

RESOLVING THE DILEMMA OF THE TELEVISED FAIR
TRIAL:
SOCIAL FACILITATION AND THE INTUITIVE EFFECTS OF
TELEVISION

Blake D. Morant*

I. INTRODUCTION

The dawn of a new millennium often prompts reflection on past significant events that have left indelible impacts on society.¹ Legal commentators engage in similar retrospection.² Inevitably, discussions of significant cases of the twentieth century conjure up such noteworthy controversies as: the trial of the Chicago Seven, whose prosecutions resulted from demonstrations at the 1968 Democratic National Convention;³ Leo Frank's emotionally

*Professor of Law, Washington and Lee University School of Law. B.A., J.D. University of Virginia. I first wish to express my appreciation to colleagues at Washington and Lee School of Law and, in particular, David Caudill, whose invitation to speak at the University's Alumni College provided the stimulus for this piece. I appreciate the honored invitation to speak in the Western New England College School of Law's Clason Lecture Series, where I presented this paper to a receptive and insightful audience. I also thank Professors Darryl Brown, Frederic Kirgis, Ron Krotoszynski, Lash LaRue, David Milion, Brian Murchison, Richard E. Redding and Scott Sundby whose insightful comments on the draft of this Article provided much needed assistance. I also appreciate the tireless efforts of Anne Jorgensen, my research assistant; Lynn Fitch, my secretary; my dear friend, Vivian Lerner, who provided valuable insight and resources; and my incredible spouse, Paulette J. Morant, whose inspiration as well as comments on drafts were, and continue to be, invaluable. I also acknowledge financial support provided by the Francis Lewis Law Center of the Washington and Lee University School of Law.

¹ See, e.g., C.G. Weeramantry, *The Lord's Prayer: Bridge to a Better World*, 6 *Tul. J. Int'l & Comp. L.* 87, 87 (1998) (observing that the dawn of the new millennium is a crucial time to ponder the errors of humanity and devise ways of avoiding those mistakes in the future).

² See Laurie L. Levenson, *Symposium on Trials of the Century: Cases of the Century*, 33 *Loy. L.A. L. Rev.* 585, 585-604 (2000) (reviewing cases, including the O.J. Simpson murder case, that captivated public interest); Jonathan K. Stubbs, *Perceptual Prisms and Racial Realism: The Good News About a Bad Situation*, 45 *Mercer L. Rev.* 773, 773-74 (1994) (noting that legal scholars have reflected upon major events of the past now that we approach the beginning of a new millennium); *Great Trials of the Twentieth Century*, Washington and Lee University Alumni College, July 9-15, 2000 (notes on file with author) [hereinafter *Alumni College*].

³ See *United States v. Dellinger*, 472 F.2d 340, 348, 409 (7th Cir. 1972) (holding that

charged trial and conviction for the murder of a young female factory worker under his charge;⁴ the “monkey trial” involving John Thomas Scopes, whom authorities tried for teaching the theory of evolution in a public school;⁵ Bruno Hauptmann’s trial, conviction and eventual execution for the murder of Charles Lindbergh, Jr.;⁶ and, perhaps most compelling, the case against nine African American youths known as the “Scottsboro Boys,” whose polemical convictions for the rape of two white women continue to spark debate.⁷ What continues to dominate this colloquy, however, is the criminal trial of former football star and actor, Orenthal James (O.J.) Simpson, whom the state of California tried for the murder of his ex-wife, Nicole Brown Simpson and her companion, Ronald Goldman.⁸

Dissection of the Simpson case was prolific, due in large measure to unprecedented media coverage.⁹ Perhaps no case in the

the trial proceedings against Dellinger, Davis, Hayden, Hoffman, and Rubin for violations of the federal Anti-Riot Act contained procedural irregularities that justified reversal and a new trial).

⁴ See *Frank v. State*, 80 S.E. 1016, 1016, 1034 (Ga. 1914) (finding, in a case built largely on circumstantial evidence, that new evidence presented by the defense was not substantial enough to overturn the murder conviction or mandate a new trial).

⁵ See *Scopes v. State*, 289 S.W. 363, 363, 367 (Tenn. 1927) (reversing Scopes’ conviction for violating the state’s Anti-Evolution Act because the trial judge, rather than the jury, levied the fine against the defendant).

⁶ See *State v. Hauptmann*, 180 A. 809, 813, 829 (N.J. 1935) (dismissing Hauptmann’s sixteen points of alleged error committed by the trial court and upholding his conviction).

⁷ See *Norris v. Alabama*, 294 U.S. 587, 588, 596 (1935) (reversing Norris’ conviction and death sentence based on the fact that African-Americans were systematically denied the right to sit on grand juries, including the grand jury that indicted Norris); *Patterson v. Alabama*, 294 U.S. 600, 601, 607 (1935) (vacating lower court decision upholding Patterson’s rape conviction and remanding for further proceedings); *Powell v. Alabama*, 287 U.S. 45, 49, 73 (1932). (reversing the convictions of Powell, Patterson, and Weems because they were insufficiently represented by counsel). The Scottsboro Boys, Clarence Norris, Charlie Weems, Haywood Patterson, Olen Montgomery, Andy Wright, Eugene Williams, Willie Roberson, Ozie Powell, and Roy Wright, each spent from six to nineteen years in prison as a result of their controversial convictions. James Goodman, *Stories of Scottsboro* at xi, 8-9 (1994). Only Clarence Norris lived to receive a pardon from the governor of Alabama. *Id.* at 397.

⁸ *People v. Simpson*, No. BA097211 (Cal. Super. Ct. Oct. 3, 1995). See also Dolores K. Sloviter, *If Courts Are Open, Must Cameras Follow?*, 26 Hofstra L. Rev. 873, 873 (1998) (noting that the Simpson case has helped spark a debate over whether live television coverage of high-profile trials is advisable).

⁹ See Christo Lassiter, *The Appearance of Justice: TV or Not TV – That is the Question*, 86 J. Crim. L. & Criminology 928, 930 (1996) (commenting on the magnitude of media coverage of, and public interest in, the criminal proceedings involving O.J. Simp-

twentieth century endured more media exposure, particularly in terms of television broadcasting, than the Simpson trial.¹⁰ The seemingly insatiable need for news, any news, of the case led to rancorous public debate and elevated otherwise ordinary trial participants to dubious celebrity status.¹¹

Despite the case's notoriety resulting from media coverage, the dubbing of the Simpson trial as the "trial of the century"¹² becomes an overstatement when judged by its jurisprudential significance.¹³ Indeed, resolution of that case, the legal issues commensurate with the trial and the judicial decisions and reasoning emanating therefrom pale in comparison to other memorable trials of the twentieth century.¹⁴ Yet the Simpson matter remains note-

son); Christopher B. Mueller, Introduction: O.J. Simpson and the Criminal Justice System on Trial, 67 U. Colo. L. Rev. 727, 727-28 (1996) (remarking on the immense coverage of the Simpson trial in all types of media).

¹⁰ See Peter M. Agulnick, In Search of Truth: A Case for Expanding Perjury's Recantation Defense, 100 W. Va. L. Rev. 353, 354 (1997) (noting the Simpson trial as the most televised trial in history); Linda Deutsch, Ito Unplugs T.V. Coverage As Final Arguments Open; Most-Televised Trial In History Is Blacked Out For An Hour; Media Lawyers In Panic; Prosecution Lists Evidence On Simpson, Calls Furman Racist, Balt. Sun, Sept. 27, 1995, at 1A (remarking on the world-wide coverage and extensive photographic material of the Simpson trial). Note that the Hauptmann trial, the first ever broadcast on radio, also attracted considerable media interest, with reporters worldwide covering all aspects of the proceedings. See Gilbert Geis & Leigh B. Bienen, Crimes of the Century: From Leopold and Loeb to O.J. Simpson 104 (1998) (noting that direct telegraph lines and special teletype machines connected reporters covering the trial to Berlin, Paris, Melbourne, and Buenos Aires). And many other cases have experienced potentially prejudicial pre-trial publicity. For example, see *infra* note 19. Of all of the so-called great trials of the twentieth century however, only the Simpson trial included extensive television coverage from beginning to end. See Geis & Bienen, *supra*, at 176 (noting that several television channels broadcasted "everything that took place during the court sessions"); Ralph E. Roberts, Jr., An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings, 51 SMU L. Rev. 621, 622 (1998) (mentioning the extensive television coverage of the Simpson trial).

¹¹ See Robert U. Brown, Simpson and Cameras, Editor & Publisher, July 1, 1995, at 8 (quoting Don Hewitt, executive producer of the CBS news magazine program, "60 Minutes," who complained that "letting cameras in can turn a courtroom into a movie set").

¹² See Lassiter, *supra* note 9, at 930 (referring to the Simpson trial as the "trial of the century"); Robert J. Cottrol, Perceptions and Decision Making: Racial Perspectives: Through a Glass Diversely: The O.J. Simpson Trial as Racial Rorschach Test, 67 U. Colo. L. Rev. 909, 911 (1996) (same).

¹³ See William G. Ross, The Constitutional Significance of the Scottsboro Cases, 28 Cumb. L. Rev. 591, 591 (1997) (noting that "[f]rom the Lizzie Borden case in the 1890s to the John Scopes 'Monkey Trial' during the 1920s to the O.J. Simpson extravaganza in our own day, America's most sensational criminal trials usually have had no significant or enduring legal impact.").

¹⁴ See *supra* notes 3-7 and accompanying text.

worthy because it reveals the unique symbiosis between unabashed media coverage of high-profile cases and the effect of that coverage on the judicial process.

The Simpson case's extraordinary press coverage, particularly by broadcast media, has spurred a cacophony of comment on the propriety and impact of intense media scrutiny.¹⁵ Commentary generally focuses on the perennial balance of the defendant's right to a fair trial as guaranteed by the Sixth Amendment of the Constitution with the public and press right of access to the proceedings as generally sanctioned by the First Amendment.¹⁶ With particular regard to television coverage, the Supreme Court's decision in *Chandler v. Florida*,¹⁷ has seemingly tipped the legal balance in favor of the media.¹⁸ Any attempt to restrict cameras from the courtroom would require a definitive showing of prejudice, a formidable burden at best.¹⁹ However, within the setting of a high-

¹⁵ See Roberts, *supra* note 10, at 622 (commenting on the extensive media coverage of the Simpson trial that prompted a plethora of polling data regarding the public opinion of the criminal court system); Cottrol, *supra* note 12, at 915 ("[the Simpson] trial proved to be a gold mine for commentators and would be commentators, both those claiming legal expertise and, perhaps more significant, those claiming expertise on racial issues.").

¹⁶ See Charles H. Whitebread & Darrell W. Contreras, *People v. Simpson: Perspectives On The Implications For The Criminal Justice System: Free Press v. Fair Trial: Protecting The Criminal Defendant's Rights In A Highly Publicized Trial By Applying The Sheppard-Mu'Min Remedy*, 69 S. Cal. L. Rev. 1587, 1587 (1996) (delineating that high-profile cases such as the Simpson trial highlight the continuing conflict between the defendant's right to a fair trial and the press and private individuals constitutionally guaranteed right to freedom of speech).

¹⁷ 449 U.S. 560 (1981).

¹⁸ See *id.* at 581 (holding that defendant bears the burden of proving specific prejudice caused by the presence of broadcast media). For more detailed discussion of *Chandler*, see *infra* notes 182-97 and accompanying text.

¹⁹ See *id.*; see also *Tyler v. Nelson*, 163 F.3d 1222, 1230 (10th Cir. 1999) (finding that due process violations cannot be proven without a proper showing that television broadcasts compromised the trial); *United States v. Maceo*, 873 F.2d 1, 6 (1st Cir. 1989) (finding that Maceo's conviction could not be set aside because of insufficient proof that the alleged bias produced by media publicity led to an unfair trial); *Willard v. Pearson*, 823 F.2d 1141, 1147-48 (7th Cir. 1987) (opining that the defendant did not demonstrate that media coverage unduly affected the outcome of the trial, as required by *Chandler*). Simpson's acquittal, despite omnipresent broadcasts of his trial, lends credence to the view that fair trial and press access rights are not mutually exclusive. However, contextual realities related to Mr. Simpson's celebrity status and the resources he possessed to amass a formidable defense skew this conclusion. The fact remains that most defendants with fewer resources than Mr. Simpson's are not likely to mount as formidable a defense. Thus, if faced with intense media scrutiny, the probability that these more typical defendants would receive a fair trial remains low. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 Fordham L. Rev. 13, 47 (1998) (noting

profile trial, such burden shifting does little to compensate for television's ostensible impact on court actors and their resultant behavior.

Intensive television coverage of such high-profile trials as the Simpson case compels a more detailed analysis of the fair trial rationale than has heretofore been attempted. Sole attribution of media's potential adverse impact within this context to decision-maker bias is myopic.²⁰ Such commonly used remedies as *voir dire*,²¹ sequestration,²² change of venue,²³ postponement,²⁴ and

the poverty of the typical criminal defendant and the impact of those limited means on the defendant's ability to mount a defense).

²⁰ See *Estes v. Texas*, 381 U.S. 532, 545-48 (1965) (identifying the primary problems with media coverage to include negative effects on witnesses, biased jurors and increased pressure on judges); see also 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, 382-83 (1995) (asserting that trial publicity is often seen as the biggest obstacle to securing an impartial jury because of psychological pressures and knowledge obtained that is indistinguishable from evidence). Media coverage of the judge may also alter her impartiality towards the case. See *id.* at 385; Gregory K. McCall, Note, Cameras in the Criminal Courtroom: A Sixth Amendment Analysis, 85 Colum. L. Rev. 1546, 1556-57 (1985) (indicating the presence of a causal link between cameras in the courtroom and deprivation of evidence through judicial intimidation of witnesses).

²¹ *Voir dire* is a preliminary examination of potential jurors to determine competency, interest and thoughts about a case. See *State v. McRae*, 156 S.E. 800, 803 (N.C. 1931); see also Whitebread & Contreras, *supra* note 16, at 1600 (noting the purpose of *voir dire* is to eliminate potential jurors who foster possible prejudice in the proceedings); Black's Law Dictionary 1569 (7th ed. 1999) (defining "*voir dire*" as a "preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury.").

²² Sequestration mandates jury seclusion that prevents exposure to outside communication. See *State v. Robertson*, 712 So.2d 8, 23 (La. 1998); see also *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (stating that sequestration protects jurors from intensive public pressures); Whitebread & Contreras, *supra* note 16, at 1604 (indicating that sequestration is used to eliminate extrajudicial information the jury may receive regarding the pending trial, and is only used when the likelihood of prejudice to the defendant's right to a fair trial outweighs the costs of sequestration); Black's Law Dictionary 1370 (7th ed. 1999) (defining "sequestration" as "[c]ustodial isolation of a trial jury to prevent tampering and exposure to publicity, or of witnesses to prevent them from hearing the testimony of others.").

²³ Change of venue includes the transfer of a case from the court where it was brought or pending to another location in order to ensure a fair trial. See *Pierce v. Crisp*, 102 S.W.2d 386, 387 (Ky. Ct. App. 1937); see also Whitebread & Contreras, *supra* note 16, at 1604 (explaining that change of venue is used to locate a jury pool that may have experienced reduced exposure to pretrial publicity, thereby increasing the possibility of a fair verdict); Black's Law Dictionary 225 (7th ed. 1999) (defining "change of venue" as the "transfer of a lawsuit from one locale to another.").

²⁴ A postponement is a request to temporarily adjourn a case to a later time during the

gag orders²⁵ reinforce this limited view. These legal Band-Aids may minimize prejudicial decision-making, but they fail to ameliorate media's potential disruptive influences on the trial itself.

This Article advances a subtly different perspective that should finally resolve the question of whether to broadcast high-profile trials. It commences with the following, recurring postulate documented by psychological principles: the television camera affects courtroom behavior,²⁶ which, in turn, impacts trial efficacy²⁷ and fairness. This natural reality thus requires parties and decision-makers to weigh very carefully any decision to broadcast the trials of high-profile cases.

Part II of the Article commences with analysis of the media frenzy that often accompanies a high-profile case. This phenomenon sets the stage for examination of contextual features that characterize these unique legal matters. This part then depicts the residual effects of intense media scrutiny, including the diminution of commonly cited benefits such as public education and the bolstering of systemic confidence.

Any discussion of television's access to court proceedings

same term (as opposed to a continuance, which is a request to adjourn a case to a later time during another term). See *Colonial Pipeline Co. v. Westlake Club, Inc.*, 145 S.E.2d 669, 670 (Ga. Ct. App. 1965); see also *Whitebread & Contreras*, *supra* note 16, at 1605 (stating the reason for postponement is to reduce prejudice by waiting for media attention to fade before the trial commences); *Black's Law Dictionary* 1187 (7th ed. 1999) (defining "postpone" as "[t]o put off to a later time.").

²⁵ A gag-order limits communication between court actors and the press, and is generally imposed to preserve justice and procedural integrity. See *State v. Cottman Transmission Sys.*, 542 A.2d 859, 864 (Md. Ct. Spec. App. 1988); see also *Whitebread & Contreras*, *supra* note 16, at 1607 (observing that gag orders do not contradict freedom of the press since they only restrict what court participants can say and not what the press can report); *Black's Law Dictionary* 686 (7th ed. 1999) (defining "gag order" as a "judge's order directing attorneys, witnesses, or journalists to refrain from publicly discussing the facts of a case.").

