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# Courtroom Cameras

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## COURTROOM CAMERAS

*Steven Brill\**

Thank you for inviting me to address this illustrious group. I'm delighted to be here.

But I'm intimidated, too. And not simply because of who you are. But also because of who I am.

You see, lately I've been thinking about my dual life as a member of the legal community and as a journalist. And so I've come to the conclusion that I belong to not one, but two of the most reviled professions on this planet.

We all know how much people say they don't like lawyers and distrust the legal system. But journalists and the media—they're even worse. For when it comes to arrogance, when it comes to unaccountability, when it comes to making a buck in the name of supposedly higher values—such as the public's right to know—we journalists make lawyers look good.

Indeed, however much we want to criticize lawyers for not enforcing their code of professional responsibility, at least lawyers have a code. Journalists don't, which is something I've been writing and talking about lately, but which is a subject I guess I should save for another day.

So let's talk about lawyers—and judges—and the legal system.

I want to talk tonight about what I see is a huge gap between the reality of the law and the legal system and the public perception of it. And I say that not as an apologist for everything in the legal world. I do believe that there's lots that can still be fixed in our system, especially in areas like judicial elections and lawyer discipline.

But I also think—and this is what I'm really here to talk about—that some judges, and lawyers, by insisting on secrecy, and being defensive about the faults in the system that need fixing, and being insecure about how the public will understand and appreciate their legal system if they can see it, have created the crisis in confidence that they now face and don't deserve.

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Let me put it a bit differently. I believe in public exposure for the courts and the legal system because I think it's right and it's consistent with all of our democratic values. But I also believe in it because I think it's the best thing for the legal system and for preserving confidence in it.

You see, I have a theory about judges. Like lawyers, I think they undersell themselves. And I think they so believe in the inability of lay people to appreciate what they do, that they are reluctant when it comes to public exposure.

With that in mind, let me tell you two recent stories. Last week, our newspaper in Washington, *Legal Times*, invited one of Washington's top federal appellate judges in for an off the record luncheon. I'd tell you his name, but he insisted that the lunch—in which he did not in any way discuss pending matters but really talked about the court and his own life and his approach to legal issues—be strictly off the record. In any event, following the lunch, I asked our editor there how it had gone. His reaction on a one to ten scale of enthusiasm (and this is a cynical, tough editor) was about an eleven. The judge was a really terrific guy, he said. All of the staff loved him. He was so, so impressive. Someone who really cares about doing the right thing. What a great public servant, my editor concluded. If only he was more visible. If only. . .

Story number two: about a year ago, I had the same kind of encounter with another judge who is probably one of the more misunderstood and misperceived figures in legal public life. If only more people could see him in action, I thought. If only. . .

You see, at the risk of sounding obsequious, I have to tell you that while our publications have proudly pioneered writing about the bad apples in the judiciary, we've also relished writing about the good judges and great judges. And at Court TV we've delighted in showing judges—my guess is probably 550 out of the 555 we've shown on Court TV—who come to work on time, make tough decisions fairly and generally outshine their counterparts in the executive and legislative branches.

Yet, as I've said, most lawyers and judges believe the bad press clips the profession gets, or at least do nothing to try to counter that bad, unfair image.

Indeed, instead of letting the world know what they really do—instead of, for example, wanting the public to see for themselves the best legal system the world has ever created—lots of lawyers and judges prefer to keep cameras out of courts, which, of course results in leaving it to Hollywood and tabloid writers and pundits to tell the

American people and the world what the world's greatest legal system is all about.

And so it frustrates me to see that those in the courts and in the legal profession generally—those who are celebrated for their ability to articulate and persuade, and simultaneously vilified for their power—find today that their agenda and image are being set by knee jerk editorial page writers; by Hollywood and by anyone else with an apocryphal and usually sensational story.

