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LEGAL TIMES

LAW AND LOBBYING IN THE NATION'S CAPITAL

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HIGH COURT HIGHLIGHTS

THE 1993-94 TERM IN REVIEW

The 1993-94 Supreme Court term saw the moderate debut of Ruth Bader Ginsburg; the departure of the last liberal, Harry Blackmun; and the imminent arrival of another consensus choice, Stephen Breyer. The decisions, too, showed a moderate-to-conservative tilt, but reflected neither a consistent philosophy nor a predictable lineup of votes. Starting on Page S25, Tony Mauro, Stuart Taylor Jr., David Cole, George H. Kendall, G. Robert Blakey, and other Supreme Court experts review some of the term's more significant cases.

Critics Fault Williams' Record On Domestic-Abuse Cases

Judicial Nominee Disputes Claim, Senate Panel Quiet

BY JULIE COHEN

Having apparently weathered a widely disputed American Bar Association finding that he is unqualified to serve as a federal judge, Prince George's County State's Attorney Alexander Williams Jr. now faces opposition on another, potentially more potent front: his policy toward prosecuting domestic-violence cases.

Since December, an advocate for battered women and a woman who was beaten by her fiancé have been complaining to the Senate Judiciary Committee that Williams, who has been nominated to a seat on U.S. District Court for the District of Maryland, has been soft on domestic violence.

"Mr. Williams and his office have demonstrated appalling indifference and hostility to victims of domestic violence which



P.G. County prosecutor Alexander Williams Jr.

should disqualify him from sitting on the federal bench," said Joan Meier, director of the Domestic Violence Advocacy Project at the George Washington University National Law Center, in a letter to Senate Judiciary Chairman Joseph Biden Jr. (D-Del.).

Williams firmly disputes that claim, saying a prosecutor's office that tries thousands of defendants each year is bound to generate complaints from a few people unhappy with the outcomes of cases.

But the critics have recently enlisted the help of other victims and advocates, including three members of a volunteer advocacy team that operates out of the Prince George's County Sheriff's Office.

The complaints against Williams could find some resonance—coming at a time of increased public awareness of domestic violence because of the O. J. Simpson case and before a Senate committee criticized in the past for its handling of women's issues.

Some of Williams' critics are now submitting testimony to the panel and writing letters to Biden, the committee chairman who is also the Senate's leading voice on the domestic-violence issue.

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Junk Science or Junk Study?

Plaintiffs Bar Slams Judges' Evidence Guide

BY EVA M. RODRIGUEZ

The Federal Judicial Center, the normally sleepy research arm of the federal courts, has become embroiled in an unusual dispute with two prominent plaintiffs-bar groups over one of the judiciary's most complicated challenges: how to determine what scientific evidence should be admitted in court.

The rift between the judicial

center and the two groups—the Association of Trial Lawyers of America (ATLA) and Trial Lawyers for Public Justice (TLPJ)—comes in the wake of the Supreme Court's 1993 decision in *Daubert v. Merrell Dow Pharmaceuticals Inc.*

That opinion was hailed by plaintiffs lawyers because it seemed to give judges the green light to accept more cutting-edge

scientific findings—which may have validity, but which may not yet have been embraced by the scientific community. At the same time, the defense bar found key aspects of the decision to their liking.

Now, ATLA and TLPJ are afraid that a new manual, set to be published by the judicial

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INSIDE

Opposing Disclosure



American Bar Association leaders, including President-elect George Bushnell Jr.

(above), scurry to preserve eight words in the lobby law that they say protect attorney-client privilege. Lobby Talk, Page 5

Mouse vs. Pirates

The Walt Disney Co. turns to a Chinese tribunal to challenge alleged product piracy. Page 2

Inadmissible

Ralph Nader steps up his attack on White House Counsel Lloyd Cutler; the D.C. office of Preston Gates lobbied Capitol Hill on the Microsoft antitrust case. Page 3

Online Exchange

Can an African-American be white? A Georgetown law-school applicant spurs debate. Page 10

TV or Not TV?

Steven Brill argues that televised trials are an antidote to media hype. Page 20
George Gerbner says that the cameras pose grave dangers. Page 21

After Hours

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GEORGE GERBNER

The Risk of Playing to the Cameras

There seems to be no end to the O. J. Simpson media (excuse the expression) overkill. But in all the commentaries and interpretations of the apparently mesmerizing (and certainly inescapable) experience, and in all the self-congratulatory media effusions about the educational value of television trials, one thing seems to have gotten lost. And that is the only relevant and crucial issue. It is not information, education, or entertainment, important though they may be. It is whether televising criminal trials in real time helps or hinders the mission of the courts—namely, fair trial for a defendant—and, in general, assists or diminishes the integrity of the judicial process.

