See* Bosco, *supra* note 96, at 146 ("The media has reported every last scrap of gossip [in the O.J. Simpson case], all too often invading the rightful privacy that should be given to murdered Nicole and Ron."); *cf.* Carlson, *supra* note 141, at 27 (decrying the trend in the media to cast Nicole as "the bitch who ate Brentwood and asked for everything she got" while empathizing with O.J. as being "only human").

143. *See, e.g.*, THALER, *supra* note 1, at 45 (discussing accounts of alleged William Kennedy Smith rape victim Patricia Bowman's "'little wild streak'"); Helen Benedict, *Panel Discussion*, 61 FORDHAM L. REV. 1141, 1141 (1993) ("At the moment, the accepted practice is for the media to investigate the life and personality of any woman who is the victim of a notorious sex crime."); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 281 (1993) (noting the attitude that "[w]omen who appear to be sexually available were not really raped, because they must have said 'yes'"). *See generally*, FLETCHER, *supra* note 140, at 108-13 (discussing how the defense strategy of blaming the victim, now popular in many criminal trials, probably was used first in rape cases).

to be defended by the party accused, tho never so innocent.'"[144] Indeed, in any trial where the victim's credibility is important, the victim can expect a searing cross-examination from the defense attorney, whose job includes the task of raising a reasonable doubt in the jurors' minds. Because such defense tactics are sometimes effective and because the investigation and prosecution of crimes do not always identify the correct defendant or collect enough evidence for a conviction, the criminal justice system does not guarantee crime victims that their transgressors will be brought to justice.[145] However, even if the defendant is convicted, the judicial system can still punish crime victims.[146]

The tremendous invasions of privacy that crime victims and their families suffer are especially difficult to bear.[147] Information that would be considered personal and private for anyone other than a crime victim is often included in news reports about trials.[148] As a result, communities often

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144. Coombs, *supra* note 143, at 282 & n.17 (quoting State v. Wiley, 492 F.2d 547, 554 (D.C. Cir. 1973) (quoting 1 M. HALE, PLEAS OF THE CROWN 636 (1680))); *see also* Linda Fairstein, *Panel Discussion*, 61 FORDHAM L. REV. 1137, 1137 (1993) (discussing ramifications of antiquated "Hale instructions" which invoked the rigorous three-part corroboration requirement necessary to support a rape victim's testimony); *cf.* FLETCHER, *supra* note 140, at 109 (discussing evidence scholar John Wigmore's statements that "'errant young girls and women' suffered from 'multifarious' 'psychic complexes' that resulted in their 'contriving false charges of sexual offenses by men'").

145. *See, e.g.*, Fairstein, *supra* note 144, at 1137 ("[I]n 1971, although more than 2000 rapes were reported to the New York City police, only eighteen men were convicted of crimes of sexual assault . . . ."); Viano, *supra* note 105, at 52 n.27 ("For example, only 42 (4.8%) of the 881 cases reported to police in Marion County, Indiana in 1970, 1973, and 1975 resulted in a convicted offender being sent to prison.").

146. *See, e.g.*, Clark, *supra* note 137, at 627 (discussing a two-year period of appeals that left a family feeling "like victims of the judicial system"); *id.* at 627-28 (noting how "an appeal by a rapist 15 years after his conviction required his victims to repeat their age-old testimony and, in some cases, discuss the rape with their spouses and children for the first time"); *cf.* Daniel E. Lungren, *Victims and the Exclusionary Rule*, 19 HARV. J.L. & PUB. POL'Y 695, 695-96 (1996) (noting a victim's comparison of the appellate process to a "'chess game'").

147. Society pays a price for the loss of privacy inherent in the criminal justice system because fear about potential loss of privacy is among the most frequently stated reasons given by victims for not reporting crimes to law enforcement officials. *Cf.* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 610 (1982) ("Surely it cannot be suggested that minor victims of sex crimes are the *only* crime victims who, because of publicity attendant to criminal trials, are reluctant to come forward and testify."); Viano, *supra* note 105, at 63 ("[A] quick cost-benefit analysis may show the victim that it is quite prudent and rational to decide not to report."); *id.* at 63-64 ("The safety of the community requires that crimes be reported and that criminals be stopped. This can be done only with the cooperation of the victims."); Suzanne M. Leone, Note, *Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment*, 27 NEW ENG. L. REV. 883, 910-11 (1993) (discussing reasons rape victims desire privacy).

148. Although the disclosure of rape victims' names by reporters is still controversial, *see* Viano, *supra* note 105, at 49 & n.17, it is now allowed if "lawfully obtained from the public

stigmatize and ostracize victims.[149] In addition, publicity about a crime increases the victim's fear that the perpetrator will retaliate against the victim for reporting the crime or otherwise attack again.[150] Televising trials only adds to the invasion of privacy and its resultant problems by increasing the size of the audience that becomes privy to otherwise private information and by providing visual images from the courtroom that give the disclosed information greater dramatic effect.[151]

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record," *see Globe Newspaper Co.*, 457 U.S. at 608 n.23. However, by disclosing the name of a rape victim, a reporter can change the life of the victim dramatically. *See* Leone, *supra* note 147, at 910-11 ("Each victim has a unique healing process and the public disclosure of her identity could disrupt that process before the victim is ready.").

> Often reporters do not stop at merely reporting the names of victims.
> [T]he media assumes that, by digging into the victim's past and personality, it will uncover something about the crime, just as it might when it digs into the accused's past and personality. Every profile of a victim, every account of what that victim does or has done, is by implication, an assumption of the victim's complicity in the crime: the very act of profiling the victim treats her as if *she* is guilty until proven innocent.

Benedict, *supra* note 143, at 1143; *see also* Viano, *supra* note 105, at 44-45 ("The media may often describe victims selectively and negatively . . . ."). At times, the persistence of reporters only adds to the anguish of crime victims. *Cf. News Media Can Be Tough on Crime Victims*, CQ RESEARCHER, July 22, 1994, at 638, 638 (describing two examples of over-zealous reporting).

149. *See* Benedict, *supra* note 143, at 1144-45; Deborah W. Denno, *Perspectives on Disclosing Rape Victims' Names*, 61 FORDHAM L. REV. 1113, 1125 (1993); Fairstein, *supra* note 144, at 1138; Viano, *supra* note 105, at 50-51, 60-61. Sometimes ostracization results not from an evil intent, but from people's discomfort and uncertainty about how to relate to crime victims. *See* Clark, *supra* note 137, at 628, 642.

150. *See* Kathryn W. Hughes, Note, Florida Star v. B.J.F.: *Can the State Regulate the Press in the Interest of Protecting the Privacy of Rape Victims?*, 41 MERCER L. REV. 1061, 1062 (1990) (noting how publicity caused a victim to seek police protection).

151. The humiliation of parading an alleged rape victim's undergarments in a courtroom as occurred in the William Kennedy Smith trial is a necessary part of the judicial process. Further humiliation by making such evidence the fare of national television may make for fair commercial television, but does it make for a fair trial?