And the blame doesn't really lie with the public, which is seduced by these stories. The blame lies with those who let fiction thrive in a vacuum while they complain amongst themselves that the lay public just doesn't understand. If the profession wants the public to learn the truth about the system, I think we have no alternative but to stop discussing it amongst ourselves and begin to open discussions with the people whom we serve.

It's the same with journalists, by the way. We have endless meetings and seminars wringing our hands over the public's loss of confidence in the press and the public's flight to entertainment—but we never deal with how the public really sees us, which is as a self-righteous, unaccountable elite who bury corrections of our stories (in the rare instance that we admit them) on page ninety-six and refuse to speak out about the ethics of covering sleaze stories instead of important stories.

I can remember when we first implemented the corrections policy that we now use at all of our papers and at Court TV: the correction had to be candid, clear and prominent. When we started doing it, several of our reporters complained that if we bared our souls that way we would be embarrassed when we screwed up and that people would ultimately have less confidence in all of our reporting. I replied that if we showed that we were willing to admit mistakes, people would end up having more confidence in us. I also said that if we were embarrassed for screwing up, it might make us focus more on the screw-ups.

Now, I have to tell you that that conversation sounds hauntingly like a lot of conversations I've had with judges in the aftermath of the Simpson case. Cameras were bad, some judges said, because they embarrassed the judiciary and gave the public less confidence in judges. You should have no trouble figuring out how I have replied to that.

I should also add that in this room I am speaking in some substantial part to a converted choir. Many of you have led the way in opening the legal systems in your state to public scrutiny and to cameras.

In many ways, as I think of the future of our state supreme courts I think that we stand at a crossroads. We have the technology to relay the wonderful arguments themselves—the spirited and articulate give and take of ideas, values, philosophies and consequences—directly to the citizens with no intrusion whatsoever into the courtroom. And I cannot urge you strongly enough to encourage its use in your own courtrooms. I think it is not only available to you, I think it is part of your mission, indeed part of your *raison d'être* to share what you do with your citizens.

I would hesitate to speak so confidently and directly to you were it not for the support these same ideas are finding among you. Right now, forty-seven states allow camera coverage of appeals. True there are restrictions and attitudes which make it more difficult in some states than others. But, in just the few years since I launched Court TV, I see more and more of your colleagues welcoming cameras. In Washington state I'm told the supreme court of Chief Justice Barbara Durham routinely televises almost all of its arguments. In Ohio, Chief Justice Thomas Moyer, has said that—quote—“if we are truly sincere about our efforts and desire to make the public more aware about the work and role of our courts, *cameras* must be part of the process.”<sup>1</sup>

Indeed, Chief Justice Moyer has argued that he thinks we should have “regional Court TV's”<sup>2</sup>—an idea, by the way that I am developing right now. And this year, Chief Justice Birch of Tennessee and Chief Justice Shepard of Indiana each broke new ground in televising court proceedings in their states.

To anyone who has listened to many of my fellow journalists, these advances would come as a surprise. After all, since the Simpson case ended over a year ago, the media has regularly reported that there is a backlash against cameras. That the Simpson case spelled the demise of gavel-to-gavel coverage. But the truth is that judges have had mixed responses to that watershed trial and I am confident that the backlash, such as it is, has already passed.

Because, if you ask real people what was wrong with the O.J. Simpson case they will not say that what was wrong with it is that they got to see it!

Instead, the televising of the Simpson case and the hostile reaction to it of many judges—especially those sitting in southern California—raise a different, larger point. Which is that for fear of the one bad case that looks bad and demands reform, many in the legal com-

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1 Tim Miller, *Court Cameras Teach Lessons, Moyer Says*, DAYTON DAILY NEWS, Sept. 10, 1995, at 3B.

2 *Id.*

munity seemed prepared right after that case, though less so now, to throw out the best thing imaginable for those worried about the public's confidence in lawyers and the legal system—and that's cameras in the courts.

Obviously, I think that response is wrong. Was there heightened scrutiny in that case—in and out of the courtroom? Absolutely.

Was some of it uncomfortable and disheartening? Again, absolutely.