O. J. Simpson is not a typical defendant, but the great interest in his case is likely to increase the pressure for opening more courts to television, including federal courts that still bar the televising of criminal proceedings. Therefore, this is a timely occasion to review the issues and focus on the most sensitive area. The issue is not freedom of reporting, but transporting the sights and sounds of sensational criminal trials in "real time" to a global arena in which the spectacle—television's unique contribution to reporting by other means—can prejudice the outcome.

That's Entertainment

We start with a bit of history to see how the courts themselves have sorted out the issues.

In early frontier America, people traveled many miles to the county seat to be entertained by court proceedings. Later, the press brought to them sensational details of criminal trials. Court became the main circulation booster of many newspapers.

When radio was introduced, broadcasters looked to the courts as a source of programming. In 1925, Chicago station WGN broadcast the Scopes monkey trial to a large audience. In 1935, the trial of Bruno Hauptmann, convicted of kidnapping Charles Lindbergh's infant son, turned the tide. Reporters jostling each other and taking countless pictures with explosive flash devices created a carnival-like atmosphere in the courtroom that led to the American Bar Association's advocacy of a ban on cameras in court.

Most states and the federal judiciary observed the ban. Eventually, television came to be viewed by the courts as presenting additional dangers, different from the noise and physical disturbances caused by the older media. These were articulated in 1965 by the U.S. Supreme Court's decision in *Estes v. Texas*, 382 U.S. 875.

Billy Sol Estes, an associate of Lyndon Johnson, was convicted on swindling charges. Texas was one of the few states that had not adopted a ban on cameras in the courts, and Estes' highly publicized trial received extensive television coverage. Estes appealed the conviction to the U.S. Supreme Court, arguing that the televising of his trial had deprived him of his 14th Amendment right to due process of law. A 5-4 majority of the Supreme Court agreed and voted to reverse his conviction.

Despite *Estes*, media organizations applied pressure and persuaded several states to admit cameras or at least conduct "ex-

periments." By 1979, eighteen states permitted televising courtroom proceedings on either a permanent or an experimental basis. This prompted a judicial re-examination of the constitutionality of televised trials.

In general, the courts have focused on three issues: (1) whether a ban on coverage of trials violated the broadcast media's First Amendment right of free speech; (2) whether such a ban undermines the defendant's Sixth Amendment right to a public trial; and (3) whether camera coverage deprives the defendant in a criminal trial of his 14th Amendment right of due process.

On Jan. 26, 1981, the Supreme Court held in *Chandler v. Florida*, 449 U.S. 560, that a ban on television coverage of trials did not violate the broadcast media's First Amendment right of free speech; camera coverage (as distinct from reporting) is not protected by the First Amendment.

In *Estes*, the concurring justices had concluded that the Sixth Amendment does not confer upon the defendant a right to televising trials. In the words of Justice John Harlan:

The "public trial" guarantee of the Sixth Amendment . . . certainly does not require that television be admitted to the courtroom. . . . Its guarantee will be met as long as the court is open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast or otherwise transmit the trial proceedings to those members of the public not present.

Likewise, Chief Justice Warren Burger observed in *Chandler* that "the requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."

On the other hand, *Chandler* held that television coverage is not a *per se* denial of defendants' constitutional right to a fair trial; the lack of scientifically acceptable evidence bearing on the issue precluded such a conclusion. Therefore, states would be free to experiment in order to accumulate empirical evidence as to the actual effect of television coverage on trials.

But as a 1983 decision, *United States v. Hastings*, 695 F.2d 1278 (11th Cir.) observed, in upholding the federal court ban, it is very difficult to detect the adverse impact of television coverage on trial participants. Indeed, at the Annenberg School for Communications, we studied the so-called experiments undertaken by the courts and found that none of them employed controls, none had specified criteria for "success," none tested effects on participants in scientifically acceptable ways, nor did any report the findings fully to the public. Most "experiments" were conducted by interested parties and came to the foregone conclusion that television coverage should be allowed to continue because it did not disturb the proceedings.

In contrast, a 1986 survey of participants and observers by a New Orleans researcher, William Henican, asked about a broader range of impacts and concluded that "the risks of allowing cameras into the trial courts of this country are very high" and that "when prejudice does occur, it will be very difficult to demon-

strate." Paul Thaler's recent book, *The Watchful Eye: American Justice in the Age of the Television Trial* (Praeger Publishers, 1994) offers mixed but equally troubling evidence.

The situation, then, is analogous to a pharmaceutical firm testing a new drug by distributing it to the public and, if nobody drops dead, declaring it a "success."

The Right to Due Process

This murky factual situation is highly critical to the issue's most difficult legal question: Whether the televising of criminal proceedings violates the defendant's 14th Amendment right to due process of law. Despite the rush to judgment and the relentless media pressure, the key question posed in *Chandler* remains unanswered.