²⁶ For a discussion of the effects of broadcasting on trial actors' behavior, see *infra* notes 245, 303 and accompanying text; for a discussion of social facilitation and its confirmation of the camera's effect on court actors' behavior, see discussion *infra* Part IV.C.

²⁷ My view of trial efficacy directly correlates to its expediency and successful production of relevant evidence. The televised Simpson trial was clearly not expedient given its interminable length. See *supra* note 32 and accompanying text. Judge Lance Ito's failure to control the proceedings' tempo by limiting attorneys' arguments and questioning of witnesses contributed substantially to this result. Arguably, scrutiny by a worldwide television audience likely influenced Ito's decisions regarding trial decorum. See *infra* notes 254-58 and accompanying text.

naturally evokes issues related to First Amendment press access and public trial notions guaranteed by the Sixth Amendment. Part III provides a *de rigueur* summary of the relevant case law that seemingly sanctions broadcasts of trial proceedings. This review will also reveal the ever-present tension between the defendant's right to fair trial and the public's and press' right to access thereto. After a study of basic notions related to prior restraint, Part III then closely examines the *Estes* and *Chandler* cases, both of which provide a constitutional basis for more critical consideration of broadcast media's access to high-profile proceedings.

Television's effect on courtroom actors is distinct, palpable and, to a large extent, intuitive. Demonstration of this assertion requires substantiation of the nexus between an actor's awareness of a television audience and her resultant behavior. The final part of the Article, Part IV, establishes this nexus, first through examination of objective manifestations of television's influences on case proceedings. Probative of television's impact are certain studies that have, with limited effectiveness, measured the effects of television cameras on court actors. But perhaps the most persuasive analytic tool that demonstrates the camera/conduct nexus emanates from theoretical principles of group dynamics. This section of the Article will thus employ social facilitation theories to establish the linkage between courtroom behavior and the camera's presence. Scenes and examples from the Simpson trial will illustrate the relevance of facilitative theories to dynamics of the courtroom. The camera's natural influences on court actors justify greater scrutiny of television's access to high-profile trials, than has been given to date. Part IV then proposes employment of a probability test, which modestly alters defendant's currently stringent burden to prove prejudice from the camera's presence in this unique context.

Readers should remain mindful of an essential caveat – this Article does not advocate unilateral banishment of television cameras from the courtroom.²⁸ Such a constitutionally suspect position would be potentially injurious to the fundamental mandate for

²⁸ But cf. Steven Brill, *The Future of State Supreme Courts as Institutions in the Law: Courtroom Cameras*, 72 *Notre Dame L. Rev.* 1181, 1181 (1997) (alluding that those who oppose unconditional access to trials by broadcast media must endorse secretive trials).

public judicial proceedings.²⁹ The goal here is to provide theoretical verification of the plausible, adverse ramifications associated with televising the trials of high-profile cases. Greater appreciation of television broadcasting's inherent influences on case proceedings should then forge a more equitable balance between the defendant's right to a fair and effective trial, and broadcast media's access to those proceedings.

II. THE UNIQUE DYNAMIC OF THE HIGH-PROFILE CASE

A. The Aura of the High-Profile Proceeding - The O.J. Simpson Trial as Prototype

Intense public and media interest are natural protuberances of the high-profile case. Media coverage often mutates to a frenzy if facts or circumstances of a particular proceeding stimulate extraordinary public interest or curiosity.³⁰ Circumstances surrounding the Simpson proceedings, perhaps the icon of high-profile litigation, confirm these postulates.

Seventy million Americans watched O.J. Simpson's preliminary hearing on television.³¹ Media reported nearly every detail of the trial for the entire duration of the almost year-long proceeding.³² Throngs of viewers worldwide tuned into portions of Simpson's trial.³³ Many interrupted normal daily tasks to listen to or watch the broadcast of the predominantly African American jury's

²⁹ See Robert Hardaway & Douglas B. Tumminello, Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong, 46 Am. U. L. Rev. 39, 40-41 (1996) (indicating that public trials have always been essential to our judicial system and publicity for trials has increased as media technology has improved).

³⁰ See Larry J. Sabato, Feeding Frenzy 6 (1991) (stating that "feeding frenzy" relates to the press' obsession with more trivial aspects of a public interest matter, leading the press to focus more on "gossip rather than governance" and "titillation rather than scrutiny"); see also *infra* notes 49-77 and accompanying text (providing the characteristics of the high-profile case).

³¹ Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Foreword: O.J. Lessons*, 69 S. Cal. L. Rev. 1233, 1252 (1996).

³² See Geis & Bienen, *supra* note 10, at 176 (commenting on the extensive newspaper and broadcast television coverage of the Simpson trial); Roberts, *supra* note 10, at 635 (noting the O.J. Simpson trial lasted 372 days from the beginning of jury selection to the reading of the verdict).

³³ Marc. A. Franklin et al., *Mass Media Law* 754 (6th ed. 2000).

“not guilty” verdicts.³⁴ Virtually every aspect of the Simpson criminal trial was televised,³⁵ with cameras strategically placed to conceal the faces of jurors, yet capture all other aspects of the proceedings.³⁶ Trial attorneys were observed pandering and posing to the cameras.³⁷ This sanctioned voyeurism allowed millions to view evidence not privy to the jury and witness the contentious squabbles of the attorneys and judge.³⁸ The enormity of the situation appeared to overwhelm Judge Lance Ito, who signaled his captivation with this media event. One legal commentator stated that, given the tone Judge Ito set for the trial, he might as well have said to the lawyers of both parties: “This is going to be a great trial. The world is watching. You are great lawyers. We are all friends. Let’s stay friends and after the trial I’ll take you all out to dinner.”³⁹

Ever unfolding developments in the Simpson case included such media attractive factors as the defendant’s celebrity status, tactics and persona of counsel, issues of domestic violence and the

³⁴ Each year, Washington and Lee University hosts the Alumni College, a voluntary group composed of judges, lawyers, and variously employed individuals who engage in discussion of contemporary ideas and problems. On July 9-14, 2000, twenty-five individuals debated the “Great Trials of the Twentieth Century.” See Alumni College, *supra* note 2. I addressed this group regarding the effect of broadcast media on the Simpson trial. Given the group’s reflection of the American populace in microcosm, I surveyed the participants on a variety of issues related to the broadcast of proceedings associated with high-profile cases. One inquiry on the survey noted that 83.3% of respondents viewed a portion of the Simpson proceedings on television. I acknowledge that the credibility of this survey may be somewhat suspect given its informality and relatively small pool of respondents. That said, the results can be probative within the confines of the limited scope of this discussion. Other results of this survey will appear in appropriate portions of this Article.

³⁵ Jonathan L. Entin, *Using Great Cases to Think About the Criminal Justice System*, 89 *J. Crim. L. & Criminology* 1141, 1151 (1999) (reviewing Gilbert Geis & Leich B. Bienen, *Crimes of the Century: From Leopold and Loeb to O.J. Simpson* (1998)).

³⁶ See Geis & Bienen, *supra* note 10, at 197 (noting that cameras were placed behind the jury box in order to conceal the identity of the jurors).

³⁷ *Id.*; see also Robert H. Freilich et al., *A Comprehensive Review of 1997-98 U.S. Supreme Court Cases and Important Legislation Affecting State and Local Government*, 30 *Urb. Law.* 785, 793 (1998) (noting that Simpson lawyers used public opinion tactics); Andrew G.T. Moore, II, *The O.J. Simpson Trial - Triumph of Justice or Debacle?* 41 *St. Louis U.L.J.* 9, 12-13 (1996) (criticizing the Simpson prosecutors’ comments to the press).

³⁸ *American Justice: Why O.J. Simpson Won* (A&E Television Networks 1995) [hereinafter *Why O.J. Simpson Won*].

³⁹ Murray Richtel, *Perceptions and Decision Making: The Jury’s View: The Simpson Trial: A Timid Judge and a Lawless Verdict*, 67 *U. Colo. L. Rev.* 977, 980 (1996).

justice system's seeming disfunctionality.⁴⁰ This prolonged media event took on a circus-like atmosphere⁴¹ and evoked visceral public reactions.⁴² Unabashed coverage and commentary by the press, including the broadcast networks, fanned the flames of general public dissatisfaction.⁴³

The aftermath of the Simpson trial spawned a focus on the continual tension between the defendant's right to a fair trial and broadcast media's access to high-profile proceedings.⁴⁴ The fair trial rationale, commonly viewed from the narrow perspective of direct harm to the defendant, expanded to include media's potentially negative impact on the trial process. Effects of continual television broadcasting of high-profile trials raised significant concerns. Negative public perceptions of the trial, its participants and the criminal justice system in general punctuated public criticisms.⁴⁵ Unceasing media probing and reporting of the Simpson case also revealed the discomfiting chasm of public opinion on such inflammatory issues as race, gender and domestic violence.⁴⁶

⁴⁰ See Geis & Bienen, *supra* note 10, at 171-72, 179-81, 191-92.

⁴¹ See John Broder, *The O.J. Simpson Murder Trial; Clinton Says Televising Simpson Trial Led to "Circus Atmosphere,"* L.A. Times, Sept. 22, 1995, at A28.

⁴² See Mueller, *supra* note 9, at 741 (commenting that the Simpson trial "touched raw nerves in American society"); see also Cottrol, *supra* note 12, at 915-16 (describing the tearful and infuriated reaction of whites, mainly women, to the Simpson verdict, and the joyous reaction of African-American students at Howard University).

⁴³ See *supra* note 10 and accompanying text (documenting the extensive media exposure experienced by the Simpson case); see generally Christo Lassiter, *The O.J. Simpson Verdict: A Lesson in Black and White*, 1 Mich. J. Race & L. 69 (1996) (analyzing press coverage of the Simpson case).

⁴⁴ For an in-depth discussion of the tension between the defendant's right to a fair trial guaranteed by the Sixth Amendment, and the First Amendment's implied right of public access, see *infra* Part III.

⁴⁵ See Dorothy K. Kagehiro & Kathryn Lease Simpson, *When Superman Loses His Cape: The Lawyer as Defendant*, Prac. Litigator 8-9 (Mar. 2000) (commenting on the media's affect on the public's opinion of lawyers); Ralph E. Roberts, Jr., *Comment, An Empirical and Normative Analysis of the Impact of Televised Courtroom Proceedings*, 51 SMU L. Rev. 621, 635-36 (1998) (providing surveys and polls of public perceptions of Simpson trial participants).

⁴⁶ For extensive commentary on the issue of race and the Simpson case, see Jeffrey Toobin, *The Run of His Life: The People v. O.J. Simpson* 144-57, 419-20, 423-24 (1996); Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. Colo. L. Rev. 989, 992-93 (1996); Rory K. Little, *Guilt, Reasonable Doubt and the Reasonable Woman*, 6 Hastings Women's L.J. 275, 275-76 (1995); Ellen Goodman, *Simpson Case Divides Us by Race*, Boston Globe, July 10, 1994, at 73; see generally Lassiter, *supra* note 43 (noting the role of the press in inciting racial tensions in the Simpson trial). For commentary on issues related to race, gender

These public reactions, fueled by intense media coverage, inevitably seeped into the consciousness of trial participants, including attorneys and the judge.⁴⁷ Thus, the high-profile Simpson trial's proclivity to encourage media's excesses, together with commensurate distractions that compromise trial effectiveness, remained contentious issues that fueled endless debate.⁴⁸

B. Endemic Features of the High-Profile Case

Appreciation of the intense public and media interest in events such as the Simpson trial requires an understanding of features that distinguish such high-profile matters. Characteristics of a high-profile case fit within two contextual categories: traits of the individuals who are central to the controversy, and substantive issues and facts related to the case's legal subject matter. Each category's features work correlatively to heighten public and media interest in the case.⁴⁹

With regard to individuals associated with a matter, the status of the defendant looms large as a critical determinant of the case's

and domestic violence in the Simpson case, see Cynthia Grant Bowman & Elizabeth M. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and the Legal Profession*, 67 *Fordham L. Rev.* 249, 254-55 (1998).

⁴⁷ See *infra* note 245 and accompanying text (providing support for the assertion that media coverage of the Simpson trial and other similar matters affected court participants). Immediately after the Simpson trial, Pete Wilson, the Governor of California, commented to the California Judicial Council, "Throughout the Simpson trial, it became evident, I think, that both the witnesses and attorneys were at times more concerned with the audience outside the courtroom than with addressing the jury. . . I think too often [cameras] turn the witnesses into something other than people who are simply supplying what they saw or what they in fact knew." Dion Nissenbaum, *Gov. Wilson: Remove Cameras From Courts*, *United Press International*, Oct. 3, 1995. The informal survey of participants in the Washington and Lee University's 2000 Alumni College revealed that approximately 92% of respondents felt that televising trials in general affects court actors' behavior. See Alumni College, *supra* note 2; see also *supra* note 34 (describing the Washington and Lee University's Alumni College).

⁴⁸ See Lassiter, *supra* note 9, at 930 ("Television coverage of. . .the O.J. Simpson trial. . .has by its very success or excess renewed interest in the wisdom of allowing cameras in court. Contemporaneous with the excesses of television coverage, a discernible tide has risen against cameras in court, especially in simulcasts of high profile cases.").

⁴⁹ Professor Peter Arenella, who has written profound scholarship in this area and to whom I give total attribution, astutely identifies the majority factors that distinguish the mundane case from its high-profile counterpart. Peter Arenella, *The Perils of TV Legal Punditry*, 1998 *U. Chi. Legal F.* 25, 39 (noting elements that elevate a case from a typical criminal matter to a high-profile trial at the local and national level).

high-profile status. The central query relevant to this feature is whether the defendant can be considered, to some extent, a public figure.⁵⁰

Many controversies gained notice due to the defendant's prominence. Note that Simpson, before his indictment for murder, was a former college and professional football star, actor and generally admired personality who sought and received media attention.⁵¹ His stature undoubtedly elevated his case's profile. In other cases, individuals, by virtue of their roles as defendants in criminal matters, heighten the status of their respective cases. The murder trial of pro football star, Ray Lewis, generated considerable media coverage, including the broadcast of the trial on Court TV.⁵² William Kennedy Smith's trial for rape garnered considerable media attention, which can be substantially attributed to Smith's membership in the Kennedy family.⁵³ Of course the high-profile case involving a famous defendant or party has not been confined to

⁵⁰ Pursuant to traditional jurisprudential notions, a public figure generally is one who has significant fame or notoriety or, in a more limited scope, has thrust herself into the "'vortex' of an important public controversy" or involuntarily placed herself in the media limelight by chance or against her will. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154-55 (1967). See also *Time, Inc. v. Firestone*, 424 U.S. 448, 453 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 345 (1974); *Dameron v. Washington Magazine, Inc.* 779 F.2d 736, 740-41 (D.C. Cir. 1985), cert. denied, 476 U.S. 1141 (1986). The concept of public figure often arises in the tort of defamation, Restatement (Second) of Torts § 580A (1976), the elements of which include injury to reputation caused by misrepresentations that place an individual in a bad light. See *Prosser and Keeton on the Law of Torts* 773 (W. Page Keeton ed., 5th ed. 1984). With regard to the high-profile feature of "public figure," I borrow loosely from the federal common law definitions to indicate that individuals with notoriety independent of the legal matter in which they are involved can be the primary factor that attracts public and media attention.

⁵¹ See, e.g., Mueller, *supra* note 9, at 729 (mentioning news items which confirmed Simpson's status as a celebrity); Bill Glauber, O.J., the Hero, Doesn't Fit the Crime, *Balt. Sun*, June 18, 1994, at 1A (reporting that Simpson was an all-American athlete who succeeded in sports, sportscasting, acting and advertising); Profile: He Couldn't Outrun His Demons; O J Simpson, Football Hero, Movie Star, Alleged Killer, *Independent (London)*, June 25, 1994, at 10 (labeling Simpson as a "charming, handsome, adorable, decent football star, who became a Hollywood actor, television ad personality and man about town.").

⁵² See 2 Cleared in Post-Super Bowl Slayings, *Chi. Sun-Times*, June 12, 2000, at Sports 2 (reporting Baltimore Ravens linebacker Ray Lewis agreed to a plea bargain which reduced a homicide charge to a misdemeanor for obstruction of justice).

⁵³ See *The Middle Name Sets Smith Trail Apart*, *Orlando Sentinel Trib*, Nov. 3, 1991, at A15 (noting William Kennedy Smith's rape trial as worldwide news due to his relation to the Kennedys, including his uncle, Senator Edward M. Kennedy, was in his company on the night of the alleged rape).

criminal proceedings. The domestic travails of actor Lee Marvin, an established actor who won a Best Actor Oscar for his role in "Cat Ballou,"⁵⁴ attracted media notice during his palimony dispute with former live-in companion, Michelle Marvin.⁵⁵

A victim's degree of pathos appeal, another high-profile feature, may also elevate a case's profile.⁵⁶ Whether the victim engenders significant sympathy or empathy is critical to this factor.

Pathos was emblematic in the Simpson case. Nicole Brown Simpson, one of the murder victims, was an attractive blonde woman who reportedly suffered domestic violence at the hands of Simpson, her estranged husband.⁵⁷ Ronald Goldman, the other victim in the case, had the misfortune of being in the company of Brown Simpson at the time of the attack. As a bystander at the murder scene, Goldman allegedly attempted vigorously, yet unsuccessfully, to defend himself during the attack.⁵⁸ No doubt the fate of both Brown and Goldman engendered sympathy in most, if not rage in some.⁵⁹

In a case in which formal charges were never filed, the murder of Jon Benet Ramsey constituted a high-profile matter involving a victim who attracted considerable public interest and pathos. Jon Benet Ramsey was a beautiful and innocent six-year-old beauty queen who suffered sexual abuse as well as a brutal strangula-

⁵⁴ Deborah Hastings, Oscar-Winning Producer Harold Hecht Dies at 77, *L.A. Times*, May 28, 1985, §2, at 1.