But, did it result in an improved awareness of how the system works in one place versus others—such as the fact that, according to the *Los Angeles Times*, the courthouse in which Simpson was tried has only a 32% conviction rate in homicide trials—lower than all the surrounding courthouses<sup>3</sup> and much, much lower than the nationwide 80% plus conviction rate? Absolutely!

I would be astonished if any of you seriously thought that the public or the courts would be better off if such truths were never discovered, or, if you thought that showing people how well the system usually works was not important.

You see, I did start Court TV to “expose” the legal system. But not quite the way you might think. For I really believed that if all Americans could see real law instead of *L.A. Law* or Clint Eastwood movies or apocryphal and usually false accounts of litigation gone haywire, and if they could see real lawyers in public defenders' offices and prosecutors' offices and in small and large firms doing the work of everyday justice, they would sometimes see something to be angry about, but more often see a dignified, fair—indeed inspiring—proceeding that is a model for the world.

And I was right. A study done by the independent Times Mirror Center for The People and The Press has found that a significant plurality of Americans who have watched trials on Court TV have come away having much more respect for, and confidence in, their legal system.<sup>4</sup> And I think those numbers would be even higher among those viewers on Court TV who watch *On Appeal*, our show dedicated exclusively to covering appellate proceedings, where judges press lawyers to articulate the consequences and philosophical and legal underpinnings of their clients' positions.

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3 Ted Rorhlich & Fredric N. Tulsky, *And Justice for Some: Solving Murders in L.A. County Not All L.A. Murder Cases Are Equal Outcomes differ by victim's race, who investigates, coverage. Law officials say they try to be evenhanded.*, L.A. TIMES, Dec. 3, 1996, at A1.

4 Cassandra Burrell, *TV Trials Draw Big Audiences*, AP, Feb. 4, 1994, available in 1994 WL 10132483.

So despite my intention—and the proven result of 550 Court TV trials and appeals later of having made good on that intention—of showing people a system they would usually be proud of, I found myself after the Simpson case defending Court TV from those who thought, to be blunt, that because one of those 550 trials made the system look bad to lots of people, the whole idea of allowing lots of Americans to see a trial should be abandoned.

I did not doubt the sincerity and good intentions of those on the side of removing the camera. Indeed, I shared their frustration that the Simpson case left Americans with such a distorted impression of our legal system. And I shared their frustration that some of the media that benefited from the pool camera that we operated in that trial exploited it in a way that no one with a press card should be proud of. I just happened to think that the answer to the distorted impression left by one aberrant trial was not to make it so that the public would now not see any other trials or appeals. Put differently, and more bluntly, the answer to the public image presented by one court's performance was not to make sure that no other courts are allowed to present a different, more representative image.

And the courtroom camera sets the record straight in other ways as well. I am willing to bet that almost every one of you has participated in or presided over an important trial or appeal and been frustrated at the evening news account's spectacularly shallow (if not downright inaccurate) coverage. I'd bet you've had the experience of reading the next morning's paper and thinking, "Gee, I thought that reporter and I were in the same courtroom; but it sure doesn't seem like it."

Courtroom cameras always show the truth. And that simple fact sets them above any other form of journalism or court-sponsored public information in existence.

Which is why right after the Simpson case I took to the speaking circuit whenever I could and argued harder than ever for more, not less, public exposure to our legal system.

And which is why I am delighted to report that a year and a half after the verdict, the pendulum seems now to have swung back the other way. And not in the state courts alone. I am delighted that the Second and Ninth Circuits recently opened up their Courts of Appeal to cameras, delighted that several cases we litigated in the Southern and Eastern Districts of New York have opened federal civil trials to cameras if the district courts, district by district, are willing to allow it.

And I am delighted that the judicial task force set up after Governor Wilson recommended (on the day of the Simpson verdict) that

cameras be removed from California courts voted unanimously to keep cameras.