Lassiter, *supra* note 2, at 999; *see also* Viano, *supra* note 105, at 43 ("When it comes to newsworthiness, there are some marked differences between television and print news. Since most cities have more television stations than newspapers competing against each other, the pressures on television news organizations are more intense than those on newspapers."); Gardner, *supra* note 19, at 490 (noting that "television is a more pervasive medium than newsprint" and that "the televising of a trial would provide for more widespread public exposure than a newspaper description"); Lacayo, *supra* note 10, at 31 ("For the accuser, the bitterest part of a rape trial is the experience of having her personal life spread before the court, and usually torn apart by the defense. Gavel-to-gavel coverage only magnifies the misery . . . ."); Saltzman, *supra* note 140, at 49 ("Television magnifies the process by extending it to a mass electronic audience. . . . Television . . . has the power to turn almost any crime into [a] kind of public spectacle."). For an analysis of cameras in the courtroom from the perspective of victims, see

B. *Victims' Monetary Losses*

The psychological damage from the crime and the subsequent investigation, trial, and publicity are not the only losses suffered by crime victims. Over two-thirds of crime victims suffer direct economic losses,[152] including lost wages[153] and medical expenses. Because lower income persons are disproportionately the victims of crime,[154] the fact that crime victims often have inadequate insurance to pay for medical expenses is not surprising.[155] The economic losses suffered by crime victims can be substantial. One study estimated that "a shotgun assault victim may . . . bear up to $5 million in lost income and medical expenses over a thirty-five-year working life . . . ."[156]

In addition to purely economic losses, crime victims endure pain and suffering, emotional distress, and other hardships.[157] By including projected costs of pain and suffering, one commentator quantified in 1985 the total cost of crime to the average rape victim as over $50,000, to the average robbery victim as approximately $12,500, and to the average assault victim as over $12,000.[158] Although tort victims who sue as plaintiffs in the civil justice system regularly recover these losses in damages, crime victims are rarely compensated for them. Crime victims theoretically can sue perpetrators for damages,[159] but perpetrators rarely have the assets to pay a significant

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Eisenbeiss, *supra* note 138.

152. *See* Albrecht, *supra* note 138, at 30 (noting that "71 percent of all victims of personal crimes experience some economic loss").

153. In addition to the time that victims miss work for physical or emotional recovery, they often must spend additional time to assist in the investigation and appear at trial. As a result, some victims have even lost their jobs. *See id.* at 32-33 (describing legislative efforts to protect crime victims from employment discipline or discharge due to participation in criminal proceedings).

154. *See* AMERICAN VIOLENCE & PUBLIC POLICY 29-30 (Lynn A. Curtis ed., 1985). Urban citizens and members of minorities are also disproportionately affected by crime. *See* Jeremy Rabkin, *Sue the Government*, NEW REPUBLIC, May 8, 1995, at 16, 16, 18.

155. *See* Albrecht, *supra* note 138, at 30 ("In 1992, 617,460 people were victims of violent crimes. Of these, 31.3 percent had no health insurance or were not eligible for public medical services.") (footnote omitted).

156. Rabkin, *supra* note 154, at 19.

157. *See* Mark A. Cohen, *A Note on the Cost of Crime to Victims*, 27 URB. STUD. 139, 140 (1990); *supra* notes 142-51 and accompanying text; *cf.* Frank, *supra* note 139, at 114 (stating that "monetary restitution cannot heal the emotional or physical scars inflicted by the offender").

158. Cohen, *supra* note 157, at 141.

159. *See* George P. Fletcher, *What Is Punishment Imposed For?*, 5 J. CONTEMP. LEGAL ISSUES 101, 103 (1944) ("It is hard to imagine a criminal injury to a person . . . that would not also be compensable in tort."); *see also* JUDGE JAMES E. MORRIS, VICTIM AFTER-SHOCK: HOW TO GET RESULTS FROM THE CRIMINAL JUSTICE SYSTEM 35 (1983) ("A civil action filed against a person by his or her victim has always been an available remedy, though rarely used until

judgment.[160] Insurance is unavailable for satisfaction of judgments against criminals because insurance for criminal acts is generally considered contrary to public policy.[161] Given the significant costs of litigation, securing an uncollectible civil judgment against a criminal defendant would be a rather Pyrrhic victory. Therefore, very few crime victims file civil suits.[162]

The contrast between crime victims and tort plaintiffs in terms of achieving meaningful recoveries is stunning—and difficult to defend.[163] An individual who is paralyzed by a defective product or by medical malpractice may recover millions in damages.[164] In contrast, an individual who is paralyzed by the stray bullet[165] of a drive-by shooter or the well-directed

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recently.").

160. JAMES H. STARK & HOWARD W. GOLDSTEIN, THE RIGHTS OF CRIME VICTIMS 192-93 (1985); *cf.* Fletcher, *supra* note 159, at 103 (noting that "in some situations the offender is judgment-proof").

161. *See* 6B JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 4252, at 4-5 (Richard B. Buckley ed., 1979).

162. *See* Tony Mauro & Mark Potok, *Double Trials an Unusual Event*, USA TODAY, Jan. 28, 1997, at 3A.

163. For one attempt at a defense of the general distinctions between crime victims and tort plaintiffs, see Gail L. Heriot, *The Practical Role of Harm in the Criminal Law and the Law of Tort*, 5 J. CONTEMP. LEGAL ISSUES 145 (1994).

Additionally, two commentators used the following syllogism to describe the simultaneous elevation and diminishment of crime victims:

> Civil courts have not been a meaningful avenue of recovery for the vast majority of crime victims; *therefore*:
> It is more practical to handle their claims to restitution as part of the criminal prosecution; *but*:
> Where it is inconvenient for the criminal courts to handle restitution, it should be left to the civil courts; *however:*
> Civil courts have not been a meaningful avenue of recovery for the vast majority of crime victims; *therefore:*
> The claims of crime victims that cannot be handled conveniently within existing criminal procedures are unlikely to be met at all.

Frank, *supra* note 139, at 112-13.

164. Multi-million dollar tort verdicts are not uncommon in products liability and medical malpractice cases. *See, e.g., $17,767,000 Verdict—Products Liability*, NAT'L JURY VERDICT REV. & ANALYSIS, Apr. 1996, at 2; *$6,021,474 Verdict—Medical Malpractice*, NAT'L JURY VERDICT REV. & ANALYSIS, Sept. 1995, at 5; *$12,688,492 Gross Verdict—Products Liability*, NAT'L JURY VERDICT REV. & ANALYSIS, Jan. 1995, at 2; *$9,600,000 Verdict—Products Liability*, NAT'L JURY VERDICT REV. & ANALYSIS, July 1994, at 3; *$3,210,000 Verdict—Medical Malpractice*, NAT'L JURY VERDICT REV. & ANALYSIS, Nov. 1993, at 10; *$8,900,000 Verdict—Medical Malpractice*, NAT'L JURY VERDICT REV. & ANALYSIS, Mar. 1993, at 5; *cf.* Janet Novack, *Torture by Tort*, FORBES, Nov. 6, 1995, at 138, 141 ("A conservative estimate from management and actuarial consultant Tillinghast/Towers Perrin puts the cost of the nation's tort system at $150 billion in 1994, over 2% of gross domestic product."). Even settlements can generate seven figure recoveries. *See $1,300,000 Recovery*, NAT'L JURY VERDICT REV. & ANALYSIS, Jan. 1995, at 18.

165. Although gunshot victims generally recover minimal—if any—damages, significant

bullet of a known gunman will usually recover nothing.[166] This disparate treatment is rendered even more indefensible if the plaintiff in a civil suit is a prisoner who was incarcerated for harming an uncompensated victim.[167]

C. *The Criminal Justice System's Attempts at Victim Compensation*

Two structures have been incorporated into the criminal justice system to try to compensate crime victims for their losses. These systems are restitution and victim compensation programs. While these systems are somewhat helpful, both are underfinanced[168] and therefore only partially effective.

1. *Restitution*

Restitution, which requires convicted defendants to compensate their victims as part of the sentence,[169] embodies the older system. In fact, restitution has existed for thousands of years in several cultures.[170] Despite its longevity, restitution awards were relatively rare in the United States until

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judgments have been rendered in favor of victims struck by stray bullets fired from police officer's guns. *E.g.*, *$7,752,500 Verdict Including $1 Million Punitive Award—Alleged Excessive Use of Police Force*, NAT'L JURY VERDICT REV. & ANALYSIS, Dec. 1994, at 2.

166. *See supra* notes 159-62 and accompanying text. Comparing the treatment of crime victims to the treatment of victims of natural disasters is also interesting.

> Victims of violent crime are as deserving of our compassion and aid as are any victims of a catastrophe, natural or man-made. It would never occur to us to ask if the victims of a natural disaster have earned emergency and restitutive aid. Every citizen has that right. I believe that violent crime victims are disaster victims and have a right to a special status. Social justice requires that society take responsibility for making the victim whole again.