⁵⁵ See generally *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (finding that express contracts between non-marital parties should be enforced with the exception of meretricious sexual services).

⁵⁶ See Arenella, *supra* note 49 (noting that "the unusual or shocking nature of [a crime]" is an element of the high-profile case).

⁵⁷ See Geis & Beinen, *supra* note 10, at 171-72 (explaining the relevance of domestic violence in the Simpson case).

⁵⁸ See Victims' Wounds Detailed/Courts: Nicole Simpson and Ronald Goldman Apparently Tried to Defend Themselves, the Deputy Coroner Says, *Orange County Reg.*, July 9, 1994, at A16; see also Erik Lacitis, I Want to Tell You: O.J. Might Win, *Seattle Times*, Sept. 29, 1995, at G1.

⁵⁹ Fred Goldman, father of the ill-fated Ronald Goldman, perhaps captured the emotional sentiments of many with the following post-verdict outburst: "Ron and Nicole were butchered by [the Simpson defense team's] client." Goldman Kin Furious, Call O.J. Killer Plan to Have Jury Revisit Crime Scene is Debated, *Buffalo News*, Aug. 17, 1995, at A1; see also Ellis E. Conklin, Rage Drives the Goldman Family, *Denver Rocky Mountain News*, Mar. 2, 1997, at 40A.

tion.⁶⁰ This unresolved case continued to endure speculation and protracted inquiry.⁶¹

Others who often heighten the profile of a case due to their notoriety include court participants. Their involvement in a case can often spark public interest, albeit to a lesser extent than parties and subject matter.

Two of Simpson's defense attorneys had achieved appreciable fame before the trial actually commenced. F. Lee Bailey and Johnnie Cochran, the defense team's lead attorneys, enjoyed significant fame due to their participation in high-profile cases.⁶² Bailey became the focal point of legal and media attention for both his success in the Sheppard re-trial⁶³ and his unsuccessful representation of Patty Hearst.⁶⁴ Likewise, Johnnie Cochran's representation of several notable public figures, including Michael Jackson, heightened his public persona.⁶⁵ To a certain extent Gil Garcetti, the Chief Prosecuting Attorney in the Los Angeles District Attorney's office, garnered much publicity when he prosecuted those accused of beating Reginald Denny.⁶⁶ Garcetti also received significant media attention stemming from his prosecution

⁶⁰ See Bill Briggs, *Real Jon Benet Overshadowed By Hype*, *Denver Post*, June 22, 1997, at A-01 (describing Jon Benet Ramsey as a six-year-old strangulation victim who, in addition to being a beauty queen, was a loving, considerate and playful child).

⁶¹ See *id.*

⁶² See Gerald F. Uelmen, *Symposium On Trials of the Century: Who is the Lawyer of the Century?*, 33 *Loy. L.A. L. Rev.* 613, 615-19 (2000) (including both F. Lee Bailey and Johnnie Cochran as candidates for lawyer of the century based on five criteria: professional reputation, participation in high-profile trials, public recognition, accessibility to information regarding career and accomplishments, and adherence to legal ethics).

⁶³ See *Testimony Begins In 3rd Sheppard Trial*, *United Press Int'l*, Feb. 14, 2000 (stating that F. Lee Bailey successfully represented Sheppard in the 1966 case that eventually became the basis for the successful television show and film, "The Fugitive").

⁶⁴ See Elizabeth Olson, *Patty Hearst Loses High Court Bid*, *United Press Int'l*, Apr. 27, 1981 (noting F. Lee Bailey's unsuccessful representation of newspaper heiress Hearst in her 1976 armed robbery trial).

⁶⁵ See *A No-Holds-Barred Victory*, *Nat'l L.J.*, Dec. 25, 1995, at C4 (noting Cochran's representation of Black Panther Elmer Pratt for murder in late 1960's); Josh Meyer, *Jackson and Arson Cases in Limbo; Investigations: Grand Jury Disbanded Without Bringing Indictments Against Either the Pop Superstar or Two Firefighters Suspected of Setting Calabasas/Malibu Blaze. Lawyers Urge Resolution of Both Issues*, *L.A. Times*, July 7, 1994, at B1 (noting the representation of Michael Jackson by Johnnie Cochran in the case where Jackson was accused of child molestation).

⁶⁶ See Edward J. Boyer, *Juror Says Evidence, Not Fear of Riots, Led to Verdicts*, *L.A. Times*, Oct. 22, 1993, at B1 (noting Garcetti's role in the trial for the beating of Reginald Denny).

of the Menendez brothers.⁶⁷

Marginally famous defense and prosecuting attorneys alone would not likely elevate an ordinary trial to high-profile status. Their celebrity, however, combined with a case's other high-profile features, may intensify public and media interest to levels typically experienced by high-profile matters.

Other characteristics also tend to elevate a case's status. Factors related to the controversy's subject matter can attract considerable attention. In a criminal matter, the heinous or sensational nature of the crime often raises a case's profile.⁶⁸

In the Simpson case, Nicole Brown Simpson and Ronald Goldman's brutal slayings offended public sensibilities while morbidly piquing interest. The murder of Jon Benet Ramsey, who suffered sexual abuse and blunt force head trauma before her death by strangulation, functioned similarly.⁶⁹ Other cases that gleaned high-profile status from the sensational nature of the crimes committed included the murder trial of Jeffrey Dahmer⁷⁰ and the bombing of the Federal Building in Oklahoma City by Timothy McVeigh and Terry Nichols.⁷¹

Inclusion of inflammatory social issues such as race, class, domestic violence, or juvenile abuse or delinquency are other features that potentially contribute to a case's high profile. Moreover, the multiplicity of these issues within a single controversy intensi-

⁶⁷ See *Menendez Brothers To Get Life Terms; 'Justice Done,' Says Prosecutor Garcetti*, St. Louis Post-Dispatch, Apr. 18, 1996, at 1A (reporting that Prosecutor Garcetti felt the verdict was correct in the re-trial of the Menendez brothers).

⁶⁸ See Arenella, *supra* note 49, at 39 (referring to this element as the "unusual or shocking nature of the crimes," and identifying, *inter alia*, Susan Smith, Lorena Bobbitt, and Ted Kaczynski as defendants whose crimes generated significant media coverage and commensurate public attention).

⁶⁹ See Howard Pankratz, *Judge Releases Partial Autopsy; Jon Benet Apparent Victim of Sex Assault*, Denver Post, Feb. 15, 1997, at A1 (reporting that the six year old beauty queen was sexually assaulted before being struck on the head and strangled).

⁷⁰ See Kate Darby Rauch, *After The Verdict: Healing Jurors Who Have Been Traumatized By Violent Testimony*, Wash. Post, Apr. 14, 1992, at Z10 (noting the effects of graphic testimony detailing Jeffrey Dahmer's murder, necrophilia and cannibalization of boys and young men).

⁷¹ See Tom Kenworthy & Pierre Thomas, *Two Brothers Face Explosives Charges; McVeigh Won't Talk, Claiming He's a POW*, Wash. Post, Apr. 26, 1995, at A1 (labeling the bombing of the Federal Building in Oklahoma City as "the worst domestic terrorist attack in U.S. history").

fies that impact.⁷²

The Simpson case was replete with multiple social issues. Interracial marriage (i.e., Simpson and Brown) and racial attitudes sparked by the revelation of Detective Mark Fuhrman's use of the "N-" word blatantly magnified the case's association with race.⁷³ The prosecution's strategic emphasis on the abuse suffered by Nicole Brown during her marriage to O.J. Simpson highlighted the emotional issue of domestic violence, which, to a certain extent, intersected with the polemical issue of race.⁷⁴

Other well-known cases also experienced heightened notoriety from their inclusion of inflammatory social issues. Testimony in the Menendez brothers' trial alluded to the defendants' emotional and sexual abuse perpetrated by their murdered parents.⁷⁵ The ever-present cloud of suspicion cloaking John and Patsy Ramsey, parents of murder victim Jon Benet Ramsey, prompted discussion of infanticide.⁷⁶ In another highly sensational case, Jeffrey Dahmer's sexual relations with, and eventual murders of, young men of color fueled commentary on issues related to homosexuality and race.⁷⁷

⁷² See Arenella, *supra* note 49, at 39 (noting that "the presence of 'hot button' social issues like child abuse, domestic violence, police brutality, and race relations" can lead to a case developing a high-profile status).

⁷³ Others have also opined that Johnnie Cochran's defense strategy, which included highlighting the possible planting of evidence by the Los Angeles police department, unnecessarily magnified the issue of race in the case. See Geis & Bienen, *supra* note 10, at 182; Victor C. Romero, Expanding the Circle of Membership by Reconstructing the "Alien": Lessons from Social Psychology and the "Promise Enforcement" Cases, 32 U. Mich. J.L. Reform 1, 34-35 (1998); Rob Morse, Cochran Preaches Simpson Gospel, S.F. Examiner, Sept. 28, 1995, at A1; but see Tammy Bruce, Playing Politics While 3 Women Die Each Day; NOW: The Response to the Simpson Verdict Has Split the Feminist Organization, L.A. Times, Dec. 24, 1995, at M5.

⁷⁴ See Geis & Bienen, *supra* note 10, at 171-72 (describing the domestic violence issue in the Simpson case); Myrna S. Raeder, People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Admissibility of Prior Acts of Domestic Violence: Simpson and Beyond, 69 S. Cal. L. Rev. 1463, 1472-77 (1996) (same).

⁷⁵ See Ann W. O'Neill, Menendezes Given Consecutive Terms; Courts: Judge Orders Separate Life Sentences for the Murder of Each Parent, L.A. Times, July 3, 1996, at B1.

⁷⁶ See Arthur Hodges & Jim Carrier, Search of House Ends; Boulder Police Remove Evidence in Ramsey Case, Denver Post, Jan. 5, 1997, at A-01; Mike McPhee, Ramseys: Killer on Loose; Jon Benet's Parents Talk to CNN, Denver Post, Jan. 2, 1997, at A-01.

⁷⁷ Maureen O'Donnell, Killer Faces Mandatory Life Sentences, Chi. Sun-Times, Feb. 16, 1992, at 1 (noting the black, Asian and heterosexual communities' criticisms of the police efforts in the Dahmer case, claiming that the investigations and possible outcomes of the case would have been different had the victims been white heterosexuals);

Features of a high-profile case can operate singularly or, as demonstrated in the Simpson case, in concert to transform a judicial proceeding into a cause celebre. The number and type of features that proportionately heighten a case's stature also contribute to its ultimate uniqueness. Either as a group or individually, these high-profile features function to signal both the potential for unusually intense public interest and the ancillary effects that stem from the barrage of media coverage that will likely follow.

C. Recognition of the High-Profile Case and Its Potential for Tumult

Recognition of features that transform an ordinary case into a high-profile matter assists in the appreciation of the incomparable problems generated by those matters. Courts nationwide hear thousands of matters involving serious criminal and civil issues, the litigation of which seldom if ever garner significant media exposure.⁷⁸ But the features that distinguish a high-profile matter from its more mundane counterpart transform the former into an aberration of the judicial system.⁷⁹ Once high-profile status is achieved, the case's proceedings become extraordinary and the targeted focus of intense public curiosity.⁸⁰ Media frenzy inevitably ensues.⁸¹

Viewed under the broad umbrella of press, broadcast media arguably furthers laudable goals. Securing the defendant's right to a public trial, which is thought to facilitate fair and unbiased decision-making, constitutes a primary by-product of broadcast coverage.⁸² Televised proceedings may also reduce public suspicion of judicial decision-making and promote accuracy of the print media, particularly the tabloid press.⁸³ But perhaps the most prevalent

Maureen O'Donnell, *Case Ignited Racism Charges*, Chi. Sun-Times, Jan. 26, 1992, at 21 (stating that racial tensions were heightened by the fact that most of the victims in the Dahmer case were men of color); see also *supra* note 70 and accompanying text.

⁷⁸ See Arenella, *supra* note 49, at 39.

⁷⁹ See *id.* (stating that "factors that make a case 'high-profile' are those unique and aberrational ingredients that distinguish it from the run-of-the-mill prosecution.").

⁸⁰ See *Chandler v. Florida*, 449 U.S. 560, 575 (1981) (asserting that cases gain notice through their "intrinsic interest to the public and the manner of reporting the event").

⁸¹ For more regarding media frenzy, see *supra* note 30 and accompanying text.

⁸² See *Gannett Co. v. DePasquale*, 443 U.S. 368, 381 (1979).

⁸³ See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572, 587 (1980); see also *infra* notes 131-32 and accompanying text; but see Arenella, *supra* note 31, at 1252-

policy that supports televised courtroom proceedings is the medium's potential to inform the public.⁸⁴ Education, a socially responsible function, is perhaps the most frequently cited and compelling justification for broadcasting trial proceedings.⁸⁵

When broadcast media cover high-profile cases, however, fulfillment of the alleged social benefits from this coverage becomes highly suspect.⁸⁶ Broadcasters' altruistic function to serve the public becomes subverted by the ultimate need to maximize ratings.⁸⁷ This drive for ratings, an unavoidable consequence of media frenzy, encourages exploitation of the high-profile trial's entertainment value.⁸⁸ Broadcast journalism in the high-profile trial

55 (questioning whether broadcasting the proceedings of high-profile cases reduces public cynicism or legitimizes regular and tabloid press).

⁸⁴ See *Richmond Newspapers, Inc.*, 448 U.S. at 587; see also *infra* note 133 and accompanying text; Nadine Strossen, *Free Press and Fair Trial: Implications of the O.J. Simpson Case*, Speech Before the Conference on Free Speech and Fair Trials: The O.J. Simpson Case (Feb. 2, 1995), in 26 U. Tol. L. Rev. 647, 654 (1995) (stating that "[t]elevised judicial proceedings have made an enormous, invaluable contribution to . . . public understanding.").

⁸⁵ *Richmond Newspapers, Inc.*, 448 U.S. at 572; see also *infra* note 130 and accompanying text; Susan E. Harding, Note, *Cameras and the Need for Unrestricted Electronic Media Access to Federal Courtrooms*, 69 S. Cal. L. Rev. 827, 846-47 (1996); Kelli L. Sager & Karen N. Frederiksen, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. Cal. L. Rev. 1519, 1540-41 (1996); Sloviter, *supra* note 8, at 887; Strossen, *supra* note 84, at 654.

⁸⁶ In the informal survey of participants in the Alumni College, 58.3% indicated that broadcast of the trial secured Simpson's right to a fair trial. On the other hand, only 42% felt that, in general (coverage of other cases, high-profile or not), broadcasting court proceedings ensures a fair trial. None of the respondents thought that television's coverage of the Simpson trial served to reduce public cynicism regarding the criminal justice system. In fact, most thought that the coverage exacerbated the public's negative sentiments. See Alumni College, *supra* note 2.

⁸⁷ See Geis & Bienen, *supra* note 10, at 198 (noting that the "major argument against the use of cameras lies in the contention that they make a serious event into entertainment"); Dominic Caristi, *The Concept of a Right to Access to the Media: A Workable Alternative*, 22 Suffolk U. L. Rev. 103, 108 (1988) (describing the "capitalistic goals of privately owned, for-profit media"); Richard L. Hasen, *Campaign Finance Laws and the Rupert Murdoch Problem*, 77 Tex. L. Rev. 1627, 1644 (1999) (describing media's goal to maximize profits when covering political campaigns); Linda N. Deitch, Comment, *Breaking News: Proposing a Pooling Requirement for Media Coverage of Live Hostage Situations*, 47 UCLA L. Rev. 243, 247 (1999) (stating that the goal of higher ratings is a "necessity in the competitive media industry.").

⁸⁸ See Arenella, *supra* note 49, at 40-41. Approximately 92% of the respondents in the Alumni College poll felt that television's main focus in televising case proceedings was to entertain (rather than inform) the public. Seventy-five percent believed that this principal objective of television lowers the educational value of the broadcasts. See Alumni

context extends beyond the mere reporting of essential trial facts to include exposés of irrelevant matters that titillate rather than educate. As one scholar astutely observes, “[A] fair trial depends on detached neutrality. The remote public, by virtue of television, corrupts detached neutrality. The bias of television may coalesce around politics, culture, and the like. However, the biggest bias is self-interest, political and financial, but mainly commercial. The media is business. Big business.”⁸⁹

Yet the pejorative effects fostered by the high-profile case extend beyond the perversion of media conduct or public misinformation.⁹⁰ The high-profile case and media frenzy it generates exponentially raise universal consciousness of the high stakes nature of a litigated matter. For court participants, the media’s presence no longer constitutes an ancillary appendage to the proceedings. Massive media attention, including continuous television broadcasts, establishes the reality that a highly critical public scrutinizes the actors’ every move. A natural consequence of this circumstance is the compulsion to appease those critics, irrespective of the effect such appeasement will have on case strategies.⁹¹ Thus, the audience that observes proceedings through the lens of the television camera potentially becomes a larger and more influential force than the decision-makers who sit in the jury box or on the bench.

Recognition of high-profile characteristics assists in the precise identification of matters that may easily succumb to media frenzy and its after effects as suffered in such cases as *Simpson*,⁹² *Menendez I*,⁹³ and *Marvin*.⁹⁴ These features serve as cautionary

College, *supra* note 2.