You see, I think that the answer to the possibility that on occasion the lawyers in the Simpson case played to the camera is to make sure that the judge does not allow them to, just as the judges in the thirty-three other cases that Court TV televised from start to finish during the Simpson trial made sure that that did not happen. And having observed the thoughtful manner in which he completed the California judiciary's inquiry into this issue, I think Chief Justice Ronald George might even agree with me.

With all of that in mind, I want to talk about a particular aspect of debate that was re-ignited after the Simpson verdict.

As that renewed debate in California proceeded, I noticed that opponents of cameras—and even some supporters of cameras—talked about the constitutional mandate that trials be public as a pesky requirement that is to be tolerated—not an essential component of our trials that is to be maximized.

Indeed, while I think there is a unique and powerful educational value to televising the appellate courts, I want to talk a bit more about public trials—because I happen to think they're crucial to restoring confidence in the system.

The opponents like to say that if, as in the Simpson case, there were about twenty seats for reporters and ten for the rest of the public, that was enough for the trial to meet the requirement of being public. Indeed, they like to argue that because a few people can come down to a courthouse to watch one of the many uncelebrated cases that Court TV televises every day that this is enough, that there is no reason for a camera to be there.

Well, with that in mind, I think we may need a history lesson. And that lesson is simple: the framers of the Constitution didn't require public trials because they wanted to throw a symbolic bone to the public or to the press, but because they thought public trials were part of the essence of what a trial was in colonial America and in the mother country before that.

Trials were not supposed to be merely unsecret; they were intended to be very public. Indeed they were meant to be as public as possible.

For example, here's a description written in 1807 of the probable cause hearing for Aaron Burr in Virginia:

At ten o'clock, MARSHALL, Chief Justice, took his seat on the bench, in the court room, which was densely filled with citizens. . . .  
On the suggestion of counsel that it would be impossible to accom-



modate the spectators in the court room, the chief justice adjourned to the hall of the house of delegates.<sup>5</sup>

Or, as Justice Holmes wrote in 1884, “[i]t is desirable that the trial . . . take place under the public eye . . . that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.”<sup>6</sup>

Chief Justice Burger, who was no great admirer of the press, understood that when he wrote in the landmark *Richmond Newspapers* case in 1980 that the constitutional right to a public trial belongs not only to defendants but to the public. “The historical evidence demonstrates conclusively,” the Chief Justice wrote, “that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history,” he added, “rather, it has long been recognized as an indispensable attribute of an Anglo-American trial.”<sup>7</sup>

Burger went on to quote Jeremy Bentham, who had written, “[w]ithout publicity,”—note he said publicity, not a few people watching the trial from the audience of a tiny courtroom—“all other checks are insufficient: in comparison of publicity, all other checks are of small account.”<sup>8</sup>

Bentham had written from an historical context in which public trials were so vital to the essence of the trial itself that in the sixteenth century all the townspeople were actually required to attend trials. Later, that rule had been eased but only insofar as all people were encouraged to attend. And anyone who chose to do so usually could because the audience galleries were huge, theater-like set-ups which is exactly the way American courtrooms of the 1700s and 1800s were built.

And, I should add, there was no illusion then that some trials when made so public would not become spectator events in their own right. For these trials, as with some trials that Court TV has televised, often became what Professor Lawrence Friedman, in his 1993 book *Crime and Punishment in American History* called “high drama,” and a “great spectator sport.”<sup>9</sup>

Nonetheless, trials were made as public as possible. There were often attempts made to quiet the audiences’ cheers and jeers, but no

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5 *United States v. Burr*, 25 F. Cas. 2, 11 (C.C.D. Va. 1807) (No. 14,692a).

6 *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

7 *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564 (1980).

8 *Id.* at 569 (quoting 1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 524 (1827)).

9 LAWRENCE M. FRIEDMAN, *CRIME AND PUNISHMENT IN AMERICAN HISTORY* 253 (1993).

attempt made to limit this essential ingredient of Anglo-American justice.