Frank, *supra* note 139, at 115 (quoting ROBERT REIFF, THE INVISIBLE VICTIM 15-16 (1979)).

167. *See* Lungren, *supra* note 145, at 701 (condemning a system that allows "those who are imprisoned [to be] the victims as opposed to the perpetrators").

168. *See infra* text accompanying notes 177-83, 199-201.

169. For discussions of the importance of restitution in the criminal justice system, see Fletcher, *supra* note 159, at 102-03; Frank, *supra* note 139, at 113-15; Kersh, *supra* note 137, at 346-49; Fred Gay & Thomas J. Quinn, *Restorative Justice and Prosecution in the Twenty-First Century*, PROSECUTOR, Sept.-Oct., 1996, at 16. Compare Robert E. Crew, Jr. & Mary Vancore, *Managing Victim Restitution in Florida: An Analysis of the Implementation of FS 775.089*, 17 JUST. SYS. J. 241, 241 (1994), which notes motivating factors for implementing Florida's plan.

170. *See* STARK & GOLDSTEIN, *supra* note 160, at 150; Frank, *supra* note 139, at 109-12; Kersh, *supra* note 137, at 346; Clark, *supra* note 137, at 633; Gay & Quinn, *supra* note 169, at 16; Peggy M. Tobolowsky, *Restitution in the Federal Criminal Justice System*, 77 JUDICATURE 90, 90 (1993). In the late nineteenth and early twentieth centuries, several states had even adopted legislation requiring the state to compensate crime victims when it failed in its obligation to protect its citizenry. *See* Rabkin, *supra* note 154, at 16, 18.

recent changes in legislative and judicial attitudes. Through the 1930s, courts in less than a dozen states were specifically allowed to order restitution in criminal cases.[171] By 1988, though, more than twenty states had adopted legislation mandating restitution orders in every case with documented economic losses.[172] All fifty states have now enacted some type of restitution statute.[173]

"[M]ost states limit restitution to . . . 'actual' or pecuniary losses . . . ."[174] With very few exceptions,[175] states generally do not allow victims to recover for "inconvenience, pain and suffering, or . . . physical impairment."[176]

Even though the restitution awards are substantially less than the damages awarded in civil cases, collecting restitution payments often has proven to be unsuccessful.[177] Although exact data is probably impossible to gather, a safe estimate is that substantially less than half of the amounts awarded in restitution will ever be collected by victims.[178] Many criminal defendants simply do not have the assets or income necessary to pay full restitution.[179] Although some states have adopted innovative programs to try

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171. Frank, *supra* note 139, at 111.

172. *Id.* at 111 & n.20; *see also* Clark, *supra* note 137, at 639 (stating the total number of states requiring restitution for "non-property crimes" was 21 in 1994).

173. *See* Frank, *supra* note 139, at 111-12. For discussions of restitution in federal criminal cases, see Tobolowsky, *supra* note 169; Kersh, *supra* note 137, at 345, 348-49.

174. STARK & GOLDSTEIN, *supra* note 160, at 154; *see also* Frank, *supra* note 139, at 127-28 (discussing how "[m]ost agencies responsible for determining restitution" focus on easily quantifiable medical costs, funeral and burial expenses, and property damage).

175. STARK & GOLDSTEIN, *supra* note 160, at 154 (noting that Washington allows awards for pain and suffering and that North Carolina "authorize[s] restitution for all damages or losses that could ordinarily be recovered by the victim in a civil action").

176. *See id.*

177. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, BRINGING CRIMINAL DEBT INTO BALANCE: IMPROVING FINE & RESTITUTION COLLECTION 5 (1992) ("Financial penalties—fines or restitution—are an important part of criminal sanctions, but such obligations often remain unpaid."); Frank, *supra* note 139, at 108 ("One vital service to victims that is often overlooked by probation and parole professionals, the community, and crime victims, is the collection of restitution."); Robert C. Davis & Tanya M. Bannister, *Improving Collection of Court-Ordered Restitution*, 79 JUDICATURE 30, 30 (1995) ("[S]ome offenders were removed from probation without ever making restitution.").

178. *See* Crew & Vancore, *supra* note 169, at 244 (stating that in fiscal year 1991-1992 Florida courts ordered over $30 million in restitution, but only about $11.5 million was collected); Davis & Bannister, *supra* note 177, at 30 ("A recent study by the American Bar Association found that nonpayment rates ranged from 38 to 67 percent at four sites where access to restitution records was available. Similarly, Davis and Lurigio report a collection rate of only 34 percent for a probation-run collection program in Cook County, Illinois.") (footnote omitted).

179. *E.g.*, STARK & GOLDSTEIN, *supra* note 160, at 149-50 ("New York officials estimate that between 20 and 25 percent of criminals convicted in the New York courts have sufficient assets to pay restitution to some of their victims . . . .").

to increase collection of criminal debt, including restitution,[180] such debts probably will never be fully recoverable.[181] Thus, restitution is a promised,[182] but largely unrealized, means of recovery for crime victims.[183]

2. *Victim Compensation Programs*

The Federal Victims of Crime Act of 1984[184] (VOCA) led to the creation of state crime victim compensation programs.[185] Under this statute, the federal government reimburses each state with a qualifying VOCA program for forty percent of the amount the state spent in the previous year for victim compensation.[186] Every state now has a victim compensation program.[187]

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180. Frank, *supra* note 139, at 121-22; Patricia G. Barnes, *Making Criminals Pay*, A.B.A. J., June 1996, at 20.

181. Even in the federal system, where U.S. Attorney's offices are staffed with debt collectors who regularly attempt to collect criminal debts, uncollected criminal debt has skyrocketed. *See* ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 177, at 7, 19; *cf.* NANCY L. RIDER & FRANKLIN T. SHIPPEN, U.S. DEP'T OF JUSTICE, PROSECUTOR'S GUIDE TO CRIMINAL FINES AND RESTITUTION 42-43 (1992) (suggesting methods to improve fine collection).

182. Some crime victims possess no illusion of recovery from restitution. Because restitution is ordered as a part of sentencing, it can be awarded only when the perpetrator is identified and convicted. As a result, only a small percentage of those who become crime victims can hope to recover through restitution. See, for example, Frank, *supra* note 139, at 114, noting that:

> John Heinz, a proponent of victims' rights, explained that "[s]ince less than 20% of all crimes lead to an arrest, less than 10% of the accused are ever prosecuted, and less than three per cent of those arrested are actually convicted, 97% of all victims would go unaided if restitution were their only means of assistance or retribution."

183. STARK & GOLDSTEIN, *supra* note 160, at 149 ("[A]n order of restitution is meaningless unless the convicted offender has the means to pay restitution and the court or some other state agency enforces the restitution order."). In addition to the obvious negative impact on crime victims, promising restitution without actually collecting it does not increase the public's confidence in the criminal justice system. *See* Davis & Bannister, *supra* note 177, at 30; *cf.* ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 177, at 5 ("Imagine the outrage if those responsible for an escaped prisoner's capture sat idly by and made no attempt to locate the fugitive. The reaction should be similar for unpaid fines and restitution orders.").

184. 42 U.S.C. §§ 10601-10605 (1994). This Act was spearheaded by Senators Strom Thurmond of South Carolina and Joseph R. Biden, Jr. of Delaware. Clark, *supra* note 137, at 634.

185. Desmond S. Greer, *A Transatlantic Perspective on the Compensation of Crime Victims in the United States*, 85 J. CRIM. L. & CRIMINOLOGY 333, 393-94 (1994); Clark, *supra* note 137, at 634; Henry J. Reske, *Constitutional Cooperation*, A.B.A. J., Oct. 1996, at 26, 26.

186. *See* Alex Daniels, *Realigning Victims' Rights*, GOVERNING, Dec. 1995, at 43, 45. The federal funds are from a Crime Victims' Fund that receives federal criminal fines, special penalty assessments, and forfeited appearance fees. Greer, *supra* note 185, at 394-95.