⁸⁹ Geis & Bienen, *supra* note 10, at 198-99.

⁹⁰ This information included such instances as faulty evidence reported to the public during prosecution of the Simpson case. See David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 *Ariz. L. Rev.* 785, 786 (1993) (asserting that television’s reporting of information regarding the criminal justice system is “often misleading and frequently wrong”). For more regarding broadcast media’s possible educative function, see *infra* note 130 and accompanying text.

⁹¹ For detailed analysis of the cognitive effects of broadcast media on court actors, see *infra* Part IV.

⁹² See *supra* notes 31-48 and accompanying text.

⁹³ See *supra* notes 67, 75 and accompanying text.

⁹⁴ See *supra* notes 54-55 and accompanying text. Although the Marvin case was a civil matter, its contextual elements and media attention mirrored that of high-profile criminal

signals, forecasting the possible impact of broadcasting on trial proceedings. They also compel a more informed examination of broadcasting access within that unique litigation context. But as explained in the next section of the Article, restrictions on that medium, regardless of its contextual effects, must conform to constitutional strictures.

III. CONSTITUTIONAL PARAMETERS GOVERNING TELEVISION ACCESS TO JUDICIAL PROCEEDINGS

A. Fundamental Concepts Related to the "Public Trial"

Any cogent discussion of broadcast access to high-profile proceedings must commence with a foundational review of applicable, constitutional jurisprudence. Press coverage of court proceedings has its genesis in the Sixth Amendment's guarantee of a defendant's right to a public and fair trial.⁹⁵ Broadcast media, as a subset of the broad spectrum of press,⁹⁶ benefits from this guarantee of open trials, though not without caveats.⁹⁷

The concept of public trials evolved from the republic's longstanding antipathy toward secretive tribunals. Lack of openness was historically synonymous with biased decision-making.⁹⁸ Public trials have accordingly remained linchpins in America's arsenal of human rights,⁹⁹ which are in turn applicable to the states

matters.

⁹⁵ The Sixth Amendment to the Constitution of the United States provides, *inter alia*: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ." U.S. Const. amend VI.

⁹⁶ Broadcast media, which includes television and radio, has long been recognized as a segment of the press, given its immense capacity to disseminate information. See *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 205 (S.D. Fla. 1979); but see *Red Lion Broad. Co. v. Fed. Communications Comm'n*, 395 U.S. 367, 389-90 (1969) (recognizing broadcast media as a form of press, but noting that constitutional protections are related more to the public's right to receive information rather than the broadcasters' right of access to news sources).

⁹⁷ See *infra* notes 158-212 and accompanying text (delineating constitutional parameters of broadcast access to case proceedings).

⁹⁸ See *In re Oliver*, 333 U.S. 257, 268-71 (1948) (noting a general distrust of secret trials, as they were perceived as being "instruments of persecution").

⁹⁹ The Bill of Rights, which includes the First and Sixth Amendments, restricts governmental action against individuals. See Laurence H. Tribe, *American Constitutional Law* 1362-63 (3d ed. 2000).

via the Fourteenth Amendment.¹⁰⁰ The defendant's right to a fair and public trial had become so fundamental that other nations, specifically those with membership in the Council of Europe, have embraced the concept.¹⁰¹

The foundational thrust of press access to case proceedings has, therefore, focused on the preservation of fair trials. This factor, coupled with the absence of express language in the constitution establishing the public's right to attend court proceedings, have led some to conclude that press access is not guaranteed.¹⁰² Applicable case law, however, demonstrates a compelling intersection of the defendant's right to a public trial with the public's First Amendment right to receive information.¹⁰³ The result of this dynamic has been a virtual presumption of press access to case proceedings.¹⁰⁴ Yet, as explained in more detail below, such a presumption, if it exists at all, does not necessarily extend to broadcast media.¹⁰⁵

¹⁰⁰ *Id.*

¹⁰¹ Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms states:

[E]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 228 U.N.T.S. 1955.

¹⁰² See Lassiter, *supra* note 9, at 930 (noting that, "[c]ontemporaneous with the excesses of television coverage, a discernable tide has risen against cameras in court, especially in simulcasts of high profile cases.").

¹⁰³ The First Amendment of the Constitution of the United States reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I. For a more detailed discussion of the intersection of defendant's Sixth Amendment right to a fair trial with the public's First Amendment right of access to those proceedings, see *infra* Parts III.B.-C.

¹⁰⁴ See *Waller v. Georgia*, 467 U.S. 39, 44-45 (1984).

¹⁰⁵ See *infra* Part III.D.

B. Supreme Court Decisions Governing Press Access to Court Proceedings

Commentary on the Supreme Court's analysis of the press' right of access to criminal case proceedings abounds.¹⁰⁶ Reiteration of the Court's reasoning in this area may initially appear redundant. But review of this critical jurisprudence should bolster exploratory efforts to minimize television's potentially adverse effects on high-profile proceedings.

The United States Supreme Court's most pointed discussion of press access to criminal proceedings arguably commenced with its decision in *Nebraska Press Ass'n v. Stuart*.¹⁰⁷ This 1976 case included charges related to multiple murders that spawned an extraordinary degree of pre-trial publicity. To protect the defendant's Sixth Amendment rights, the trial judge issued an order restraining the press from publishing accounts of confessions or admissions made by the defendant to law enforcement authorities.¹⁰⁸ In striking down the restraining order, Chief Justice Burger's opinion for the majority avoided resolving the conflict between the defendant's right to a fair trial pursuant to the Sixth Amendment and First Amendment free speech and access rights accorded to the public.¹⁰⁹ Justice Burger acknowledged that rights granted by the First Amendment are not absolute.¹¹⁰ The opinion, however, strongly denounced the court's restraining order, observing that "the barriers to prior restraint remain high and the presumption against its use continues intact."¹¹¹ Thus, any attempt to limit press access to these presumptive public proceedings faced a formidable burden of proof.¹¹²

¹⁰⁶ For excellent summaries of the Supreme Court's jurisprudence relevant to fair trial and public access to court proceedings, see Slovis, *supra* note 8, at 874-86; Lassiter, *supra* note 9, at 936-62.

¹⁰⁷ 427 U.S. 539 (1976).

¹⁰⁸ *Id.* at 542.

¹⁰⁹ *Id.* at 561.

¹¹⁰ *Id.* at 557.

¹¹¹ *Id.* at 570.

¹¹² *Id.* at 569. The court employed the following three factors required to balance the defendant's fair trial right with the right of the press to access to those proceedings: "(a) the nature and extent of pre-trial news coverage; (b) whether other measures would be

Three years later the Court became less tolerant of unfettered press access to pre-trial criminal proceedings. In *Gannett Co. v. DePasquale*,¹¹³ extensive pre-trial publicity surrounding a murder investigation prompted the trial judge, upon the defendants' request and prosecution's tacit concurrence, to grant a motion banning the press from preliminary (suppression) hearings.¹¹⁴ Justice Stewart's opinion abandoned the Court's previous reluctance to balance fair trial and public access rights,¹¹⁵ noting that concept of a public trial had been created "for the benefit of the defendant."¹¹⁶ Concomitantly, Justice Stewart found that the constitution failed to provide the public a right to attend criminal trials,¹¹⁷ particularly in circumstances such as those in the present case, where all of the parties agreed to close the proceedings.¹¹⁸ A "strong societal interest in public trials" could not trump the defendant's Sixth Amendment right to a speedy trial by an impartial jury.¹¹⁹ The Court considered limitations placed on the public's right to attend preliminary hearings to be temporary abridgements that did not violate First or Fourteenth Amendment rights.¹²⁰

The next year the Court promptly reevaluated its position in *Gannett* and reverted to the stringent standard against prior restraints it had previously endorsed in *Nebraska Press Ass'n*.¹²¹ In *Richmond Newspapers, Inc. v. Virginia*,¹²² Chief Justice Burger's opinion reviewed a trial judge's decision to grant an unopposed defense motion to close the trial (the fourth trial on a murder charge).¹²³ The Court resoundingly reinvigorated the notion of an implicit, constitutional right of public access to trial proceedings, guaranteed by the First Amendment.¹²⁴ Chief Justice Burger recognized that free speech incorporates a freedom to listen, which in

likely to mitigate the effects of unrestrained pre-trial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.* at 562.

¹¹³ 443 U.S. 368 (1979).

¹¹⁴ *Id.* at 374-75.

¹¹⁵ *Nebraska Press Ass'n*, 427 U.S. at 561.

¹¹⁶ *Gannett Co.*, 443 U.S. at 380.

¹¹⁷ *Id.* at 391.

¹¹⁸ *Id.* at 394.

¹¹⁹ *Id.* at 383.

¹²⁰ *Id.* at 393.

¹²¹ 427 U.S. 539 (1976).

¹²² 448 U.S. 555 (1980).

¹²³ *Id.* at 561.

¹²⁴ See *id.* at 580.

turn precludes governmental closure of courtrooms.¹²⁵ Emphasizing the broad nature of free speech rights, the opinion specifically states that “the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.”¹²⁶

The record from the trial proceedings contained no evidence verifying the need for trial closure.¹²⁷ Moreover, the trial judge failed to inquire into alternative methods to preserve trial fairness.¹²⁸ The Court ultimately rejected the defendant’s motion, finding that the court should have opened the criminal proceedings.¹²⁹ *Richmond Newspapers* thus confined permissible restrictions on press access to the narrow setting of pretrial proceedings, similar to that in *Gannett*.

Pivotal and prophetic in *Richmond Newspaper* were the policy notions which the various justices believed inspired the public trial concept. Chief Justice Burger emphasized the “educative effect” of open trials, which inform the public of the workings of the legal system.¹³⁰ He also noted that the system benefits from potential satisfaction that those who witness the workings of justice system gain, stating that, “[t]o work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ and the appearance of justice can best be provided by allowing people to observe it.”¹³¹ Chief Justice Burger also opined that the public access “enhance[s] the integrity and quality” of the witnessed pro-

¹²⁵ Id. at 575-76 (noting specifically that courtrooms have been historically open since the establishment of the First Amendment).

¹²⁶ Id. at 575. It should be noted that the justices’ views regarding the public’s right of access to court proceedings were by no means unanimous. In addition to concurring opinions by Justices White and Stevens, id. at 581-82, there were three concurrences in the judgment: one by Justices Brennan and Marshall, id. at 584, another by Justice Stewart, id. at 598, and yet another by Justice Blackmun. Id. at 561. Justice Rehnquist dissented. Id. at 604.

¹²⁷ Id. at 580.

¹²⁸ Id. at 580-81; see also *Nebraska Press Ass’n*, 427 U.S. at 563-65 (discussing, among the factors needed to establish the need for closure, the lack of alternatives that mitigate the negative effects of pretrial publicity).

¹²⁹ *Richmond Newspapers, Inc.*, 448 U.S. at 581.

¹³⁰ Id. at 572.

¹³¹ Id. at 571-72 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)); see Slovir, *supra* note 8, at 877 (describing Justice Burger’s view that public trials have “therapeutic, cathartic value,” thus “making it easier for the public to accept particular verdicts and engendering public respect for and confidence in the judicial system”).

ceedings.¹³² Justice Brennan, in a concurring opinion, noted that public access pursuant to the First Amendment fostered informed discussion of governmental actions, which would ensure the integrity of the democratic process.¹³³ Previously in *Gannett*, he had also suggested that open trials served to curb biased decision-making and encouraged witnesses to testify honestly.¹³⁴

Cases decided subsequent to *Richmond Newspapers* essentially solidified the Court's enmity toward prior restraints against press and public access to court proceedings. In *Globe Newspaper Co. v. Superior Court*,¹³⁵ the Court reviewed a Massachusetts statutory provision that compelled exclusion of the press from any sexual assault proceedings in which the victim was a minor.¹³⁶ The trial court, pursuant to the statute, closed the preliminary hearings and the trial of defendant's rape case because the victims were minors.¹³⁷ Justice Brennan's opinion acknowledged that certain sexual assault cases might merit closure from the press for legitimate societal reasons, such as the protection of underage victims.¹³⁸ Mandatory closure of *all* sexual assault cases however, even under special circumstances, violated First Amendment strictures.¹³⁹ After reiterating the Court's finding in *Richmond Newspapers* that open criminal proceedings have historical importance,¹⁴⁰ Justice Brennan cautioned that constitutionally valid limitations on press access to court proceedings are extremely rare, and must be evaluated on a case-by-case basis.¹⁴¹ The Court accordingly found Massachusetts's mandatory closure provision unconstitutional.¹⁴²

After *Globe Newspaper Co.*, the Court continued to expand the implied right of public access to pretrial proceedings. In *Press-Enterprise Co. v. Superior Court (Press-Enterprise I)*,¹⁴³ the Court struck down as unconstitutional a trial court's order barring access

¹³² *Richmond Newspapers, Inc.*, 448 U.S. at 578.

¹³³ *Id.* at 587-88 (Brennan, J., concurring).

¹³⁴ See *Gannett*, 443 U.S. at 383.

¹³⁵ 457 U.S. 596 (1982).

¹³⁶ *Id.* at 598.

¹³⁷ *Id.*

¹³⁸ *Id.* at 607-08.

¹³⁹ *Id.* at 607-08, 610-11.

¹⁴⁰ *Id.* at 605.

¹⁴¹ *Id.* at 606-08.

¹⁴² *Id.* at 610-11.

¹⁴³ 464 U.S. 501 (1984).

to voir dire proceedings in case involving the rape and murder of a teenage girl.¹⁴⁴ Chief Justice Burger relied, as he did in *Richmond Newspapers*,¹⁴⁵ on the societal notion that open court proceedings foster integrity and fairness.¹⁴⁶ The Court later expanded public access to preliminary proceedings in *Waller v. Georgia*.¹⁴⁷ The facts of *Waller* were similar to those in *Gannett*, except that the defendant in *Waller* objected to the closure of his preliminary hearing.¹⁴⁸ In striking down the order barring press access, Justice Powell, writing for the majority, alluded to the symbiosis between the defendant's right to a public trial pursuant to the Sixth Amendment, and the press and public's First Amendment implied right of access to those proceedings.¹⁴⁹ Any proposed closure of proceedings over the defendant's objection must comport with the standards set in *Press-Enterprise I*.¹⁵⁰

The issue of public access to preliminary hearings resurfaced in *Press-Enterprise Co. v. Superior Court (Press-Enterprise II)*.¹⁵¹ This 1986 case prompted the Court to review a trial court order granting the defendant's motion to close preliminary evidentiary hearings and bar release of transcripts to the public.¹⁵² Writing again for the majority, Chief Justice Burger strongly disagreed with the California Supreme Court's finding that the right to public access extends only to the trial and not to the preliminary proceedings.¹⁵³ After reiteration of the historical and regulatory functions of open criminal proceedings,¹⁵⁴ the Court established a stricter standard required to authorize closure of those proceedings.¹⁵⁵ To bar the public, the proponent must demonstrate that open proceedings would lead to a substantial probability of harm or prejudice to the defendant and that reasonable alternatives to closing the proceedings could not adequately protect the defen-

¹⁴⁴ *Id.* at 503, 510-11.

¹⁴⁵ 448 U.S. at 578.

¹⁴⁶ *Press-Enterprise Co.*, 464 U.S. at 508.

¹⁴⁷ 467 U.S. 39 (1984).

¹⁴⁸ *Id.* at 42.

¹⁴⁹ *Id.* at 46.

¹⁵⁰ *Id.* at 47.

¹⁵¹ 478 U.S. 1 (1986).

¹⁵² *Id.* at 3-5.

¹⁵³ See *id.* at 5, 10-13.

¹⁵⁴ *Id.* at 7-9.

¹⁵⁵ *Id.* at 13-14.

dant's rights to a fair trial.¹⁵⁶ The Court accordingly rejected the California Supreme Court's use of a reasonable likelihood test, which placed a substantially lower burden on the defendant to establish prejudice from pretrial publicity.¹⁵⁷

C. Constitutional Parameters of Television Access to Court Proceedings

1. The Estes and Chandler Decisions

Although the Supreme Court seemingly endorsed general press access to court proceedings, broadcast media's rights appeared less mandatory. The Supreme Court's foray into the debate over television access to criminal proceedings surfaced in the 1965 case of *Estes v. Texas*.¹⁵⁸ Extensive television broadcasting allegedly compromised the trial of Billie Sol Estes, who allegedly induced farmers in Texas to purchase nonexistent fertilizer tanks in exchange for mortgages on their properties.¹⁵⁹ The sweep of Estes' fraudulent scheme and the large sums of money involved in the scam fueled extraordinary media interest in the criminal case.¹⁶⁰ Intense broadcast and print press coverage led to disruptions in both pretrial and trial proceedings.¹⁶¹ Over the defendant's objections, the trial judge allowed television broadcast of case proceedings,¹⁶² which ultimately ended with Estes' conviction.¹⁶³

The Supreme Court ultimately reversed Estes' conviction, concluding that the television coverage compromised the defendant's right to a fair trial as guaranteed by the Sixth and Fourteenth Amendments.¹⁶⁴ Writing for a five to four majority, Justice Clark emphasized the paramount importance of the public trial as a guarantor of the defendant's right to due process: "We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused.' The purpose of the requirement of a

¹⁵⁶ Id.

¹⁵⁷ Id. at 5-6, 15.

¹⁵⁸ 381 U.S. 532 (1965).

¹⁵⁹ Id. at 534 n.1.