Chief Justice Burger endorsed exactly that notion of not compromising the public nature of a trial even in the face of audience misconduct or exploitation of the event. In the Richmond case he quoted a colonial historian as follows:

Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was "by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected," the response was not to restrict the openness of the trials to the public, but instead to prescribe rules for the conduct of those attending them.<sup>10</sup>

Burger went on to quote the Journals of the Continental Congress as extolling the necessity of a trial "in open Court, before as many people as chuse to attend . . .'"<sup>11</sup>

As many people as choose to attend.

Compare this notion—Bentham's, the founding fathers', and Chief Justice Burger's—with that of some California opponents of cameras in the courts who surfaced after the Simpson verdict.

In the Simpson aftermath, Governor Pete Wilson's counsel, pressing the governor's new post O.J. Simpson position that cameras should now be banned from criminal trials, compared the nine month trial in New York in 1995 of those charged with a terrorist conspiracy to blow up various New York landmarks and the Holland Tunnel to that of Mr. Simpson. Because the federal New York bombing conspiracy trial, he noted, had not been televised, it had not been highly publicized and in fact had "slipped from the public consciousness."<sup>12</sup> His words.

That, the governor's counsel said, was a good thing.

To the post O.J. opponents of cameras in the courts, a trial that "slips from the public consciousness" is a good trial. Thus, the second Menendez brothers trial was presumably a better one than the first. Even though without cameras and with far fewer witnesses, it grinded on to a verdict almost exactly as long as the endless first trial (eighty-seven days versus eighty-six days, putting the lie to the notion that cameras prolong trials). And the Oklahoma City bombing trial will

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10 *Richmond Newspapers*, 448 U.S. at 567 (quoting ARTHUR PEARSON SCOTT, *CRIMINAL LAW IN COLONIAL VIRGINIA* 132 (1930)).

11 *Id.* at 568-69 (quoting 1 *JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789*, at 107).

12 Henry Weinstein, *Court TV Founder Defends Live Trial Coverage*, *L.A. TIMES*, Jan. 18, 1996, at 1.

presumably be fine if it doesn't attract too much attention. And a key federal civil rights trial or a Microsoft antitrust case, or a political corruption trial will be just right if the lawyers and the judge are left to sort it all out on their own.

Would the founding fathers have thought that was a good thing? Wouldn't it have been better for Court TV and CNN and others to have televised that New York bombing conspiracy trial—which involved basic issues of national security juxtaposed against defense charges of entrapment and official misconduct—instead of having it “slip from the public consciousness?”

Was that the founding fathers' original intent?

Is that the standard John Marshall had in mind when he moved the Aaron Burr trial to a huge auditorium? Was he worried about the lawyers playing to the crowd, or did he understand that controlling those lawyers was part of his job?

Did he confuse the notion of the dignity of the proceedings with the idea of keeping the proceedings out of the view of the masses? No way. Because he understood that the best justice is very public justice. Not justice that “slips from the public consciousness.”

Indeed, I submit to you that the problem we have today with public confidence in our legal system is that the real workings of the system have slipped from public consciousness and been replaced by mystery and by myth.

“As many people as chuse to attend.” That's a far cry from the tiny courtrooms that have lately become the norm in America, usually because of tight budgets, tight space, crowded dockets, our national evolution from town-square-based villages to urban-suburban metropolises, and, I submit, a straying from this hallowed tradition of public trials.

Since when are de facto non-public trials good?

Sure it may mean that some trials replace soap operas and freak-of-the-day talk shows as daily entertainment fare. But, assuming any of us can define entertainment, let alone constitutionally distinguish it as something less worthy than news, is that trade-off of soap opera fiction and talk show sleaze for non-fiction justice bad, let alone something the founding fathers—who regularly saw trials captivate the throngs in the huge town square courthouses—would have wanted the government to define and prohibit? No way. They understood that the dignity of the courts came from the courtroom, itself, and from the values on display there, and that those values would be invigorated, not undercut, by having the so-called “masses” there to watch.