187. Clark, *supra* note 137, at 627; Daniels, *supra* note 186, at 43. The District of Columbia and the Virgin Islands also have victim compensation programs, but Puerto Rico does not. Greer,

States have relatively wide discretion in setting up victim compensation programs.[188] Nonetheless, the programs share substantial similarities. For example, only victims of violent crime are eligible to participate.[189] Most states further limit eligibility to innocent victims who were not engaging in illegal activity at the time of the crime, victims who filed reports of the crime to law enforcement officials within five days and thereafter fully cooperated with these officials, and victims of crimes that caused physical injury, emotional trauma, or death.[190]

Compensable expenses vary somewhat from state to state, but are almost universally more limited than those awarded in restitution. Victim compensation programs usually cover only out-of-pocket expenses incurred as a direct result of crimes, including medical bills, counseling fees,[191] funeral expenses, and lost wages.[192] Losses that can be recovered from insurance or other collateral sources are not recoverable from victim compensation programs.[193] Except in a few states,[194] property losses are not covered.[195] Additionally, victims generally cannot recover for cash and other items stolen in robberies[196] or for pain and suffering.[197]

The maximum amount recoverable from the victim compensation programs varies from state to state,[198] but these maximums are rarely reached. The average recovery from victim compensation programs is only $2,000.[199] Despite the relatively modest sums recovered by crime victims,

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supra note 185, at 334 n.8. Nevada is the only state that has a program that does not qualify for VOCA reimbursement. *See id.*

188. The requirements for federal reimbursement are set forth in 42 U.S.C. § 10602(b) (1994).

189. Greer, *supra* note 185, at 340-43. "Victims" eligible to participate invariably include relatives of persons who have died after a crime of violence. *Id.* at 353-57.

190. Frank, *supra* note 139, at 116-18.

191. Greer, *supra* note 185, at 354, 372-73.

192. Clark, *supra* note 137, at 634.

193. Greer, *supra* note 185, at 373; Clark, *supra* note 137, at 634.

194. For a discussion of assorted state provisions allowing limited recovery for some property damage or losses, see Greer, *supra* note 185, at 357-59.

195. *Id.* at 357; *cf.* Frank, *supra* note 139, at 118 & n.50 (stating the general principle that "[n]one of the . . . programs provide reimbursement for damages to, or the loss of, personal property," but noting limited exceptions).

196. *See* Clark, *supra* note 137, at 634. In some states, recovery is allowed for eyeglasses, prosthetic devices, hearing aids, and dentures that were lost or damaged as a result of crimes. Frank, *supra* note 139, at 118 n.50; Greer, *supra* note 185, at 357.

197. Frank, *supra* note 139, at 118; Greer, *supra* note 185, at 373-74. The exclusion of pain and suffering usually results from a desire to reduce costs. *See id.* at 374.

198. Greer, *supra* note 185, at 375 (containing a chart showing varying ranges of maximum compensation among states); Clark, *supra* note 137, at 634 (noting that maximums generally range from $10,000 to $25,000); *id.* at 637 (containing a map showing maximum compensation by state).

199. *See* Daniels, *supra* note 186, at 45; *cf.* Greer, *supra* note 185, at 376-77 ("To a British

many state compensation programs continually face financial stress that causes delay or reduction in benefit payments.[200] Due to a combination of insufficient funds and failures by victims to file claims, less than ten percent of those injured or killed by criminals obtain compensation.[201] Viewed from a different perspective, the compensation system paid only $2.3 million in 1992 even though the direct economic cost of crime (excluding pain and suffering and other noneconomic losses) was estimated at over $1.3 billion.[202]

Even acting in combination, the restitution and victim compensation systems fall well short of providing crime victims adequate recovery for their losses. This failure largely results from a lack of financial resources.

IV. THE BROADCAST-FEES-FOR-CRIME-VICTIMS PROPOSAL

Televised trials present one possible source of this much needed revenue for underfinanced restitution and victim compensation systems. Although charging fees for the right to televise trials will not, in and of itself, completely solve the problem of undercompensated crime victims, it is an overdue step in the right direction.

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observer, [even the American] maxima might seem comparatively low—the British Board has made awards in excess of $750,000.").

200. Awards under many programs are also subject to the availability of funds, thereby limiting the victim's 'right' to compensation. . . . Boards are frequently authorized to 'prorate' awards or to make "appropriate proportionate reductions" if they find or anticipate that sufficient funds are not available.

. . . Occasionally there is a complete embargo where "no further awards . . . shall be made until sufficient funds are available." In recent years, many programs have availed themselves of such provisions and suspended or reduced awards otherwise payable to victims.

Greer, *supra* note 185, at 377-78 (footnotes omitted); *see also id.* at 396 (noting that "'[e]ighteen [state] programs said [financial] resources were inadequate to pay deserving claim[ants]'"); Clark, *supra* note 137, at 631, 633 (statement of Dan Eddy, executive director of the National Association of Crime Victim Compensation Boards) ("State victim compensation funds. . . 'are facing financial pressure and some are delaying payments'. . . . 'I don't know of one that's not either facing a problem or nervous about the future . . . .'"); Daniels, *supra* note 186, at 45 ("Even at those relatively low levels of recompense, the programs are finding it difficult to keep up with demands on their services and money. . . . Some states are two years behind in awarding compensation.").

201. Greer, *supra* note 185, at 396-97.

202. *Id.* at 397 & n.328.

A. *Overview of the Proposal*

Although a few courts have asked broadcasters to pay electric bills or other costs that directly result from televising trials,[203] courts do not currently charge fees for the right to broadcast criminal trials. In an age when governments are continuously and sometimes somewhat desperately seeking sources of revenue outside general taxes, the states' failure to charge fees for broadcasting rights perpetuates this corporate welfare program. Given the substantial value of broadcasting rights, as documented by the significant revenue generated by those who televise trials,[204] this government "gift" is rather remarkable.

This largess stands in marked contrast to widespread government fee collection in other areas. Examples of fees charged by governments include the following: users' fees charged for a wide variety of government services, including access to parks,[205] the right to participate in public school system extracurricular activities,[206] the right to dump solid waste,[207] the use of government-produced electrical power,[208] connections to water and sewer lines,[209] special assessments charged to property owners for infrastructure development,[210] and airport development "head taxes" collected from

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203. California's newly revised cameras in the courtroom rule provides, "The judge may condition the order permitting media coverage on the media agency's agreement to pay any increased court-incurred costs resulting from the permitted media coverage (for example, for additional court security or utility service)." CAL. R. 980(e)(4). Prior to this change in the California law, the Los Angeles County Board of Supervisors proposed asking broadcasters to reimburse the county for expenses incurred during the O.J. Simpson trial. *See* Carla Rivera, *County May Ask Media to Help Shoulder Costs*, L.A. TIMES, Feb. 28, 1995, at A13.

204. *See supra* text accompanying notes 119-25; *see also* Gospill & Molander, *supra* note 11, at 12 ("If the stakes are high, and the ratings are there, the courts could charge a hefty fee—and get away with it.").

205. *See* Randal O'Toole, *Fund National Parks Out of User Fees*, ENVTL. FORUM, July/Aug. 1996, at 37; Ralph Regula, *The Public Must be a Partner in National Parks*, ENVTL. FORUM, July/Aug. 1996, at 38, 39 (discussing recreation fees in National Parks).

206. David G. Challed, *Student Fee Waivers in Public Schools: Have Fees Created a Private School Within a Public School?*, CLEARINGHOUSE REV., June 1996, at 121, 121 (stating that "in approximately 34 states . . . some type of student fees are [sic] assessed or charged against children to attend school").

207. Steve Yarbrough, Casenote, *Compensatory Fee or Protectionist Tax: Oregon's Surcharge on Out-of-State Waste*, 34 NAT. RESOURCES J. 497, 498-99 (1994).