¹⁶⁰ Id. at 577-78.

¹⁶¹ Id. at 536.

¹⁶² Id. at 535.

¹⁶³ Id. at 534.

¹⁶⁴ Id. at 534-35 (stating that the central issue in the case was whether Estes was denied due process "by the televising and broadcasting of his trial").

public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned.”¹⁶⁵

With regard to the broadcast media’s First Amendment claims of access, the Court drew a distinction between access afforded traditional press, i.e., print media, and that accorded to broadcast media. Different media required different scrutiny as decision-makers attempt to balance media access rights with the defendant’s critical need for due process.¹⁶⁶ Thus, the press’s right of access may be limited by the judicial system’s primary responsibility to secure the defendant’s constitutional right to a fair trial.¹⁶⁷

Justice Clark’s opinion also commented on television’s influence on case proceedings. Initial commentary focused on the interference with court ambiance caused by the physical presence of technicians and television apparatus. Throughout *Estes*’ preliminary hearing, more than ten camerapersons roamed the courtroom, with cables, wires and microphones conspicuously present.¹⁶⁸ Justice Clark noted that this obvious and disruptive media presence must have alerted court participants to *Estes*’ “notorious character” and the case’s “peculiar public importance.”¹⁶⁹

Equally troubling to the Court was television’s intrinsic and natural impact on court actors.¹⁷⁰ This effect was palpable regardless of the defendant’s failure to prove actual prejudice. As Justice Clark observed, “at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.”¹⁷¹

¹⁶⁵ *Id.* at 538-39.

¹⁶⁶ See *id.* at 539 (noting that allowing newspaper reporters access to the courtroom, while denying broadcast media the same privilege, is not necessarily a violation of the First Amendment).

¹⁶⁷ *Id.* at 540.

¹⁶⁸ *Id.* at 536 (stating that “[i]t is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.”).

¹⁶⁹ *Id.* at 536-37.

¹⁷⁰ See *id.* at 541.

¹⁷¹ *Id.* at 542-43; see also *id.* at 552, 578 (Warren, C.J., concurring) (agreeing that televising criminal trials is an inherent denial of due process, and noting that defendant need not prove actual prejudice to merit relief). But cf. *id.* at 616 (White, J., dissenting) (stating that while “[s]erious threats” to constitutional rights in instances where the Court has had ample experience warranted abandonment of the general rule requiring demonstration of actual prejudice, that was not the *Estes* situation as it relates to television’s impact).

The Court then recognized that, as a tenet of basic human nature, television coverage consciously and unconsciously affects trial participants, particularly the jury. The opinion noted:

[W]hile it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury 'distraction.' . . . [W]e know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. *It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised.* Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.¹⁷²

Justice Clark's opinion also referenced the trial judge who, being human and "subject to the same psychological reactions as laymen," is similarly susceptible to television's influences.¹⁷³ The mental and physical harassment that the defendant might face as a result of extensive television broadcasts also prompted the need for relief.¹⁷⁴ The totality of the broadcast media's effect on all court participants ultimately lead a plurality of the Court to conclude that televising *Estes*' trial compromised his due process right to a fair trial.¹⁷⁵

The *Estes* opinion brought forth implications that extended beyond the decision's seemingly blatant limitation on television's access to criminal trials. Justice Harlan, the fifth and deciding vote in *Estes*, authored a prophetic concurrence that would eventually come to define the Court's position on this complex issue.¹⁷⁶ He

¹⁷² *Id.* at 546 (emphasis added). For illustration of the *Estes* majority's thesis regarding the natural impact of the television camera on human behavior, see *infra* note 305 (describing guests' behavior before the cameras of the television show, *Step Up Toledo*, which I co-hosted).

¹⁷³ *Estes*, 381 U.S. at 548.

¹⁷⁴ *Id.* at 549.

¹⁷⁵ *Id.* at 551-52.

¹⁷⁶ See *id.* at 587-601 (Harlan, J., concurring); see also *Chandler v. Florida*, 449 U.S. 560, 571 (1981) ("A careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*.").

agreed that television broadcasting could have a significant impact on court proceedings.¹⁷⁷ The medium's potential influence on jurors elicited further critical concern.¹⁷⁸ But Harlan ultimately concluded that limitations on that medium's access, without proof of prejudice, should be confined to criminal proceedings that attract "widespread public interest."¹⁷⁹ He specifically declared that:

[in] a notorious criminal trial such as [the one in *Estes*], the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assumed by the Due Process Clause of the Fourteenth Amendment.¹⁸⁰

In effect, Harlan condoned restriction on television access to *Estes*-like trials. These proceedings were sensational and garnered intensive publicity – classic characteristics of the high-profile proceeding.¹⁸¹

Sixteen years after *Estes*, the Supreme Court reevaluated its more restrictive view of televised criminal proceedings in *Chandler v. Florida*.¹⁸² Retrenchment from its previous position expressed in *Estes* seemed inevitable. Recall that one year prior to *Chandler*, Chief Justice Burger, writing for a clear majority in *Richmond Newspaper Co. v. Superior Court*,¹⁸³ had emphatically rejected limitations placed on the traditional (print) press. Such confirmation of traditional press access to criminal proceedings compelled the Court to reassess its position on broadcast access rights.

In *Chandler*, the Florida Supreme Court experimented with televising state court proceedings. Broadcast coverage of judicial

¹⁷⁷ *Estes*, 381 U.S. at 594-95 (Harlan, J., concurring) (citing support for the proposition that "the presence of television in the courtroom represents a serious danger to the trial process").

¹⁷⁸ *Id.* at 592-93.

¹⁷⁹ See *id.* at 587.

¹⁸⁰ *Id.*

¹⁸¹ See *supra* notes 49-77 and accompanying text (describing the features of the high-profile matter).

¹⁸² 449 U.S. 560 (1981).

¹⁸³ 448 U.S. 555, 563-81 (1980). For more detailed discussion of *Richmond Newspapers*, see *supra* notes 122-33 and accompanying text.

proceedings remained within the discretion of the trial judge who followed strict guidelines designed to preserve defendant's fair trial rights.¹⁸⁴ In a trial involving two former police officers accused of conspiracy to commit burglary, grand larceny and other related charges, the trial judge allowed television broadcasts of the trial, despite defendants' objections.¹⁸⁵ Defendants argued a liberal interpretation of *Estes*, stating that television broadcasting of criminal trials presumptively violated their due process rights.¹⁸⁶ The true inquiry before the court, thus, encompassed a review of defendants' broad and sweeping interpretation of *Estes*, and the validity of the Florida experiment.

Writing for the majority as he did in *Richmond Newspapers, Co.*, Chief Justice Burger carefully examined the six opinions authored in *Estes* and concluded that Justice Harlan's concurrence¹⁸⁷ captured the essence of *Estes*' holding.¹⁸⁸ Thus, *Estes* did not establish a ban on television access to criminal proceeds "in all cases and under all circumstances."¹⁸⁹ Improvements in broadcast technology buttressed the Court's view.¹⁹⁰ That a criminal case garnered intense publicity, and, as a result, possible juror prejudice, did not justify a ban on broadcast media coverage.¹⁹¹ Burger noted that public awareness of a case arises due to the matter's "intrinsic interest."¹⁹² The primary safeguard against due process denial due to television coverage rested with the defendants' right (and now duty) to prove discernible prejudice.¹⁹³ This proof must be "more than juror awareness that the trial . . . [will] attract the attention of broadcasters."¹⁹⁴

¹⁸⁴ Chandler, 449 U.S. at 560.

¹⁸⁵ Id. at 567.

¹⁸⁶ Id. at 568.

¹⁸⁷ See supra notes 176-81 and accompanying text (describing Justice Harlan's concurrence).

¹⁸⁸ Chandler, 449 U.S. at 571.

¹⁸⁹ Id. at 573.

¹⁹⁰ Id. at 576.

¹⁹¹ Id. at 574-75.

¹⁹² Id. at 575.

¹⁹³ Id.

¹⁹⁴ Id. at 581 (noting defendant's failure to show with "any specificity" that television cameras had an impact on court participants). *Chandler* evokes a pivotal question whether defendant's burden to prove television's harmful effects remains fair and legitimate. This imposition on the defendant seems curious in light of the latter's explicit constitutional right to a fair trial, and the media's lack of a right to bring cameras into the

The majority specifically distinguished *Chandler* from *Estes*. Unlike in *Estes*, where the trial operated within a “circus” atmosphere, the record in *Chandler* failed to establish that intense media coverage led to similar frenzy.¹⁹⁵ In fact, the State had tailored rules governing television access to proceedings to ensure the integrity and fairness of the proceedings.¹⁹⁶ Thus, without documentation of the pervasive nature of media coverage or its effect on court participants, states (like Florida in *Chandler*) have the authority to experiment with television coverage of criminal proceedings.¹⁹⁷ Like those cases governing traditional press access,¹⁹⁸ the *Chandler* decision saddled defendants with the burden to justify television’s banishment from court proceedings. Yet, analysis of television’s right of access to criminal proceedings does not end with that ostensibly simple directive.

2. Supreme Court’s Tacit Endorsement of a Contextual Evaluation of Television’s Access Rights

Perhaps compelling support of a more circumspect approach to television access to high-profile proceedings lies within the Supreme Court’s dicta in several of the press access cases. While generally eschewing restrictions on press access to criminal proceedings,¹⁹⁹ the Court has also acknowledged the possible need for restraint in the appropriate factual context. Note the Supreme Court’s commentary on the Hauptmann trial in *Nebraska Press Ass’n*.²⁰⁰ Press coverage and general circumstances in Hauptmann’s case contributed to what was described by the Court as a “carnival atmosphere.”²⁰¹ Thus, despite First Amendment guarantees, the nature and context of the proceedings mightulti-

courtroom. Detailed discussion of this constitutional contention is best reserved for future scholarship.

¹⁹⁵ Id. at 582. For more on media frenzy, see supra notes 30, 81 and 88 and accompanying text.

¹⁹⁶ See *Chandler*, 449 U.S. at 576-77.

¹⁹⁷ See id. at 582 (relying on the concept of federalism as justification of the states’ right to experiment as with television cameras in the courtroom).

¹⁹⁸ See supra notes 107-57 and accompanying text.

¹⁹⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575-81 (1980). Note that “public access” connotes both the mere physical presence of a live audience in a courtroom, as well as presence of media, including cameras and microphones. This Article utilizes “access” in a broad sense, which can encompass both of these interpretations.

²⁰⁰ See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 548-49 (1976).

²⁰¹ Id. at 549 (internal quotation marks omitted). For more on the Hauptmann trial, see supra note 6 and accompanying text.

mately compel some restriction of press access in a particular case.²⁰² Even the Court's opinion in *Globe Newspaper Co.*, a post-*Richmond Newspaper* decision, emphasizes the need to evaluate press access to criminal proceedings on a "case by case basis."²⁰³ The Court's recurrent endorsement of a contextual evaluation of press access can only signify that this implied First Amendment right has its limits.

Even the Court's opinion in *Chandler*, the guardian of television access rights, tacitly acknowledges the need for a case-by-case evaluation of broadcast access to criminal proceedings. As Chief Justice Burger states near the end of the majority's opinion: "The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise."²⁰⁴ Even more telling is the majority's tacit appreciation of the possible problems associated with unchecked broadcast access to criminal proceedings. Reflecting on Florida's experimental program, Burger admits: "Dangers lurk in this, as in most experiments."²⁰⁵ The *Chandler* majority ultimately suggests that caution regarding television access might be appropriate in cases with contextual circumstances similar to those found in *Estes*²⁰⁶ – an arguably high-profile matter in its time.²⁰⁷

Perhaps most important in this post-*Chandler* analysis is a critical fact: *Chandler* does not overrule *Estes*, but only distinguishes it factually.²⁰⁸ It appears that Chief Justice Burger exercised great care not to overrule *Estes*, instead adopting Justice Harlan's view that broadcast access to certain proceedings must be

²⁰² See *Nebraska Press Ass'n*, 427 U.S. at 562.

²⁰³ *Globe Newspaper Co.*, 457 U.S. at 607; see also *Sheppard v. Maxwell*, 384 U.S. 333, 352 (1966) (citing *Estes* and noting that claims of a denial of due process requires the decision-maker to review the "totality of circumstances").

²⁰⁴ *Chandler*, 449 U.S. at 582.

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 580-82 (observing that the record in *Chandler* contained no proof of a "Roman circus," "Yankee Stadium" or other such disruptive atmosphere that was apparent in *Estes*, a case with proceedings that were demonstrative of prejudice to the defendant).

²⁰⁷ Given the contextual features, i.e., the financial magnitude and consequence of the fraud perpetrated by the defendant, and the atypical public interest generated by the case, the *Estes* matter may be fairly characterized as a high-profile matter. See *supra* section II.B. for a more detailed discussion of the features of high-profile cases; see also *supra* notes 158-63 for the facts relevant to the alleged crime of fraud in the *Estes* case.

²⁰⁸ *Chandler*, 449 U.S. 560, 583 (1980) (Stewart, J., concurring) (stating that he would "flatly overrule" *Estes*).

evaluated contextually.²⁰⁹ To the extent that context plays a role in broadcast access, *Estes* comports with *Chandler*. As Justice Harlan observed in *Estes* (and by implication the majority in *Chandler* must concur): “The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved.”²¹⁰ *Estes* provides that media coverage that fosters a circus-like atmosphere can result in prejudice.²¹¹ The Court’s opinion in *Chandler* tacitly endorses this view.²¹²

D. Television Access After Chandler – Permissive Scrutiny of Television’s Access to High-Profile Proceedings

Given the case progeny governing press access, particularly after *Chandler*, one might have predicted that courts, both state and federal, would ultimately become television studios. That transformation, however, has not truly materialized.

The post-*Chandler* era ushered in guarded tolerance of televised proceedings in state courts.²¹³ Forty-seven states enacted rules allowing cameras into criminal courtrooms.²¹⁴ Experimentation led some federal courts to permit televised proceedings in civil and appellate cases.²¹⁵ That privilege, however, was not extended to criminal proceedings.²¹⁶ State venues, then, became primary battlegrounds for challenges to television’s access to the courtroom. But, as seen below, attempts to limit cameras in state courts were largely unsuccessful.

An appropriate motion may preclude television’s access to courts in a minority of jurisdictions.²¹⁷ Most states that follow the *Chandler* rationale require the defendant to prove the camera’s

²⁰⁹ See supra notes 176-81 (providing Justice Harlan’s view on television access to criminal proceedings).

²¹⁰ *Estes*, 381 U.S. at 590.

²¹¹ See supra notes 169, 180, 195 and accompanying text.

²¹² See infra notes 387-89, 398 and accompanying text (demonstrating *Chandler*’s compatibility with *Estes* on the relative importance of context in decisions on broadcast access to criminal proceedings).

²¹³ See infra notes 232-39 and accompanying text.

²¹⁴ See Geis & Bienen, supra note 10, at 197; Lassiter, supra note 9, at 930.

²¹⁵ David C. Weiner, *The Courtroom Camera*, *Litigation*, Winter 1995, at 1.

²¹⁶ See *id.*

²¹⁷ See Lassiter, supra note 9, at 1007 n.23 (listing the states that do not allow television cameras in court without defendant’s consent).

disruptive influence prior to imposition of any ban.²¹⁸ Thus, efforts to exclude cameras at the commencement of proceedings face the same evidentiary standard applied to post-trial attempts used to redress alleged due process violations stemming from the camera's influence.²¹⁹

State courts have been surprisingly sensitive to problems related to the camera's presence in pre-trial proceedings, perhaps reflecting the Supreme Court's cautionary stance in this context.²²⁰ Fear of potential harm to the deliberative process seemingly fuels this concern. Such caution, however, has been confined to the limited goals of preserving an untainted jury pool in the trial of a co-conspirator or protecting a defendant's right to privacy.²²¹ A few decisions have limited television access to pretrial proceedings due to the camera's potential effect on witnesses.²²² No court has found sufficient evidence to support restrictions stemming from television's negative impacts on other participants during pre-trial.²²³ Despite decision-maker anxiety related to integrity of the pre-trial process, efforts to restrict or even ban television at this stage continually face formidable obstacles. *Chandler's* stringent requirements,²²⁴ though most applicable to post-trial remedial ef-

²¹⁸ See supra notes 182-98 and accompanying text (discussing *Chandler* at length).

²¹⁹ See *Chandler v. Florida*, 449 U.S. 560, 574-75 (1981) (describing standard for due process denial for courtroom cameras as actual prejudice).

²²⁰ See *Gannett v. DePasquale*, 443 U.S. 368, 394 (1979) (finding that the public has no constitutional right to attend a pre-trial judicial proceeding). For a discussion of *Gannett*, see supra notes 113-20 and accompanying text.

²²¹ See *WALB-TV, Inc. v. Gibson*, 501 S.E.2d 821, 823 (Ga. 1998) (denying a request for camera access in first trial of co-conspirator out of concern that potential jurors for second trial could watch and become tainted); *Georgia Television Co. v. State*, 363 S.E.2d 528, 531 (Ga. 1988) (finding that defendant's privacy rights could be substantially violated by the increased notoriety that camera coverage give the case); *Commonwealth v. Salvi*, Nos. 99518-99524, 1996 WL 350842, at *1 (Mass. Super. Ct. Jan. 25, 1996) (denying courtroom cameras for fear of infecting jury pool); *State v. Gregory M.*, 22 Media L. Rep. 2252, 2254 (N.Y. Fam. Ct. July 11, 1994) (finding that because defendant was considering testifying in own behalf but was reluctant to do so with camera coverage, such coverage will not be allowed).