It is true that Chief Justice Burger and his brethren were not talking about cameras when they opened the Court. But he was talking

about the press as a surrogate for the people who could not attend public trials. And he was ruling fifteen years after the Billie Sol Estes case,<sup>13</sup> the Supreme Court case that is thought to be the ruling that says that there is not a constitutional right to cameras in the courts. But that case involved the wires and lights and general circus atmosphere surrounding a trial that had been televised; and the ruling had to do with all of those physical intrusions imposed by the electronic media—intrusions that today's technology has eliminated. Indeed, Justice Clark in his plurality opinion in *Estes* explicitly noted that “[w]hen the advances in these [television] arts permit reporting . . . by television without [its] present hazards to a fair trial we will have another case.”<sup>14</sup>

So let me close by presenting in its simplest terms that new case Justice Clark envisioned. Suppose Jeremy Bentham or the founding fathers or Chief Justice Marshall were in this audience and suppose I presented them with the following proposition: courtrooms today are not nearly as accessible as they were in the 1700s. And the community's interest in many trials these days extends far beyond a town or city's borders. However, we can use technology to make up for that. We can make trials totally public to millions of Americans without any physical intrusion and with no chance of noise or other disruption from this huge audience. True, some trials will be seen by some as entertainment, just the way they were in the old days when there were hoots and cheers from huge audience galleries and vendors sold souvenirs outside the courthouse. But now the audience will be at home and quiet and able to see and hear everything without disrupting or otherwise affecting the proceedings or distracting or intimidating the jury.

Would the founding fathers—the people who wanted as many people as possible to see the government at work when it decides whether to deprive someone of his or her liberty—have liked that idea? Or would they have said, no, sometimes the system will look bad, and we don't want that.

Or, no, we can't trust the public to understand what they are seeing.

Or, no, such a huge but silent audience will impair the dignity of the proceedings.

Or, no, we really would prefer that trials “slip from the public consciousness.”

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13 *Estes v. Texas*, 381 U.S. 532 (1965).

14 *Id.* at 540.

I think we all know the answer. I think we all know that public trials should be celebrated. For they are an idea, and an ideal, that is basic to the kind of justice that our forefathers cherished and that we should cherish.

I also hope that you can see that not only is a public process the right process, but it's also the process that can restore faith in our legal system and in our lawyers.

I want to close by quoting two judges who I believe are moving forward to realize the educational responsibilities of the courts. One is your colleague, Chief Justice Adolpho Birch of Tennessee, who said a couple of weeks ago that after experimenting for a year his state was ready to adopt a more liberal camera access law because "[t]he court is committed to keeping the public informed about the judicial system. One method for doing that is to allow cameras in courtrooms."<sup>15</sup>

The other is federal District Judge Jack Weinstein who in October allowed cameras into a trial in the Eastern District of New York for the first time in history. As he wrote: "[i]n our democracy, the knowledgeable tend to be more robustly engaged in public issues. Information received by direct observation is often more useful than that strained through the media."<sup>16</sup>

So, as a journalist and as a citizen, I want to thank those of you—perhaps most of you—who have willingly opened your supreme courts to the public through cameras. To those who have been reluctant, I urge you to discuss it candidly with your colleagues here today.

Finally, I want to ask all of you to consider the overwhelmingly positive experience America has had in recent years of televised trials. Please—speak to trial court judges you know and respect who have actually had cameras in their courtrooms. The rare media side show, you will find, is vastly outweighed by the serious coverage possible only with a camera.

My point is simple. Our courts are among the most inspiring institutions of our democracy. And yet, despite the efforts of many people in this room, they remain in most states and certainly in the federal sphere the least visible and least understood. It was never meant to be that way. We should be proud, not afraid—in fact, we should be aggressively proud—to have them be seen.

Thank you for listening.

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15 Duren Cheek, *Plan to Keep Cameras in Courts Lauded*, TENNESSEAN, Dec. 31, 1996, at 1B.

16 *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).