208. *See* Matthew C. Cordaro, *What's in Store for Public Power?*, PUB. UTIL. FORT., July 1, 1995, at 14; Randall Hardy, *Should the United States Privatize the Power Marketing Agencies (PMAs)?: Can We Learn Lessons from the United Kingdom?*, PUB. UTIL. FORT., June 1, 1995, at 38.

209. Charles C. Mulcahy & Michelle J. Zimet, *Impact Fees for a Developing Wisconsin*, 79 MARQ. L. REV. 759, 760 (1996).

210. Joe McDaniel, Jr., *You Get What You Pay for: Using Special Assessments to Finance Infrastructure*, 14 GLENDALE L. REV. 1, 3 (1995).

passengers.[211]

Governments are especially likely to collect fees from businesses that stand to profit from goods, services, or rights bestowed upon them by government agencies. For instance, state and local governments generate substantial revenue through the sale of liquor licenses.[212] Municipalities require payments from land developers.[213] Governments collect fees from those who use government property, including ranchers who graze their livestock on public lands[214] and oil and gas developers who lease the mineral interests on these lands.[215] The National Park Service charges fees to concessionaires who operate businesses in national parks.[216] The FCC recently began auctioning licenses for portions of the radio spectrum.[217] Cities demand large franchise fees from cable television operators.[218] Courts require litigants to pay filing fees[219] and charge reporters fees for copying

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211. Suzanne Imes, Comment, *Airline Passenger Facility Charges: What Do They Mean for an Ailing Industry?*, 60 J. AIR L. & COM. 1039, 1041 (1995).

212. *See generally* Shelley Ross Saxer, *License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing*, 22 HASTINGS CONST. L.Q. 441, 449-50 (1995) (discussing the power of state and local governments to issue liquor licenses).

213. Exactions are fees, rights, or restrictions demanded by local governments from developers to offset the costs of constructing new capital facilities. *See* Mulcahy & Zimet, *supra* note 209, at 760-61. Exactions include mandatory dedications of land for schools or parks (or fees in lieu of such dedications), impact fees, and special assessments. *Id.* at 760.

214. Joseph M. Feller, *'Til the Cows Come Home: The Fatal Flaw in the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 709 (1995).

215. *See generally* Alan S. Miller, *Energy Policy from Nixon to Clinton: From Grand Provider to Market Facilitator*, 25 ENVTL. L. 715, 719 n.38 (1995) (indicating opposition to the expansion of oil and gas leasing on public lands from Congress and the courts).

216. Dennis J. Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks*, 11 STAN. ENVTL. L.J. 3, 45 (1992); George T. Frampton, Jr., *The Public Wants a Protected, Funded System*, ENVTL. FORUM, July-Aug. 1996, at 36, 37.

217. Ian Ayres & Peter Cramton, *Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition*, 48 STAN. L. REV. 761, 762 (1996); Ruth W. Pritchard-Kelly, Comment, *A Comparison Between Spectrum Auctions in the United States and New Zealand*, 20 MD. J. INT'L L. & TRADE 155, 155 (1996); Stephen Maloney, *Auctioning Access to Regulated Markets*, PUB. UTIL. FORT., Mar. 15, 1996, at 18, 19.

218. *See* Kent D. Wakeford, *Municipal Cable Franchising: An Unwarranted Intrusion into Competitive Markets*, 69 S. CAL. L. REV. 233, 246-49 (1995). Although the basis for a city's right to demand franchise fees from a cable television company is not readily apparent, the courts have upheld this right. *See id.* at 234-35 (noting that the approval of municipal regulations of cable television franchises largely stems from "three primary rationales: (1) cable franchises continuously use and occupy public property; (2) 'laying cable' constitutes a public disruption implicating a locality's police power to protect the safety, health and property of its citizens; and (3) cable franchises are a 'natural monopoly'") (footnotes omitted).

219. *See, e.g.*, 28 U.S.C. § 1911 (requiring litigants to pay Supreme Court filing fees); *id.* § 1913 (requiring litigants to pay courts of appeal filing fees); *id.* § 1914 (requiring litigants to pay federal district court filing fees); N.D. CENT. CODE § 11-17-04 (1995 & Supp. 1997) (requiring litigants to pay fees for the filing of complaints, answers, and other pleadings); *id.* §

court records.[220] Under the leadership of the NCAA and CFA, state universities charge radio and television stations and networks large fees for the right to broadcast their football games and other sporting events.[221]

Given the widespread government practice of collecting fees from businesses and other citizens, now is the time for states to stop giving away the right to broadcast criminal trials. If courts can charge litigants for the right to use the court system, then they can charge networks for the right to broadcast criminal trials.

If requiring broadcasters to pay for televising trials is accepted, then procedures and policies need outlining. To maximize revenue from broadcast rights fees, the two-step approach outlined more fully in the Appendix should be used.[222] First, courts should set a standard "per day" fee for nonexclusive rights to broadcast ordinary criminal proceedings.[223] The standard fee amount should vary somewhat from jurisdiction to jurisdiction, depending in part upon the television market's size. Broadcasters should be required to pay the fee to the clerk of court before they are given access to the courtroom to set up their equipment.[224]

When particular criminal cases are important or notorious enough to generate more than the standard fee, courts should follow the FCC's lead and conduct sealed bid auctions[225] for exclusive[226] rights to broadcast trials and

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27-03-05 (Supp. 1997) (requiring litigants to pay North Dakota Supreme Court filing fees).

220. *See, e.g.*, N.D. CENT. CODE § 44-04-18(2) (Supp. 1997) (providing for a reasonable fee for the making of copies). Some federal courts have also adopted fees for providing access to electronically stored court records. Lucy Dalglish, *Judges Reverse Course on Cameras in Federal Courts*, QUILL, May 1995, at 16, 16; *see also Los Angeles Times Sues County over Electronic Record Fees*, NEWS MEDIA & L.,Winter 1996, at 35, 35 [hereinafter *Electronic Record Fees*] (describing the County of Los Angeles's new program whereby companies contract with the county to provide on-line access to court documents to the public and to private companies).

221. *See* NCAA v. Board of Regents, 468 U.S. 85, 92-95 (1984); *see also* David L. Anderson, *The Sports Broadcasting Act: Calling It What It Is—Special Interest Legislation*, 17 HASTINGS COMM. & ENT. L.J. 945, 956 (1995) (discussing the Court's reasoning in *NCAA*).

222. The Appendix is based, in part, upon the courtroom rules from the state with perhaps the most experience with televised trials, California. *See* CAL. R. 980.

Although the primary concern is televised trials, the model rule/statute in the Appendix is written broadly enough to cover other camera and broadcast issues. In some cases, both radio and television stations or networks may wish to broadcast trials.

The Appendix primarily addresses the collection and distribution of broadcast fees. Other issues related to broadcasting of trials, such as restrictions on the number, location, and operation of cameras and microphones, presumably would be covered by other court rules or orders.

223. *See infra* app. at 51.

224. *See infra* app. at 50-51.

225. *See supra* note 212 and accompanying text. The FCC uses sealed bid auctions as well as other auction systems. William Kummel, *Spectrum Bids, Bets, and Budgets: Seeking an Optimal Allocation and Assignment Process for Domestic Commercial Electromagnetic Spectrum*

other proceedings.[227] Based on the FCC's experience in auctioning resources that it previously gave away,[228] auctions for broadcasting rights to important or notorious trials should generate substantial, perhaps even unexpectedly high, revenues.[229] However, given the relatively few networks that televise trials at length, lack of bidding competition is a potential problem. Therefore, courts should establish a minimum bid when announcing sealed bid auctions.[230]

Fees collected from broadcasters should be maintained by the clerk of court in a separate account for the crime victims involved.[231] If the defendant is convicted and restitution is ordered, the victims from that trial should be allowed to collect the restitution ordered from this account.[232] The defendant, however, should not be relieved of his obligation to pay restitution. Instead, the defendant's restitution payments should be made to the applicable victim compensation program.[233]

Products, Services, and Technology, 48 FED. COMM. L.J. 511, 528-38 (1996) (comparing the merits of the different auction systems).