²²² See, e.g., *Salvi*, 1996 WL 350842, at *2 (finding that electronic coverage would increase risk of harm to material witnesses, as state introduced evidence that prospect of electronic coverage has heightened their fears of harassment or attack); *State v. Mathews*, No. 01C01-9605-CC-00177, 1996 WL 269465, at *1 (Tenn. Crim. App. May 22, 1996) (noting potentially negative effects of in-court media coverage on witnesses).

²²³ But see *Mathews*, 1996 WL 269465, at *1-2 (noting potentially negative effects of in-court media coverage on jurors, but relying on general claims of potential prejudice to approve limitations on T.V. cameras).

²²⁴ See supra notes 193-94 and accompanying text.

forts, loom large in questions of television's access to pre-trial proceedings.

In contrast to the few successful attempts to limit television access to pretrial hearings,²²⁵ post-trial challenges arising from the medium's impact on proceedings in state courts have consistently failed. Subsequent to *Chandler*, no court has concluded that the presence of television cameras compromised a defendant's due process right to a fair trial.²²⁶ This circumstance is the likely result of the defendant's onerous burden to show specific prejudice.²²⁷ Mere allegations of disruption caused by the camera's presence are no substitute for definitive proof of palpable harm.²²⁸

Though *Chandler* reinvigorated broadcast media's right of access to criminal proceedings, that privilege, by no means, appears absolute.²²⁹ Several factors in the jurisprudential landscape buttress this finding. By its endorsement of Florida's experimental program that entrusted the trial judge with the discretion to determine the propriety of television access, the Court seemingly supported an informed decision to bar television cameras if warranted by circumstance.²³⁰ Most states have adopted this interpretation of *Chandler*, and have promulgated rules that provide for judicial discretion in the decisions regarding the broadcast of case proceedings.²³¹

²²⁵ See supra notes 220-24 and accompanying text.

²²⁶ See Sager & Frederiksen, supra note 85, at 1548 (noting that "there has not been a single case since 1981 where the presence of a courtroom camera has resulted in a verdict being overturned").

²²⁷ See supra notes 182-98 and accompanying text.

²²⁸ See *State v. McNaught*, 713 P.2d 457, 465-66 (Kan. 1986) (noting that defendant failed to present "evidence that any individual juror's ability to judge the defendant fairly was influenced by media coverage"); *Willard v. Pearson*, 823 F.2d 1141, 1147 (7th Cir. 1987) (same); *State v. Cardenas*, 704 P.2d 834, 836 (Ariz. 1985) (same); *People v. Spring*, 200 Cal. Rptr. 849, 854 (Cal. Ct. App. 1984) (same); *State v. Adkins*, No. 1307, 1982 WL 3346, at *2 (Ohio Ct. App. Jan. 20, 1982) (same); *Commonwealth v. Cross*, 605 N.E.2d 298, 300 (Mass. App. Ct. 1992) (noting that "[a] recognition of the possibility that a juror might be distracted by the presence of television cameras 'cannot substitute for a showing that the defendant was actually prejudiced.'").

²²⁹ See Slovirer, supra note 8, at 885 (explaining that while electronic media access to courtroom proceedings does not violate tenets of due process, the Constitution does not mandate such access).

²³⁰ See *Chandler*, 449 U.S. at 566 (stating that "the judge [in Florida's experimental program] has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial.").

²³¹ For a description of various state rules governing television's access to criminal

This practice of discretionary decision-making has seemingly triggered an interesting judicial reticence to permit cameras in the trials of some noteworthy high-profile proceedings. The trial judge in *Menendez II* summarily concluded that the second trial of the brothers accused of murdering their parents would not be televised.²³² In the civil matter where plaintiffs attempted to obtain damages from O.J. Simpson due to the alleged wrongful deaths of Nicole Brown Simpson and Ronald Goldman, the judge disallowed television coverage of the trial.²³³ Furthermore, the federal judiciary, despite a rule that permits experimental televised broadcasts of federal trial proceedings, has demonstrated a marked reluctance to allow television cameras in various courtroom proceedings.²³⁴

Judicial aversion to cameras in the courtroom has not been universal however. The murder trial of pro-football star Ray Lewis,²³⁵ British au pair Louise Woodward's murder trial²³⁶ and

proceedings, see Lassiter, *supra* note 9, at 931.

²³² *People v. Menendez*, No. BA-068880 (Cal. Super. Ct. Mar. 20, 1996) (convicting Lyle and Erik Menendez for the shotgun killings of their parents, Kitty and José, in 1989); see also *supra* notes 67, 75, 93 and accompanying text (describing additional details of the *Menendez* case).

²³³ *Rufo v. Simpson*, No. SC-031947 (Cal. Super. Ct. Feb. 10, 1997) (finding Simpson liable in the wrongful death suits on behalf of Nicole Brown Simpson and Ronald Goldman with damages totaling \$ 8.5 million). Although Simpson's wrongful death suit was a civil matter, the judge's decision to bar television coverage of the trial related to concerns, i.e., courtroom decorum and control, similarly relevant in criminal cases.

²³⁴ See Sager & Frederiksen, *supra* note 85, at 1546 (noting that, despite the reported success of the Judicial Conference's experimental electronic media coverage pilot program, the Judicial Conference rejected a permanent program for televising federal court proceedings); see also Kathleen M. Krygier, Comment, The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms, 3 *CommLaw Conspectus J. Comm. L. & Pol'y* 71, 81 (1995) (stating that the Judicial Conference's rationale for rejecting the proposal for televising federal court proceedings focused on the potential negative effects on jurors); Joan Biskupic, Vote on Cameras Reveals Judges' Deep Concern; Mistrust of Media is Called a Factor in Decision Against Televising Federal Court Hearings, *Wash. Post*, Sept. 23, 1994, at A3 (noting judicial fears related to "sound-bite journalism" and negative impact on witnesses if federal court proceedings were televised). Note, too, that the judge in the murder trial of Susan Smith excluded television cameras from the courtroom, over objections by the media. See *supra* note 68.

²³⁵ Ken Rosenthal, Nearly Clean Slate Gives Lewis Chance to Start Fresh, *Balt. Sun*, June 6, 2000, at 1E (reporting that the murder charges for Ray Lewis were dropped in a plea bargain agreement including a misdemeanor for obstruction of justice, probation, and testimony against his former co-defendants).

²³⁶ *Commonwealth v. Woodward*, No. Crim. 97-0433, 1997 WL 694119 (Mass. Super. Ct. Nov. 10, 1997) (reducing Woodward's second-degree murder conviction to involuntary manslaughter in the death of infant, Matthew Eappen).

Mary Kay LeTourneau's trial for the rape of a minor student²³⁷ were all televised. But it is significant to note also that these cases' stature, defined largely by the degree and number of high-profile features associated with those cases,²³⁸ pales in comparison to the Simpson matter. The Simpson case's bevy of public figures, a significant high-profile feature,²³⁹ clearly outnumber those associated with the Lewis, Woodward and LeTourneau matters. The significant media interest (and its resultant effect on proceedings) in those cases failed to reach Simpson-like levels of frenzy. Thus, the probability of significant adverse impact from broadcasting the trials of those cases would have been relatively low. Observe, too, that, after the Simpson debacle, trial judges have likely become more attuned to the potential problems associated with the broadcast of case proceedings.

Thus, careful scrutiny of broadcast media coverage of high-profile trials is constitutionally sound when contextual circumstances associated with media frenzy exist.²⁴⁰ Substantiation of needed restrictions on television's access to criminal proceedings rests with some evidence of prejudice that compromises the defendant's due process rights to a fair trial. But what type and character of evidence sustain such a burden – actual, circumstantial or anecdotal? Answers to this query seem embedded within the compatibility factors shared by *Estes* and *Chandler* – contextual factors relevant to the high-profile nature of, and inevitable media frenzy associated with, certain matters before the court.

Those who document the high-profile features of their cases and any ensuing frenzy *may* legitimize requests to limit the broadcast of case proceedings. This documentation would be more effective, however, if courts would accept, on an intuitive level, that the television camera's focus in the high-profile trial can affect court participants²⁴¹ and, as a result, impact court proceedings.²⁴²

²³⁷ State v. LeTourneau, 997 P.2d 436 (Wash. Ct. App. 2000) (amending the sentencing of LeTourneau for violating the provision that she have no contact with the minor she was convicted of raping).

²³⁸ For a more thorough discussion of features attributed to a high-profile case, see *supra* Part II.B.

²³⁹ See *supra* notes 50-55, 62-67 and accompanying text (explaining that the association of public figures with a matter contributes to the matter's high-profile status).

²⁴⁰ See *supra* notes 204-12 and accompanying text (noting *Chandler's* tacit adoption of *Estes'* contextual approach to the evaluation of television's access to criminal trials).

²⁴¹ See Lassiter, *supra* note 9, at 968 (noting that televising trials "may negatively af-

As explained in the following section of the Article, established psychological principles should further the court's appreciation of this unavoidable trait of human nature.²⁴³

IV. THE NEXUS BETWEEN TELEVISION AND PERFORMANCE

A. Objective Evidence of Television's Impact on Court Participants

As noted in Part II of this Article, the high-profile case by its very nature attracts extraordinary public interest and media focus.²⁴⁴ This premise forms the precursor to a fundamental yet significant truism: televising trials of high-profile cases inevitably and naturally affects the participants in those proceedings.²⁴⁵ To date, the barrier to universal acceptance of these premises lies in the seeming absence of definitive proof.²⁴⁶ But as explained more fully below, empirical proof of television's impact seems to be a rather spurious exercise given that medium's intuitive effects.

The television camera impacts many aspects of a high-profile trial. Certain events in the Simpson proceedings lend credence to this view.

The aura created by intense media coverage, most particularly

fect the performance of many jurors, witnesses, lawyers and judges").

²⁴² See *Chandler v. Florida*, 449 U.S. 560, 575 (1981) (asserting that proof of the camera's presence as a negative influence on court behavior so as to compromise trial fairness would justify restriction of cameras in the courtroom).

²⁴³ See *Estes v. Texas*, 381 U.S. 532, 546 (1965) (expressing the natural discomfort any individual experiences while being televised).

²⁴⁴ See *supra* notes 30-94 and accompanying text.

²⁴⁵ See Arenella, *supra* note 49, at 43 (explaining that broadcasting trial proceedings affects courtroom actors' conduct); Lassiter, *supra* note 9, at 968 (observing the potentially negative effects of in-court television coverage on jurors, witnesses, lawyers and judges); Robert L. Shapiro, For the Defense, 30 *Loy. L.A. L. Rev.* 105, 108 (1996) (noting media's affect on trial lawyers and its impact on the "playing-field drama of game plans"); Rory K. Little, That's Entertainment! The Continuing Debate Over Cameras in the Courtroom, *Fed. Law*, at 30 (July 1995) (observing that "[a]vailable data, in addition to anecdotal experience, support the view that cameras have undesired, adverse effects on all court participants: witnesses, jurors, lawyers, and judges."); see also Nissenbaum, *supra* note 47 (noting, in particular, then Governor Pete Wilson, speaking before the California Judicial Council, remarked that broadcast of the Simpson proceedings adversely impacted the behavior of witnesses and counsel).

²⁴⁶ See *supra* note 193-97 and accompanying text (discussing the defendant's burden to prove prejudice resulting from television coverage).

broadcast media, enveloped and controlled the Simpson proceedings from their inception.²⁴⁷ Note the decision to move the trial's situs from Santa Monica (the jurisdiction where the murders took place) to Los Angeles. Post-trial commentary by Christopher Darden suggested that such logistical changes were customary in cases of great magnitude.²⁴⁸ Others, however, confirmed that the move to the larger Los Angeles venue served primarily to accommodate the plethora of media – broadcast media.²⁴⁹

Actions by court participants in the Simpson case also signaled the influence of television coverage. Trial attorneys often engaged in rancorous debate on seemingly insignificant issues.²⁵⁰ The physical dress and appearances of the attorneys indicated a heightened awareness of their images on television. Marcia Clark, one of the prosecutors in the Simpson case, changed her hairstyle during the course of trial proceedings allegedly to soften her image.²⁵¹ Judge Lance Ito's wife allegedly adjusted his hair gel to ensure a positive television appearance, and Johnnie Cochran, lead defense counsel, purchased new suits for the occasion.²⁵² Some even speculate that a number of the contentious debates between attorneys and the numerous sidebars resulted not only from the importance of the proceedings themselves, but also from awareness of the vast audience assembled by television cameras.²⁵³

Perhaps the one individual most visibly and significantly affected by the television camera's presence was Lance Ito, the pre-

²⁴⁷ See *supra* notes 31-43 and accompanying text (describing media interest in the Simpson case).

²⁴⁸ See Christopher A. Darden, *In Contempt* 169 (1996).

²⁴⁹ See *Why O.J. Simpson Won*, *supra* note 38.

²⁵⁰ See Allen, *supra* note 46, at 1014 (noting Judge Ito's inability to control the pace of the trial and length of the lawyers' arguments); see also *Why O.J. Simpson Won*, *supra* note 38.

²⁵¹ Richard Gabriel, "This Case is Brought to You By . . .": How High-Profile Media Trials Affect Juries, 33 *Loy. L.A. L. Rev.* 725, 727 (2000) (stating that prosecutor Marcia Clark changed her clothing style and haircut to improve her public image); see also *Why O.J. Simpson Won*, *supra* note 38 (showing Marcia Clark's hairstyle change from the preliminary hearing to the latter stages of the trial).

²⁵² See Geis & Bienen, *supra* note 10, at 198 (noting the court clerk's obsession with the television camera, demonstrated by her concentrated efforts to keep her pen out of her mouth). For more regarding the camera's effect on Ito during the Simpson trial, see *supra* note 39, *infra* notes 352-69, and accompanying text.

²⁵³ See Geis & Bienen, *supra* note 10, at 197 (stating that the attorneys and judge in the Simpson case were "said to posture and preen for the cameras"); see also *infra* note 259 and accompanying text.

siding judge. Judge Ito signaled his cognitive obsession with the trial's massive television coverage by the tone he set from the beginning of the proceedings. In essence, he seemingly recognized that this Goliath of a trial would be witnessed by viewers all over the world.²⁵⁴ The timing and influence of this statement was pivotal. It overtly manifested his awareness of television's prominent role that would particularly impact his functioning. Perhaps more importantly, Ito's statement implanted in the trial participants' consciousness the significance of the trial and its critical television audience. Because the judge occupies the position of authority,²⁵⁵ Ito's pronouncement ensured television's eventual impact on virtually every aspect of the trial.

Perhaps the most important aspect of Judge Ito's awareness of the heightened media coverage noted in his statement was the eventual effect of the television audience on the temporal progress of the trial. Regardless of its high-profile nature and the breadth of the evidence, the trial's length was interminable, due in no small measure to Ito's failure to control the proceedings.²⁵⁶ Ultimate responsibility for a trial's cadence and efficiency rests with the trial judge.²⁵⁷ Ito seemingly abdicated that responsibility.²⁵⁸

Of course, confining television's effect in the Simpson trial solely to Judge Ito would be shortsighted. The camera's influence was pervasive in nature. All court participants ostensibly demonstrated their awareness of a television audience that scrutinized their every move.²⁵⁹

²⁵⁴ See *supra* note 39 and accompanying text.

²⁵⁵ See Richtel, *supra* note 39, at 980 (quoting Judge Learned Hand, who stated, "Justice does not depend upon legal dialectics so much as upon the atmosphere of the courtroom, and that in the end depends primarily upon the judge.").

²⁵⁶ Geis & Bienan, *supra* note 10, at 190; see also Richtel, *supra* note 39, at 980 (opining that the trial's length was "unconscionable").

²⁵⁷ See Rebecca Love Kourlis, *Not Jury Nullification; Not a Call for Ethical Reform; But Rather a Case for Judicial Control*, 67 U. Colo. L. Rev. 1109, 1120 (1996) (explaining the presiding judge must remain in control of the courtroom as he is responsible for a trial's effectiveness and fairness); see also Allen, *supra* note 46, at 1014 (emphasizing the presiding judge's role to enforce the rules of the court and ensure courtroom decorum).

²⁵⁸ See *infra* notes 365-66 and accompanying text.

²⁵⁹ Even Marcia Clark admitted after the trial that "cameras influence[d] the behavior of the trial lawyers . . . skew[ing] a case against justice, with lawyers pandering to cameras." Mark Henry, *Court, Cameras Don't Mix*, *Marcia Clark Says*, *The Press-Enterprise* (Riverside, Cal.), Feb. 16, 1996, at B3; see also *supra* note 47 and accompanying text.

Yet despite objective manifestations of the camera's effects, the premise that television coverage of high-profile trials adversely affects performance remains largely conjecture. And as *Chandler* and its progeny establish, conjecture fails as proof of television's prejudicial effects.²⁶⁰ The continuing challenge, then, remains substantiation of the relationship between trial actors' behavior and their awareness of the television camera's glare.

B. Studies of the Effects of Television Cameras in the Courtroom

Attempts to demonstrate the cause and effect nature of television coverage on trial participants generally surface in measured studies.²⁶¹ The results of these experiments, however, have been mixed. Several studies suggest that televised trials either have no effect on trial participants, or actually improve their abilities to complete their fact-finding mission.²⁶² These results of course support the Supreme Court's decision to allow state experimentation with televised trials.²⁶³ Other studies confirm the cameras' impact on trial participants.²⁶⁴ A brief review of the findings and methodologies of a few of these experiments should shed some light on the camera-performance nexus.