Every student of communication (or public figure or actor) knows that if you change the audience, you change the performance. It is also clear that the addition of sight and sound, showing what participants look like and how they act—the most interesting parts of courtroom drama—are the least informative but potentially most misleading and prejudicial parts of trials.

Can judges ignore the fact that they are playing to a national or global audience? Or that their election or appointment may depend on how they appear on the screen? Likewise, prosecutors and defense attorneys know that television coverage presents career-making or breaking opportunities that may depend on how they look and sound on camera. Jurors become instant celebrities, recognized wherever

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George Gerbner is a professor and the dean emeritus of the Annenberg School for Communication of the University of Pennsylvania.

Those Media Abuses Aren't Going On in the Courtroom

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in general—not cameras in the courts—have often been so awful in the Simpson case.

There were re-enactments by actors of scenes described in the hearing, on-screen pulse readings taken of mock jurors to test their reaction to various aspects of the defense and prosecution claims, and even (in the *New York Post*) an "OJ-Ometer" that gauged how well things were going in the hearing day by day. More important, almost every news and talk show seemed (and still seems) to be hanging onto any angle of the story, however far-fetched, for every last Neilsen point.

But all of that would have come without cameras in the courtroom. It always has.

The media circus has nothing to do with one small, silent, unlit camera that covers the dignified, serious proceeding actually going on in court. If anything, that camera lessens the circus, for it allows the evening

We need cameras in the courts precisely to counteract the garbage.

news to show a sound bite of what really happened rather than some snippet from a prosecutor's press conference or a witness being ambushed on the courthouse steps. (Think back, for example, to the camera ambushes and other circus happenings attendant to the Imelda Marcos and Mike Tyson trials, which were not televised.)

And like a full text of a presidential news conference printed alongside a re-

porter's story about the press conference, a camera showing the actual proceedings makes the sound-bites more honest when they decide on their bites and spins, and makes the print reporters more careful when they do their version of a sound bite, a quote from the testimony.

Because having a camera in the court (as opposed to being present with a reporter's pad) is not constitutionally protected, I often discuss cameras in the courts with reluctant lawyers, judges, and legislators in the handful of state court systems that do not yet allow cameras. What I inevitably hear is some complaint, even horror story, about the media.

But to the extent that the stories are true (and often they are), I have found that they never have anything to do with the presence of cameras in the courtroom. They're always about the media's out-of-court coverage. About something done at the crime scene, or on the courthouse steps, or on the victim's family's front

lawn. Or about docudramas, or talk-show spins, or anchormen's adjectives, or pre-trial saturation of pictures of the handcuffed defendant.

Judges and legislators can't and shouldn't stop any of this non-courtroom material, however distasteful. Nor, just because they can keep cameras out of court, should they act on their general distaste for the medium by editing out the one kind of coverage they control. We need cameras in the courts precisely to counteract the garbage that now pollutes reporting of these serious and seriously distorted events.

As the Simpson trial approaches, we are certain to be treated to much more of the out-of-court media abuses that are the artifacts of pseudo-reality television. But because California law allows a camera at the Simpson trial, there will be an antidote to it all: the real reality television of a camera in the courtroom. We need it now more than ever. □

Effect on Trials Of Television Needs Research

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they go, in a way that never happened before television. They return to communities aroused as only television images can arouse, facing hostility and even harassment from viewers who disagree with their verdict. Witnesses, like jurors, are catapulted into notoriety. They can sell carefully tailored testimony ("cash for trash") to tabloids, destroying their usefulness in court.

Most defendants in criminal trials are not as handsome, rich, popular, and articulate as O. J. Simpson. Television is the new pillory exposing their close-up expressions and gestures to a public that will form judgments on that basis. What about these presumed-to-be-innocent defendants' private rights and sensibilities, their public humiliation and personal anguish?

No research has been performed to properly answer these questions. It is time to put them to a genuine test before the court becomes fully integrated into a global entertainment system for purposes and in ways inimical to their mission. Good courtroom drama can best go behind the scenes and expose the invisible but all-important dynamics of justice.


If the networks are really interested in providing legal news, they should restore their regular Supreme Court beat. If we want legal education directly from the courtroom, we can record and broadcast or otherwise distribute on video the proceedings with appropriate explanations after the trial is over and all appeals have been exhausted. If we want live news from the courtroom, but still reduce, if not eliminate, the grave risk to lives and justice cameras may represent, we can extend to states the federal court practice of limiting television to civil cases.

Now that the Judicial Conference of the United States will soon consider whether to extend the federal "experiment" with cameras, it is a good time to answer the questions posed in *Chandler* in an independent and scientifically acceptable way. In the meantime, courts should take a more careful and critical view before dismissing appeals on grounds that camera coverage deprives defendants in a criminal trial of their 14th Amendment right of due process. Let us stop using defendants as guinea pigs in live experiments that can have tragic consequences we would never know. □


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