226. The network securing the exclusive right to broadcast a trial would also have the right to resell this right or to sell other networks feeds of its images. *See infra* app. at 51.

227. Auctions are an economically efficient way to generate revenue and distribute scarce government resources. *See* John Berresford, *A Free Market in Spectrum: Closer Than You Think*, PUB. UTIL. FORT., June 15, 1996, at 16 ("Contrary to the general impression, I believe this idea [of auctioning all FCC radio rights] is neither radical nor impracticable. It is founded on the same general principle that has worked elsewhere in our economy: Voluntary exchanges between intelligent adults will produce the greatest good for society."); Maloney, *supra* note 217, at 20 ("Two hundred years of auctions demonstrate the superiority of market solutions . . . . Auctions have also proven most effective in serving the public interest.").

228. Ayres & Cramton, *supra* note 217, at 813; Kummel, *supra* note 225, at 512; Pritchard-Kelly, *supra* note 217, at 155.

229. *See* Ayres & Cramton, *supra* note 217, at 762 (noting early FCC auctions raised nearly $9 billion); Kummel, *supra* note 225, at 512 ("In less than two years, federal government spectrum auctions have generated more than $20 billion in revenue through the sale of 2745 licenses, a remarkable amount considering that radio frequencies are a resource that were always awarded without charge and still are for many users.") (footnote omitted); Pritchard-Kelly, *supra* note 217, at 161 n.37 ("In 1992, the Office of Management and Budget projected $4.5 billion in revenues from auctioning the PCS bands. In 1995, the industry estimates were nearing $12 billion.") (citation omitted); *id.* at 174 ("[B]idders were willing to pay money far in excess of that anticipated by either the government or industry observers."); Maloney, *supra* note 217, at 19 ("Spectrum auctions raised close to $7 billion in license fees alone in recent years.").

230. *See infra* app. at 51.

231. *See infra* app. at 52.

232. *See id.* The availability of broadcast fees as a source of restitution payments may overcome judicial reluctance to order restitution when the defendant is indigent. Consequently, restitution should become more common in televised cases with identifiable victims.

233. Payment of restitution into victim compensation programs is not unprecedented. *See* Crew & Vancore, *supra* note 169, at 246 ("Faced with accumulations of [restitution] funds that they cannot—for whatever reason—distribute to victims, most organizations seek guidance

If the broadcast fees in the clerk of court's account for victims exceed the amount necessary to fully satisfy the restitution order, the excess should be paid to the victim compensation program for the benefit of other victims.[234] Similarly, if the defendant is acquitted and therefore no restitution order is issued, all broadcasting fees collected for the trial should be forwarded to the victim compensation program.[235]

Although victims have always had some interest in whether criminal proceedings would be televised,[236] they traditionally have lacked a financial stake in this decision. Under the broadcast-fees-for-crime-victims proposal, victims would have a direct financial interest in this decision. Therefore, victims should be given the right, along with the defendant and the prosecution, to advise the court of their position regarding whether a trial should be televised and whether the court should conduct an auction for exclusive broadcast rights.[237]

If the fees generated through this proposed sale of broadcast rights are sufficient, courts and victim compensation programs could expand restitution and compensation awards to include recovery for pain and suffering and other noneconomic damages that traditionally have been excluded. Even if this expanded recovery is not possible, any amounts generated by broadcast fees for victims would increase their current meager recoveries.

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from the relevant court. The second . . . alternative is to remit funds to the state Crime Compensation Fund."); *cf.* Frank, *supra* note 139, at 119 ("Staff workers at victim compensation programs often point out that these programs are only 'fronting' the money which the offender should ultimately have to pay back to the programs through restitution.").

234. *See infra* app. at 52.

235. If an acquittal results, the crime victim will not be entitled to restitution, but she may be able to collect benefits from the victim compensation program. Eligibility requirements for victim compensation programs do not require conviction or even identification of the perpetrator. *See supra* notes 185-86 and accompanying text.

236. *See supra* notes 142, 150 and accompanying text.

237. *See infra* app. at 51.

Even in the current system, some states permit victim input into the court's decision concerning the allowance of cameras into the courtroom. MURPHY, *supra* note 10, at 38-39; Frank, *supra* note 36, at 802 n.339; Lassiter, *supra* note 2, at 929 n.8. Many lawyers believe the victims' views should be taken into account. *See* Day, *supra* note 68, at 51 (printing survey results that reveal 62% of lawyers said victims' feelings should be given consideration and 38% said they should be controlling); Eisenbeiss, *supra* note 138, at 15.

In some states, the concerns of witnesses or other "participants," presumably including victims who will serve as witnesses, are considered by judges contemplating televised trials. MURPHY, *supra* note 10, at 153 (Connecticut); Frank, *supra* note 36, at 792, 802 & n.339 (noting 14 states require witness consent); Lassiter, *supra* note 2, at 929 n.8 (listing 13 states requiring witness consent); Gardner, *supra* note 19, at 490, 495-97; *cf. id.* at 511 (proposing a model guideline which would prohibit photographing, broadcasting, or telecasting of any "witness who expresses to the judge any prior objection").

B. Rebuttal of Expected Criticism

The move to collect fees for broadcast rights cannot be made without dissent. However, each of the anticipated criticisms of this system can be rebutted.

1. Broadcast Fees Are Not Unfair to Broadcasters

Those who now televise trials without paying access fees will undoubtedly complain that charging such fees is unfair.[238] Whenever the government begins charging for a benefit that it previously distributed free of charge, former beneficiaries of the windfall can be expected to protest. However, the mere existence of a windfall should not be enough to justify its continued existence—regardless of how long the windfall has operated.

Enactment of the broadcast-fees-for-crime-victims proposal will not force networks or stations to broadcast trials. Those who choose not to televise trials will never have to pay standard broadcast fees or bid for the right to exclusive television coverage. For those who choose to continue to televise trials, broadcast fees will reduce, but should not eliminate, the profitability of televised trials. No economically rational network will bid or pay higher broadcast fees than it can recover by televising a trial.

Without question, charging broadcast fees will raise the costs of televising trials.[239] This economic disincentive is not necessarily a problem. In some cases, network executives will decide not to broadcast trials because of the extra cost associated with broadcast fees. Given the social costs and problems associated with televised trials,[240] some would argue that this disincentive is an added benefit of broadcast fees.[241]

Broadcasters will suggest that any trials that are not televised due to access fees are a loss to society because networks are performing a public service whenever they televise trials. This argument ignores the real reason that trials are televised: the generation of revenue for television networks through entertainment programming.[242] If public service is the concern,

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238. *See* Rivera, *supra* note 203, at A13 ("The Radio and Television News Assn. responded that it is 'adamantly opposed' to any effort to impose charges on the media."). Media agencies already complain about the rather paltry fees that they have been charged for access to electronic court information systems. *See* Dalglish, *supra* note 220, at 16; *Electronic Record Fees*, *supra* note 220, at 35.

239. *Cf. supra* text accompanying notes 16-17 (discussing the minimal costs currently associated with televising trials).

240. *See supra* notes 68, 150 and accompanying text.

241. *See* Day, *supra* note 68, at 20-21 (arguing that the cost of televising trials may provide some "intrinsic value" by shielding trials from cameras).

242. *See supra* notes 119-25 and accompanying text.

courts could waive broadcast fees for television networks who are willing to forego any revenue from broadcasting trials.[243]

2. *Broadcast Fees Are Not Unconstitutional*

Television executives and their supporters might also suggest that broadcast fees somehow infringe upon their constitutional right of access to court proceedings.[244] However, this argument overstates the scope of the right of access.[245]

In a series of relatively recent decisions, the Supreme Court repeatedly has held that courts cannot adopt broad sweeping rules excluding the public[246] from trials—although case-specific court closings are sometimes

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243. *See infra* app. at 52. Other commentators suggest that trials would best be televised by cable access or other similar local television stations. MURPHY, *supra* note 10, at 41 (proposing televising of trials on local cable television); Harris, *supra* note 1, at 826-27 (proposing televising local trials on "Community Court TV"); Sasaki, *supra* note 19, at 804-05 (discussing uninterrupted gavel-to-gavel coverage on cable access channels); Dershowitz, *supra* note 104, at 46 (proposing a "J-Span" channel with coverage similar to the congressional coverage on C-Span).