1. Studies Indicating Minimal Adverse Impact from the Camera's Presence in the Courtroom

In the early 1990s, the Federal Judicial Center performed a limited evaluation of cameras' impact on trial participants.²⁶⁵ This

(discussing the impact of the television camera on court actors). For more regarding the demonstrative effect of television coverage on participants in the Simpson trial, see also *infra* Section IV. A and C.

²⁶⁰ See *supra* notes 193-94 and accompanying text.

²⁶¹ See Sager & Frederiksen, *supra* note 85, at 1543-47 (noting that studies have refuted the alleged deleterious effects of television cameras on court proceedings); see also Roberts, *supra* note 45, at 631, 640-41, 644 (reporting results of numerous studies on the effects of cameras on court participants).

²⁶² See J. Stratton Shartel, *Cameras in the Courts: Early Returns Show Few Side Effects*, *Inside Litig.*, Apr. 1993, at 1 ("The most reputable surveys of real courtroom participants and the probable psychological affects on witnesses and jurors indicate that television cameras don't adversely affect litigators, judges, or jurors.").

²⁶³ *Chandler*, 449 U.S. at 582-83 (allowing states to continue to experiment with cameras in the courtroom, partially based on federalism grounds).

²⁶⁴ See *infra* notes 282-89 and accompanying text (describing studies that note the television camera's adverse impact on court participants).

²⁶⁵ See generally Molly Treadway Johnson & Carol Krafka, *Federal Judicial Center, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot*

study relied on participants' opinions as determinants of the camera's influence on proceedings.²⁶⁶ Both judges and attorneys reported that cameras had a minimal affect on courtroom decorum and the administration of justice.²⁶⁷ The report ultimately concluded that cameras had no negative influence on trial participants.²⁶⁸

During the early 1980s, the State of California conducted studies of television's impact on trial proceedings.²⁶⁹ A survey of trial participants revealed that the majority was unaware of the camera's presence.²⁷⁰ A number of the attorneys and judges felt that cameras distracted trial participants, but also believed this ultimate effect was *de minimis*.²⁷¹ The California study also reported that twenty-five percent of the jurors believed that the cameras negatively influenced the courtroom environment.²⁷² Twenty-two percent of the attorneys stated that the cameras adversely impacted witnesses, and eighteen percent of this group indicated that televised coverage negatively influenced juror behavior.²⁷³

A study conducted at the University of Minnesota included college students who functioned as witnesses in mock trials.²⁷⁴ Experiments included trials conducted both with and without a camera broadcasting the proceedings.²⁷⁵ The ultimate goal was to document the impact of courtroom cameras on witness recall and performance.²⁷⁶ While witnesses who testified before cameras were demonstratively more nervous, their experience did not perceptively impact their recall.²⁷⁷ Witnesses testifying before cam-

Program in Six District Courts and Two Courts of Appeals (1994).

²⁶⁶ See *id.* at 7.

²⁶⁷ See *id.*

²⁶⁸ See *id.* at 43.

²⁶⁹ See Shartel, *supra* note 262, at 24.

²⁷⁰ See *id.* at 25 (noting that 75% of survey respondents were "unaware" or "a little aware" of coverage, while only 11% were "highly aware" or "very highly aware.").

²⁷¹ See *id.* (observing that 90% of attorneys and judges surveyed found that cameras interfered "slightly" or "not at all" with courtroom dignity, while only 10% found the interference "extreme.").

²⁷² See *id.*

²⁷³ See *id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See *id.* (describing the University of Minnesota study).

²⁷⁷ See *id.*; but see *infra* note 288 and accompanying text (describing how nervousness or discomfort can effect thoughts).

eras appeared to remember as much information as those who were not televised.²⁷⁸

Another study by psychologist Saul M. Kassin measured the degree of distraction experienced by mock jurors.²⁷⁹ Jurors in these experiments heard cases in courtrooms with and without cameras.²⁸⁰ Kassin concluded that any distraction suffered by jurors was short-lived, with attention quickly refocused on the trial.²⁸¹

2. Studies Reflecting Problems with Cameras in Courtrooms

While the aforementioned studies found that cameras had little discernable impact on court proceedings, the various results of other experiments cloud this conclusion. The Criminal Justice Section of the New York Bar Association conducted a survey that raised questions concerning the allegedly negligible effect of cameras in the courtroom.²⁸² Although a majority of attorneys surveyed claimed that televised trials had no impact on court proceedings, a substantial minority reported that cameras increased court tension, impacted witnesses' testimonies, caused general distraction and adversely affected the trials' fairness.²⁸³ Nineteen percent of jurors concurred that courtroom cameras negatively impacted the trials.²⁸⁴ A substantial minority of witnesses also reported that the camera affected their testimony.²⁸⁵

An experiment by Alan Puncches measured the effect of television cameras on witnesses' cognitive functions.²⁸⁶ Puncches concluded that witnesses before the camera had consistently lower levels of recall than those who testified in a courtroom without a camera.²⁸⁷ Not only did those in camera-covered courtrooms recall

²⁷⁸ *Id.*

²⁷⁹ Saul M. Kassin, *TV Cameras, Public Self-Consciousness, and Mock Juror Performance*, 20 *J. Experimental Soc. Psychol.* 336, 336 (1984).

²⁸⁰ *Id.*

²⁸¹ *Id.*

²⁸² See Lassiter, *supra* note 9, at 968.

²⁸³ *Id.* at 968-69.

²⁸⁴ *Id.* at 969.

²⁸⁵ See *id.* at 970 (finding that 39% of witnesses felt that the presence of cameras in the courtroom effected them).

²⁸⁶ See Anton R. Valukas et al., *Cameras in the Courtroom: An Overview*, *Comm. Law.*, Fall 1995, at 21 (discussing Alan Puncches's *Cognitive Effect* study).

²⁸⁷ See *id.* (noting, however, that the differences in the results between the two study groups were not statistically significant).

less, but witnesses possessing high public self-consciousness remembered significantly fewer facts than those possessing low self-consciousness.²⁸⁸ The PUNCHES study confirmed the camera's influence on witnesses, though that effect was variable among members of that group.²⁸⁹

3. The Dubious Reliability of Studies as Proof of the Camera's Impact in the Courtroom

The various studies, while probative on the issue of television's impact on court participants, are not definitive regarding the medium's cause and effect. This shortcoming relates not so much to the studies' results, but to their inherent artificiality. These studies are generally performed in a sterile environment that is more indigenous to ordinary or typical trial proceedings. These experimental or mock trials fail to replicate a true high-profile case scenario and, thus, cannot accurately document television's effect on participants within that environment.²⁹⁰

Contextual factors may leave studies susceptible to bias. Interpretation of collected data often leads to results reflective of the researcher's attitudes and beliefs rather than objective determinations.²⁹¹ In fact, a researcher's interests in a study's results can affect the responses of subjects who participate in that study.²⁹² Moreover, sponsorship of a study may call into question its ultimate credibility. For example, a Court TV study indicated that Court TV's cameras were inconspicuous and its personnel courte-

²⁸⁸ See *id.*; see also *infra* notes 361-69 and accompanying text (describing self-presentational theory as explanation for court participants' conduct in the Simpson trial).

²⁸⁹ See Valukas et al., *supra* note 286, at 21.

²⁹⁰ See Shartel, *supra* note 262, at 25 (warning against the use of a California study to justify the media's unfettered access to the courtroom since that study was performed "in a highly structured and tightly controlled environment."). Studies of the effect of television coverage within the high-profile trial scenario might be difficult or even impossible to produce, given the inherent artificial nature of the experimental environment and the difficulty of creating an experimental scenario that is truly high profile in nature. Cf. McCall, *supra* note 20, at 1553-54 (noting that cameras may affect witness performance in high-profile trials due, in part, to fears about personal safety, ostracism by the public, and the loss of anonymity).

²⁹¹ See Richard E. Redding, How Common-Sense Psychology Can Inform Law and Psycholegal Research, 5 U. Chi. L. Sch. Roundtable 107, 137 (1998) (noting that a researcher may interpret a study's results in accordance with their own "socio-political beliefs.").

²⁹² See Richard E. Redding, Reconstructing Science Through Law, 23 S. Ill. U. L.J. 585, 593 (1999).

ous may not be a truly objective indicator of the cable channel's impact on court proceedings.²⁹³ Thus, conclusions from studies financed or conducted by parties interested in those studies' results or outcomes remain inherently suspect.²⁹⁴

Studies principally rely on self-reporting, a technique that creates a bias in favor of those who respond, which, in turn, skews survey results.²⁹⁵ Despite their intent to provide accurate data, respondents remain subconsciously bound to their primary goal of esteem maintenance.²⁹⁶ A respondent may consequently be disinclined to reveal the camera's true adverse impact if she believes that revelation might signal some flaw in her abilities.²⁹⁷ In other words, the need to preserve self-image may interfere with the respondent's duty to report candidly the impact of cameras on her performance.²⁹⁸ This reality casts doubt on the veracity of studies that report minimal impacts from the television camera's presence in court.²⁹⁹ The commonly used self-reporting technique not only obscures television's possible effects, but also underscores the inherent failure of studies to address the cognitive compromises made by respondents.³⁰⁰

Another, more fundamental problem with these studies relates

²⁹³ See Shartel, *supra* note 262, at 26 (detailing the results of a Court TV survey of judges who commented on the effect of the channel's cameras and personnel on court proceedings and participants).

²⁹⁴ See Ellie Margolis, *Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs*, 34 U.S.F. L. Rev. 197, 233 (2000) (asserting that studies financed by a partisan group may reflect the objectives of that group); Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. Rev. 91, 143 (1993) (noting the potential conflicts of interest in studies sponsored by "partisan funding sources").

²⁹⁵ See Lassiter, *supra* note 9, at 966.

²⁹⁶ See *infra* notes 338-40 and accompanying text (discussing self-presentational theory as it relates to an individual's goal of a positive self-image).

²⁹⁷ Lassiter, *supra* note 9, at 966-67.

²⁹⁸ See *infra* notes 338-40 and accompanying text (noting that presentational theory explains individuals' strategies to maintain esteem and a positive image).

²⁹⁹ See Lassiter, *supra* note 9, at 972 ("Measuring psychological impact may well require more than simplistic, and perhaps self-serving, surveys."). Note also in those studies that the significant minority who reported television's negative impact may have been less concerned with image preservation and, thus, provided more truthful and reliable responses. For a description of the minority view in the New York Bar study, see *supra* notes 282-85 and accompanying text.

³⁰⁰ For more regarding the inherent fallacies of self-reporting and general problems associated with empirical research, see Richard E. Redding, *Reconstructing Science Through Law*, 23 S. Ill. U. L.J. 585, 592-97 (1999).

to the dilemma of television's coverage of high-profile trials: studies, like the omnipresence of television cameras in the courtroom, fail to provide participants incentives that compel appreciation of context's influence on their conduct.³⁰¹ Like television cameras themselves, studies prompt those surveyed to report expected rather than true outcomes.³⁰² And there is no indication that precautions are taken to encourage participants not to engage in this behavior. Thus, studies become an ineffective gauge of television's true effects on participants in the litigation arena, particularly the high-profile trial.

4. The Intuitive Nature of Television's Effect on Performance

At some basic level, the requirement of *definitive* proof of television's effect on human behavior seems cognitively unrealistic. The focus of the television camera naturally evokes reactions that would not otherwise occur if the event were not televised.³⁰³ This manifestation is more intuitive than empirical. Awareness that one's every action is recorded or broadcast heightens self-consciousness, and can consciously or unconsciously influence cognitive strategies and behavior. As the Court in *Estes* observed, the television camera impacts court actors in ways they cannot realize or articulate.³⁰⁴

The camera's constant stare can, thus, alter performance.³⁰⁵ Of

³⁰¹ See Arenella, *supra* note 31, at 1256 (questioning whether televising high-profile proceedings creates incentives for court actors "to view their own roles somewhat differently with consequent changes in their behavior and decision-making").

³⁰² See *supra* note 91 and accompanying text (noting that court actors' awareness of the camera affects strategies and decision-making).

³⁰³ See Valukas et al., *supra* note 286, at 21.

³⁰⁴ *Estes v. Texas*, 381 U.S. 532, 550 (1965).

³⁰⁵ Illustrative of television's natural impact was the performance of guests on a television talk show in Toledo, Ohio. From 1996 until the fall of 1997, I co-hosted *Step Up Toledo*, a local television show. My function on this program was to interview guests who would comment on issues of current and local public concern. To ensure the guests' comfort and ease during the taping of the show, I would have a dress rehearsal, where I would converse with the guests and present questions that would be asked of them once the show was ultimately taped and aired. Before the dress rehearsal and taping, I would ensure the guests' comfort level by counseling them on the experience of being televised. The principal object of this counseling session was to reduce the impact of the televised experience on their responses and demeanor. During dress rehearsal, virtually all guests performed confidently, with very little evidence of nervousness. Once taping or live airing of the exact same dialogue commenced however, many of the guests exhibited significant discomfort. Some assumed a frightened stance that resembled a deer suddenly caught in the headlights of an oncoming vehicle on a darkened road. These situations

course, performance quality can vary depending upon the number of high-profile features of a case, as well as the actor's experience and comfort level at performing before a television camera.

Television's effect as an intuitive norm impacts both cognition, i.e., self-awareness, consciousness and decision-making; and conduct, i.e., physical appearance and behavior. The problem in accepting television's role in this dynamic is not so much tied to the absence of empirical proof. The true dilemma lies in the acceptance of the nexus between cognitive and objective manifestations of television's influences. But even if one accepts the premise that television affects self-consciousness and thought, a pivotal inquiry remains: Does awareness of scrutiny by a television audience affect an actor's behavior?

C. Theoretical Nexus Between Trial Behavior and Television Broadcasting – Social Facilitation

1. Audience and Coaction as Facilitative Factors

As previously noted in this Article, some anecdotal studies suggest a nexus between cognitive awareness and action based on television coverage.³⁰⁶ Psychological concepts of group theory, however, provide more persuasive confirmation of this linkage. As a precept, one must view trial participants and the television audience as a group – in the high-profile case, a vast group.³⁰⁷ Television viewers significantly enlarge the courtroom audience. Within the context of the high-profile trial, this audience becomes a catalyst, potentially influencing the strategies and behavior of court actors.³⁰⁸ Case proceedings within this context logically become exercises in group dynamics, where the actors and audience are bound together by the totality of the circumstances.³⁰⁹

vividly illustrated the impact of awareness of the television camera on the actor's conduct.

³⁰⁶ See supra notes 261-64 and accompanying text (indicating the conflicting findings among studies that report the camera's impact on courtroom proceedings).

³⁰⁷ Generally, a group is defined as three or more individuals who influence or interact with each other. Ann L. Weber, Introduction to Psychology 247 (1991).

³⁰⁸ See id.; see also Peter Arenella, supra note 31, at 1256 (stating that "televising a high-profile case alters the behavior and experiences of all the trial's participants.").

³⁰⁹ See Weber, supra note 307, at 247 (noting that "group influences can be characterized as either deriving from the presence of others or group dynamics.").

Social psychologists have often examined an audience's effect on human behavior and term this phenomenon social facilitation.³¹⁰ As a general maxim of this relatively popular theory, the mere presence of others either augments or deters an individual's performance of a task. Two paradigms dominate the facilitation model: coaction, where the actor performs a task in concert with others performing the same or similar task;³¹¹ and an audience, which examines the influence of observation by a non-participatory group on an actor's accomplishment of tasks of variant difficulty.³¹² In the televised high-profile trial, viewers assembled by the camera observe the functioning of courtroom actors.³¹³ Thus, audience becomes the most relevant facilitation paradigm within this context.

Coaction applies to the televised high-profile trial, but to a more limited extent in the context of this discussion. Attorneys, as co-actors, perform similarly and arguably facilitate one another's performances. Theoretically, performance with a co-actor, i.e., co-counsel, may actually enhance performance due to an actor's increased comfort level gleaned from working cooperatively with others. Performance of similar tasks with others often diffuses an actor's efforts thereby minimizing stress and anxiety.³¹⁴ On another level, prosecution and defense attorneys might gain synergy from arguing opposing positions in litigation. Coaction in this cir-

³¹⁰ See Nicky Hayes, *Principles of Social Psychology* 159 (1993) (defining "social facilitation" as "[t]he observation that the presence of other people can influence how well individuals perform on a task").

³¹¹ See Philip G. Zimbardo & Ann L. Weber, *Psychology* 445 (1994) (noting that performance enhancement resulting from social facilitation occurs when an individual performs in front of an audience or in a coacting group). Hayes notes Triplett's 1898 study that showed that children turned a fishing reel faster while in the presence of others performing the same task. See Hayes, *supra* note 310, at 43. She also describes a 1920 study that documented college students' enhanced performance on multiplication problems when executed in the presence of other students. *Id.* Commonplace examples of co-active activities include: runners in a race, performers in a musical group or workers in an assembly line.

³¹² See *id.* (Stating that the presence of an audience can help or hinder performance and documenting Dashiell's 1930 study reporting that students who completed multiplication problems in front of an audience performed their task faster, but with more mistakes).

³¹³ See *supra* notes 32-39 and accompanying text.