244. *See* Rivera, *supra* note 203 (statement of Sylvia Teague, president of the Radio and Television News Association) ("'We believe charging for trial coverage is a clear violation of the news media's right to report on public trials' . . . .").

245. *See* Estes v. Texas, 381 U.S. 532, 541-42 (1965) (holding that the press's First Amendment rights do not confer the right to use equipment in the courtroom and that the public's right of access to courtrooms is satisfied by allowing reporters merely to attend proceedings); United States v. Edwards, 785 F.2d 1293, 1295 (5th Cir. 1986) ("While these cases establish that the press has a right of access to observe criminal trials, . . . the right of access therein was a right to attend, listen and report. No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials."); Westmoreland v. CBS, 752 F.2d 16, 23 (2d Cir. 1984) ("There is a long leap, however, between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised."); United States v. Hastings, 695 F.2d 1278, 1280 (11th Cir. 1983) ("To conclude from these cases . . . that the right of access extends to the right to televise, record, and broadcast trials, misconceives the meaning of the right of access at stake in those cases."); ABA STANDARDS, *supra* note 19, at 58 ("All of the cases to date that have addressed the issue of whether electronic media coverage falls within the right of access promulgated in *Richmond Newspapers v. Virginia* have concluded that it does not.") (footnote omitted); *cf.* Gerbner, *supra* note 9, at 417 (noting that the issue is not whether reporters are free to report trials, but whether "the addition of video spectacle to the already existing press and broadcast coverage would reduce or increase the risk of prejudice" to defendants).

The right of access to trials is a right enjoyed by the public—not a right that only the press itself possesses. Therefore, the media's argument that this right somehow gives it authority to televise trials has interesting implications. *Cf.* Prentice, *supra* note 5, at 14 ("Would we allow the public in a courtroom during a trial to make 'home videos' if they wished to do so? Imagine spectators recording trial proceedings for home use or later broadcast by some interested cable network program.").

246. Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598, 610-11 (1982) (holding

allowed.[247] Therefore, any rule prohibiting reporters (whether they are representatives of television networks, newspapers, magazines, or other non-broadcast media outlets) from attending and covering trials would be unconstitutional.[248]

However, the broadcast-fees-for-crime-victims proposal does not close trials or exclude reporters from courtrooms. Instead, it merely provides that those who wish to televise trials must pay a fee for this privilege. Even when exclusive broadcasting rights would be sold through silent auctions, reporters from media outlets who did not secure the right to televise the trial would be given the same right to attend and report about all trial proceedings as those representing the televising network.[249]

As long as access to the courtroom is unaffected, the broadcast-fees-for-crime-victims proposal is constitutional. Neither the Supreme Court[250] nor

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that a state statute requiring the exclusion of the public and the press from courtrooms during the testimony of all minor victims in sex offense trials violated the First Amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580-81 (1980) (finding that a state trial court's order closing a murder trial to the public and press violated the First and Fourteenth Amendments).

247. Gannett Co. v. DePasquale, 443 U.S. 368, 392-93 (1979) (holding that a state court order barring members of the press and public from a pretrial suppression hearing was constitutional). For more complete discussions of cases outlining the public's right of access to criminal trials, see MURPHY, *supra* note 10, at app. 1 at 97-103; Lassiter, *supra* note 2, at 947-59. Compare ABA STANDARDS, *supra* note 19, at 19, setting forth Standard 8-3.1 which "prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case."

248. *See Richmond Newspapers, Inc.*, 448 U.S. at 578.

249. *See infra* app. at 50.

250. Although some commentators have suggested that the Supreme Court should recognize a constitutional right to televise trials, *see* Frank, *supra* note 36; Riemer, *supra* note 39, at 1296-1307, the Court has not recognized such a right. Instead, it has ruled only that allowing television coverage does not necessarily deprive a criminal defendant of his right to a fair trial. Chandler v. Florida, 449 U.S. 560, 574-75 (1981) (rejecting a per se rule "that all photographic or broadcast coverage of criminal trials is inherently a denial of due process"); *see also* Lassiter, *supra* note 2, at 942 ("[I]n the combination of *Estes* and *Chandler* the Supreme Court struck with Solomon-type wisdom, holding that the Constitution neither prohibited nor mandated televised coverage of trial proceedings . . . ."); *id.* at 965-66 ("[T]here is no constitutional right to introduce cameras in the courtroom."); Gardner, *supra* note 19, at 484-85 ("[T]he Supreme Court's decisions in the cameras in the courtroom area establish [that] . . . . broadcasters do not possess a first . . . or sixth amendment right to televise criminal trials [and that] . . . . states may permit cameras in their courtrooms only if they take steps to protect the defendant's . . . rights to a fair trial.") (footnote omitted).

One Supreme Court case that did not directly deal with the issue of televising trial proceedings suggests that the Supreme Court is unlikely to establish a constitutional right to televise trials. *See* Lassiter, *supra* note 2, at 955-56 ("*Nixon v. Warner Communications, Inc.*, [435 U.S. 589 (1978),] the Court's latest decision arguably involving this question, may be interpreted as providing a fairly dispositive answer opposing a First Amendment right for televised coverage of trials.").

any other court[251] has ruled that a judge must allow cameras into the courtroom. If courts can exclude cameras altogether, they can also make payment of broadcast fees a condition of access.[252]

3. *Broadcast Fees Cannot Create the Push for Revenue*

Finally, some may argue that the collection of broadcast fees may turn televised trials into unseemly efforts to generate revenue through entertainment programming.[253] The reality, of course, is that trials are already televised in an effort to generate revenue, but the television networks are the primary recipients of this income in the current system.[254] Unless and until courts decide to bar cameras from courtrooms, a highly unlikely event,[255] the fervor to generate revenue through televised trials will continue.

Of course, courts must protect the integrity of the judicial process. The

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251. Lower federal courts have consistently held that no First Amendment right to televise trials exists. Gardner, *supra* note 19, at 480-81 & n.33. Cases rejecting media petitions for the right to televise trials include *Conway v. United States*, 852 F.2d 187, 188 (6th Cir. 1988); *Edwards*, 785 F.2d at 1296; and *Westmoreland*, 752 F.2d at 23. Even when the defendant wishes to have the trial televised, no right to a televised trial exists. United States v. Kerley, 753 F.2d 617, 622 (7th Cir. 1985).

252. *Cf. Kerley*, 753 F.2d at 620-21 (stating that "a limitation on the manner of news coverage . . . . can withstand constitutional scrutiny so long as it is reasonable and neutral, as with time, place, and manner restrictions generally").

In a similar vein, if courts can charge parties for the right to use the court system, *see supra* notes 219-20 and accompanying text, they should be allowed to charge networks for the right to televise trials, *see supra* text accompanying notes 223-24.

253. Many already object to the entertainment and business aspects of televised trials. *See, e.g.*, THALER, *supra* note 1, at 37 (noting that the judge in Big Dan's Tavern gang rape trial charged that, "[t]he essential motive of the press . . . was crass commercial exploitation"); Frank, *supra* note 36, at 793-94 ("Some opponents, including jurists, have stated that the courts should not be the subject of commercial exploitation. Another concern is that televised trials may be perceived as entertainment rather than news by a confused public.") (footnote omitted); Kollin, *supra* note 12, at 37 ("But the business of courts should be justice, not t-shirts. And we, as responsible citizens as well as journalists, should be concerned about creating an atmosphere that puts t-shirts in the front seat and justice in the back."); *see also* Bosco, *supra* note 96, at 146 (noting that members of Parents of Murdered Children initiated a national movement called "Murder Is Not Entertainment"); Reske, *supra* note 109, at 48d (explaining that Sixth Circuit Chief Judge Gilbert S. Merritt's displeasure with the television coverage of the *Simpson* trial stems from the fact that it "is providing a forum more for entertainment purposes than for getting at [the] truth"); Smolowe, *supra* note 74, at 38 (statement of Don Hewitt, the executive producer of *60 Minutes*) ("'I don't like the idea that a murder trial has been turned into an entertainment special . . . . There are certain moments in American life that have a certain dignity.'"); Stein, *supra* note 108, at 16 ("The dark side . . . is the fact that the [*Simpson*] case has become an 'entertainment bonanza, exposing all the worst elements of American popular culture.'").

254. *See supra* notes 119-25 and accompanying text.

255. *See supra* notes 73-78 and accompanying text.

fact that the broadcasting of trials is primarily an entertainment and business function does not mean that the court system's administration of trials should be for these purposes. The realities of televised trials should not affect decisions about whether trials should be conducted in the first place, or the manner in which they are conducted generally. However, the reality that broadcasting trials is an entertainment and business phenomenon should affect the decisions and rules about broadcasting of trials.

The fundamental question is whether television networks are entitled to all of the revenues generated through televised trials or whether they should share some of these revenues with crime victims. In deciding between allowing television networks to keep all revenue generated from televised trials and asking them to share a portion of that revenue with uncompensated or undercompensated crime victims, crime victims have the compelling claim.[256]

V. CONCLUSION

The criminal justice system's widely disparate economic treatment of crime victims and television networks cannot be justified. While crime victims suffer significant economic losses from their victimization and from their participation in the criminal justice system, television networks are given the right to use that same system to generate substantial revenue without even paying for this opportunity.

If television networks are going to use the criminal justice system as a profit center, they should pay what the market will support for that privilege. The fees generated from the sale of broadcast rights will help to compensate victims for the losses they sustain by involuntarily entering the same system that television networks are so anxious to exploit. Because trial broadcasting is a growth industry, now is the time to implement this program. After all, the next "Trial of the Century" may be just around the corner.

256. Because some funds would be forwarded to state victim compensation programs, *see infra* app. at 52, to some extent the decision is also a choice between television networks and a state's taxpayers. To the extent that funds for victim compensation programs come from general tax revenue, *see* Greer, *supra* note 185, at 390, a state may be able to reduce the contribution of taxpayers to the victims compensation program when broadcast fees are collected.

APPENDIX

MODEL STATUTE OF BROADCAST FEES FOR CRIMINAL TRIALS

A. *Introduction:* Media agencies who desire to broadcast trials will, in some cases, be allowed to do so. Except in the circumstances outlined in subsection F, media agencies will pay a broadcast fee for this privilege.

B. *Definitions:* For purposes of this rule:
   1. "Electronic media coverage" means any photographing, recording, or broadcasting of court proceedings by any media agency using television, radio, photographic, or recording equipment;
   2. "Media agency" means any person or organization engaging in entertainment production or news gathering or reporting and includes any radio or television station or network, newspaper, news service, magazine, trade paper, in-house publication, professional journal, or other entertainment-producing, news-reporting, or news-gathering agency;
   3. "Nonprofit media agency" means any media agency that generates no revenue from its programming;
   4. "Court" means the courtroom at issue, the courthouse, and its entrances and exits; and
   5. "Judge" means the judicial officer or officers assigned to or presiding at the proceeding.

C. *Media Coverage:* Electronic media coverage is permitted only pursuant to a written order by the judge. This provision does not otherwise limit or restrict the right of the media to attend and report about court proceedings.
   1. A media agency may file a written request for an order permitting electronic media coverage with the clerk of court. In considering this request, the judge must give the media agency, the parties, the victims of the crime, and witnesses the opportunity to present their views in writing or in a hearing following notice. The judge must consider the views that are presented.
   2. Except when an order is issued under subsection F, if the judge issues a written order allowing electronic media coverage, a media agency's right to participate in such

coverage is contingent upon its prior payment of the designated broadcast fee to the clerk of court. The clerk of court will not allow individuals possessing electronic media equipment access to the court prior to the payment of the broadcast fee.

3. In the written order, the judge shall state whether the broadcast fee will be the standard fee or a fee determined through a sealed bid auction.

D. *Broadcast Fee*: The broadcast fee shall be either:

1. The standard fee per courtroom day (or any portion thereof), which shall grant each media agency that pays the fee the right to conduct nonexclusive electronic media coverage for the number of prepaid courtroom days, but not the right to resell or otherwise distribute any images produced during electronic media coverage (and any other media agency shall have the right to use any images broadcast or acquired by the media agency); or
2. The fee determined through a sealed bid auction, which shall grant one designated media agency that pays the daily fee determined through a sealed bid auction the right to conduct exclusive electronic media coverage of the number of prepaid courtroom days (or portions thereof), including the right to resell any images produced during its electronic media coverage.

E. *Sealed Bid Auctions:* Whenever a judge either *sua sponte* or from the input of a media agency, party, victim, or witness, recognizes that a case could generate broadcast fees in excess of those that will be generated with the standard fee, the judge will consider whether to conduct a sealed bid auction for the right to conduct exclusive electronic media coverage. Neither a prior order allowing nonexclusive electronic media coverage under the standard fee nor the payment of any such fees by any media agency will prevent the judge from considering whether to conduct a sealed bid auction. If the judge conducts a sealed bid auction, copies of the judge's order announcing the sealed bid auction shall be served by the clerk of court upon every media agency that has previously paid any broadcast fee or filed a written request for an order permitting electronic media coverage with the clerk of court. The judge may direct the clerk of court to also serve other media agencies with copies of the order. The order announcing the sealed bid auction shall include a statement of the minimum acceptable bid and designation of the date and

time by which sealed bids must be filed with the clerk of court. The amount of the minimum acceptable bid and the amounts bid by media agencies shall be stated in a fee for each court day (or any portion thereof). Following the deadline for sealed bids, the judge shall unseal the bids in open court and determine, based solely upon the amounts bid, which media agency has secured the right to conduct exclusive electronic media coverage of all future proceedings.

F. *Waiver of Broadcast Fees for Nonprofit Media Agencies:* In the event that no media agency other than a nonprofit media agency has paid any broadcast fee or filed a written request for an order permitting electronic media coverage with the clerk of court, the judge may consider a written request from a nonprofit media agency to conduct electronic media coverage without paying a broadcast fee. In considering this request, the judge must give the nonprofit media agency, other media agencies, the parties, the victims of the crime, and witnesses the opportunity to present their views, in writing or in a hearing following notice. The nonprofit media agency must present sufficient evidence to allow the judge to determine that it is indeed a nonprofit media agency. If the request is granted, the nonprofit media agency will be granted the right to conduct electronic media coverage, but not the right to resell or otherwise distribute for profit any images produced during electronic media coverage; and any other media agency shall not have the right to use any images broadcast or acquired by the nonprofit media agency.

G. *Deposit and Distribution of Broadcast Fees*: The clerk of court shall deposit all broadcast fees in an account maintained only for this purpose. Following the completion of all appeals or the expiration of the time for the filing of a notice of appeal, the clerk of court shall pay victims designated to receive restitution the greater of the full amount of restitution ordered or the total broadcast fees collected. If the total broadcast fees collected exceed the amount of restitution ordered, the clerk of court shall pay the excess to the victim compensation program for the benefit of other crime victims. To the extent that the broadcast fees provide payment to victims for restitution, the defendant will be obligated to make restitution payments to the victim compensation program. If the broadcast fees are not sufficient to pay the full restitution ordered, the defendant's restitution payments will first go toward payment of the balance of restitution owed to the victims, then to the victim compensation program. If restitution

is not awarded or if an award of restitution is reversed on appeal, the clerk of court will pay the collected broadcast fees to the victim compensation program.