³¹⁴ See Hayes, *supra* note 310, at 44-45 (noting Jackson and Latané's 1981 experiment that demonstrated that co-actors', performing similar tasks, i.e., workers on an assembly line, were less nervous due to diffusion, where the effect of the audience is shared by all performers instead of focused upon one actor).

cumstance enhances performance due to competitive drive.³¹⁵

Central to the comprehension of television's plausible effect on court participants however, is the concept of audience. Awareness of an audience can often trigger arousal or drive responses that either enhance or inhibit an actor's conduct.³¹⁶

In the Simpson trial, some of the court participants' actions, i.e., Judge Ito's concern with hair grooming, and the attorneys' grandstanding and flair for the dramatic in arguments,³¹⁷ appeared motivated by the presence of a television audience. A more significant manifestation related to the conduct of the trial itself. Appeasement of the audience,³¹⁸ increased substantially by television viewers, seemingly stymied Judge Ito from exercising control over the trial and its participants.³¹⁹ The audience's presence thus influences an actor's election of strategies employed to accomplish fundamental tasks.³²⁰

Another important corollary to this drive/arousal hypothesis is that the perceived significance of an actor's tasks is proportionate to the size and critical nature of the audience. Thus, judges and attorneys in a televised high-profile trial such as that in the Simpson case will naturally magnify the importance of any trial tactic performed within the presence of an audience enlarged and incited by television's coverage. The magnified significance of tasks leads

³¹⁵ See *id.* at 43 (describing the influence of competition and rivalry which, according to a 1930 Dashiell study, can impact performance). A simplistic example of coaction in the litigation context is the influence of co-counsels (those assisting one another in the case) and plaintiff and defense counsels who, as adversaries, mutually influence case strategies and performance. This Article's focus on the effects of television cameras on performance confines facilitation analysis to the influence of audience. Detailed examination of coaction in this context is less relevant and, therefore, reserved for future scholarship.

³¹⁶ See Jim Blascovich et al., Social "Facilitation" as Challenge and Threat, 77 *J. Personality & Soc. Psychol.* 68, 69 (1999) (stating that the presence of others invokes a "learned drive response or arousal," that theoretically arises from the actor's perception that she is being evaluated by others). Note, too, that arousal or drive responses that can result from an actor's performance before an audience has also been demonstrated to trigger cardiovascular responses as well as to affect cognitive functioning. *Id.* at 69, 74.

³¹⁷ See *supra* notes 250-53 and accompanying text.

³¹⁸ See *supra* note 91 and accompanying text.

³¹⁹ See *supra* notes 254-58 and accompanying text.

³²⁰ Catherine E. Seta & John J. Seta, When Audience Presence is Enjoyable: The Influences of Audience Awareness of Prior Success on Performance and Task Interest, 16 *Basic & Applied Soc. Psychol.* 95, 97 (1995) (noting that "the presence of spectators may increase an individual's willingness to expend resources").

to an instinctive adjustment of strategies needed to perform those tasks successfully. These premises then give rise to a critical inquiry: Does the presence of an audience facilitate or impair an actor's performance?³²¹

On a cognitive level the drive prompted by the audience's presence often induces an actor to perform well-learned tasks well, thereby facilitating performance.³²² On the other hand, the audience's scrutiny of an actor's accomplishment of tasks that are not well-learned generally impairs performance, given that the dominant response under such conditions is to perform those tasks awkwardly, ineptly or incorrectly.³²³

Social scientists test these theories in measured experiments. Audience and co-actors, considered peripheral cues by social psychologists, have been shown to influence behavior in various situations.³²⁴ The results of experiments devoted to this hypothesis include the finding that an actor's attention to detail can be inhibited by the breadth of the peripheral cue. As a consequence, an audience's size and critical nature loom prominently in the actor's consciousness and ultimately impact her resultant behavior.³²⁵ Optimal performance, particularly of more complex tasks, may be inhibited by knowledge of the audience's character, i.e., large and

³²¹ See Zimbardo & Weber, *supra* note 311, at 445 (noting Zajonc's theory that the presence of others increases generalized drive and dominant responses that either augment or impair performance).

³²² See *id.*

³²³ See *id.*; Bernard Guerin, *Social Behaviors As Determined by Different Arrangements of Social Consequences: Social Loafing, Social Facilitation, Deindividuation, and a Modified Social Loafing*, 49 *Psychol. Rec.* 565, 567 (1999) (stating that "[s]ocial facilitation is the general finding that people performing alone do better on simple tasks but worse on complex tasks than when performing in the presence of other people or with co-workers"); Blascovich et al., *supra* note 316, at 69 (recognizing that social facilitation theorizes that the presence of others may enhance or deter performance). Facilitation of simple tasks and detracting in the performance of complex tasks are primarily attributable to 1965 and 1980 studies concluded by Zajonc, who opined that errors resulted from the actor being placed in a high-drive state due to the audience's presence. See Hayes, *Principles of Social Psychology*, *supra* note 310, at 44.

³²⁴ See *supra* notes 311-12 and accompanying text.

³²⁵ See Hayes, *supra* note 310, at 44 (noting Paulus and Murdock's 1971 and Latané and Harkins' 1976 studies demonstrating that performers react more strongly when viewed by an audience that is large or laden with experts or critics). This phenomenon is also illustrated by the anxiety felt by many required to give presentations to law faculty for employment.

critical, and the distraction it causes.³²⁶ The force of this social impact may vary depending upon the audience's critical nature and immediacy (frequency or proximity of contact).³²⁷

The simple/complex task dichotomy explains, to a limited extent, the performances of the judge and attorneys in the Simpson trial. Certainly mundane or frequently performed tasks such as introductions, salutations and direct examination of witnesses pertinent to non-complex details of evidence were performed with confidence and acumen.³²⁸ These tasks probably would have been performed well regardless of the television audience's presence. Nonetheless, heightened awareness of a very critical audience enlarged by the television camera likely led attorneys in the Simpson trial to perform these mundane tasks with greater flare and emphasis.³²⁹

Note, however, that designation of a simple task performed within the context of a high-profile proceeding remains problematic. A trial such as that in the Simpson case endures unusual scrutiny, and its sheer magnitude transforms customarily simple duties into concentrated, high-risk exercises. Intense media and public attention paid to every aspect of the proceeding, together with the gravity of the crime and charges in the case, serve to magnify those risks. Of course, complex tasks abound naturally in a high-profile matter like the Simpson case. The sheer plethora and character of the evidence, the charges and defenses presuppose the case's difficulty.³³⁰

³²⁶ See *id.* (citing Baron's 1986 study that indicated that audience attention leads to distraction, creating conflict over whom (audience or jury) to provide primary attention, and contributing to tension that leads to mistakes). A 1982 study by Bond also demonstrates this phenomenon. *Id.*

³²⁷ See *id.* at 45-46 (describing the Latané's social impact model).

³²⁸ See generally *Why O.J. Simpson Won*, *supra* note 38.

³²⁹ See Geis & Bienen, *supra* note 10, at 197 (indicating the tendency of attorneys in the Simpson case to "posture and preen for the cameras").

³³⁰ Note that the O.J. Simpson trial, given its notoriety and high-profile features, resulted in extraordinary resources being spent by both the prosecution and the defense to amass evidence probative to the case. As a result, over four hundred individual exhibits and testimony of a number of witnesses over a protracted period of time transformed typically mundane requirements or tasks within a murder trial into much more involved and complicated actions. See Reid Hastie & Nancy Pennington, *The O.J. Simpson Stories: Behavioral Scientists' Reflections on the People of the State of California v. Orenthal James Simpson*, 67 U. Colo. L. Rev. 957, 958 (1996) (describing the Simpson case as extremely complex, involving circumstantial evidence, technical analysis, physical

Specific incidents in the Simpson trial illustrated the symbiosis between a large, critical audience enhanced by television and the impaired performance of complex tasks. Despite his general reputation for stellar oratory and artful communication, Johnnie Cochran's opening statement in the trial had been generally regarded as surprisingly flawed.³³¹ He not only referenced witnesses not identified during the discovery period, but also failed to provide a cohesive description of the state's alleged blunders in its assemblage of evidence against Simpson.³³² Perhaps there is no definitive explanation for Cochran's deficient performance at that stage of the proceedings. One can hypothesize, however, that awareness of, and the ensuing pressure caused by, the vastness of the audience, together with the high stakes nature of this extraordinary case, contributed to his lackluster performance. Exacerbating the complexity of the opening statement was Cochran's explanation of an alleged conspiracy involving police malfeasance and tainted evidence.³³³ Under even the best of circumstances, i.e., lower-profile cases, tenable explanations of conspiracies remain enigmatic and difficult to construct.³³⁴ This strategy no doubt contributed to the troubles Cochran experienced at the start of the trial.

Another example from the Simpson trial of a complex task compounded by the presence of a vast, critical audience is the prosecution's presentation of DNA evidence. Explanations of both the DNA testing process and conclusions drawn from those tests, remain intricate exercises that can befuddle both presenter and listener.³³⁵ The prosecution in the Simpson case has been largely

evidence, and lengthy sequestration); Darden, *supra* note 248, at 167 (commenting that the prosecution was relying on extremely complex DNA forensics); *infra* note 334 and accompanying text (noting the difficulty associated with conspiracy theories).

³³¹ See Darden, *supra* note 248, at 224-28; see also *Why O.J. Simpson Won*, *supra* note 38.

³³² See Darden, *supra* note 248, at 225-26.

³³³ See generally *The O.J. Simpson Murder Trial: The Defense Rests*, *L.A. Times*, Sept. 23, 1995 at A21 (explaining the principal elements of the defense's conspiracy theory).

³³⁴ See Stephen D. Easton, *Review Essay: Lessons Learned the Hard Way from O.J. and "The Dream Team"*, 32 *Tulsa L.J.* 707, 726-27 (1997) (stating that conspiracy theories, while loved by the American public, are often factually implausible).

³³⁵ See Ryan McDonald, *Note and Comment, Juries and Crime Labs: Correcting the Weak Links in the DNA Chain*, 24 *Am. J.L. & Med.* 345, 345-46 (1998) (stating that the complex and technical nature of DNA evidence hinders jurors' ability to understand the significance of the information).

criticized for its failure to cogently explain the DNA methodology.³³⁶ The innate difficulty of proving such evidence, coupled with the scrutiny of a judgmental television audience, must have contributed to the prosecution's poor performance. While the complex task theory under the facilitation model does not fully explain the prosecution's shortcomings in the Simpson trial, it does provide an analytic rationale for their occurrence.³³⁷

2. Self-Presentation as a Catalyst of Performance

Self-presentation, an alternate yet related facilitative theory, also can aid in documenting a television audience's effect on an actor's performance. This theory postulates that the actor's innate need to maintain a positive public or self-image impacts the performance of her tasks.³³⁸ Impairment related to possible embarrassment from acts performed before an audience becomes a critical variable.³³⁹ The actor purposefully regulates her image through conscious modification or adjustment to conform with her contemplated behavior. The self-presentational performer has as her primary objective, self-esteem maximization, a goal directly attributed to the presence of an audience. A good performance before an audience can consequently lead to praise and recognition. Conversely, performing poorly results in embarrassment and shame. Succinctly stated, the capacity to heighten esteem enhances performance; the possibility of loss of face impedes it.³⁴⁰

As in the studies of audience and coaction, experiments testing self-presentational theory indicate that performance can be enhanced when the actor perceives that her conduct meets or exceeds

³³⁶ See William C. Thompson, *Proving the Case: The Science of DNA: DNA Evidence in the O.J. Simpson Trial*, 67 U. Colo. L. Rev. 827, 856-57 (1996).

³³⁷ Note that complex tasks in the Simpson trial are not confined to those examples presented in this section of the Article. Indeed there were a number of difficult tasks, the complexity of which was exacerbated by the camera's presence. For example, in *Estes*, Justice Clark acknowledged that a trial judge's charge to ensure that an accused receives a fair trial constitutes a "most difficult task." *Estes v. Texas*, 381 U.S. 532, 548 (1965). To examine all of the complex tasks associated with the Simpson trial exceeds the practical bounds of this Article. The sundry examples analyzed in this section serve to illustrate generally the facilitative impact of a vast television audience.

³³⁸ See Charles F. Bond, Jr., *Social Facilitation: A Self-Presentational View*, 42 J. Personality & Soc. Psychol. 1042, 1042 (1982).

³³⁹ See *id.* at 1042-43 (noting that the self-presentational theory attributes facilitation to the performer's active regulation of a public image, and impairment to embarrassment following a loss of public esteem).

³⁴⁰ *Id.* at 1043.

an audience's expectations. On the other hand, embarrassment and face-saving conduct occurs when those expectations are not met.³⁴¹

Self-presentational theory as described above had significant applicability within the context of the Simpson trial. As a precursor to their strategic behavior, trial participants were keenly aware of the breadth of media coverage, that coverage's intersection with public opinion, and the effect of that intersection on their performances.³⁴² This reality most likely contributed to Christopher Darden's decision to compel Simpson to try on the infamous blood-soaked, left-handed glove found at the murder scene. Convinced that it would fit Simpson's large hands, Darden had Simpson try on the glove in the presence of the jury and, of course, the television audience.³⁴³ This ploy, if it had been successfully executed in such bravura fashion before a vast audience, would have significantly bolstered Darden's public image. Knowledge of that potential payoff must have factored heavily into Darden's decision to employ such a dramatic, high-risk tactic.

If the glove had fit Simpson's hand, the self-presentational aspect of Darden's strategy would have been apparent, as Darden's public stature would have undoubtedly soared. Both the jury and television audience would have likely considered Darden a superb tactician who cut through the morass of convoluted evidence³⁴⁴ to produce the ultimate determinant of guilt. Praise, if not accolades, would have likely ensued. Though he stated that his choice to have Simpson try on the glove was calculated,³⁴⁵ Darden admits that his strategy violated the commonly held litigation credo that one never asks a question or pursues an inquiry to which the presenter

³⁴¹ *Id.*

³⁴² See *supra* note 39 and accompanying text (referencing Judge Ito's comment to the lawyers prior to the trial); see also Marcia Clark, *Without a Doubt* 485 (1997) (stating that the media encouraged lawyers to preen for the cameras and prolong every action for more airtime); Darden, *supra* note 248, at 260 (explaining that cameras induced lawyers in the Simpson trial to change their approaches and styles, tailoring them to public opinion and expert commentary).

³⁴³ See *infra* note 345 and accompanying text. For more regarding court actors' pandering before the television camera in the Simpson case, see *supra* notes 37, 250-53, 317 and accompanying text.

³⁴⁴ See *supra* note 330 and accompanying text (regarding the amount and complexity of evidence amassed in the Simpson case).

³⁴⁵ See Darden, *supra* note 248, at 322-24 (explaining the rationale that led to Darden's ill-fated decision to compel Simpson to try on the glove).

does not know the answer.³⁴⁶ The most plausible explanation for Darden's assumption of such a potentially costly risk must have been his desire to produce the case's magic bullet that would link Simpson to the crime scene and simultaneously bolster his professional and public image. Admittedly, Darden might have employed the same strategy regardless of the camera's presence. Nonetheless, one cannot ignore the enhanced presentational value of his strategy when performed before a vast television audience.

In reality, however, Darden's glove tactic failed.³⁴⁷ Fallout from the gamble included visceral criticism from those in Darden's own ranks³⁴⁸ and from the more discerning, less conspicuous critics who viewed the proceedings through the camera's lens.³⁴⁹ Darden's self-esteem and image plummeted. He subsequently admitted his desire and need to rehabilitate his tarnished public persona³⁵⁰ – a presentational move designed to rehabilitate his reputation.³⁵¹

Perhaps the Simpson trial participant whose conduct was most self-presentational in nature was Judge Lance Ito. From the trial's inception, he evinced his susceptibility to the scrutiny of a worldwide television audience – a significant peripheral cue.³⁵² Often

³⁴⁶ See *id.* at 326-27.

³⁴⁷ See *id.* at 325-27.

³⁴⁸ See *id.* at 326-27.

³⁴⁹ See *id.* at 326; *The Simpson Legacy/Los Angeles Times Special Report; Trial and Error: Focus Shifts to a Justice System and its Flaws; Weighing the Necessity of Change; How One Case May Reshape Criminal Justice in America; 'How I Would Have Won'*, *L.A. Times*, Oct. 8, 1995, at S7 (stating that Darden should not have asked Simpson to try on the glove); *Stephanie Simon & Bill Boyarsky, Jury Rapt as Simpson Tries Bloody Gloves*, *L.A. Times*, June 16, 1995, at A1 (indicating that asking Simpson to try on the glove likely crippled the prosecution).

³⁵⁰ See Darden, *supra* note 248, at 327-28. The failed glove tactic was not the only incident that compelled Darden to protect his public image. At a time when he was assigned to the case, some implied by innuendo that Mr. Darden, an African-American, had been placed on the trial primarily because of his race and the prosecution's perceived need to have an African American on their team. See *id.* at 171. Fueling this alleged strategic move was the composition of the trial's Los Angeles jury, which would have undoubtedly included a significant number of persons of color. See *id.* This strategy could have resulted in negative connotations related primarily to Darden's seeming disloyalty to the minority community. See *id.* at 172. Darden sought permission from Garcetti to debunk this perception and preserve his image by appealing to the black press. *Id.* Garcetti, however, vetoed this request. *Id.* at 173.

³⁵¹ See *supra* note 341 and accompanying text (explaining the need to save face as an element of self-presentation).

³⁵² See *supra* note 39 and accompanying text (providing the text of Judge Ito's pre-

described as star struck and media aware,³⁵³ Ito throughout the trial seemed plagued by his tacit concern for a positive appearance before the television audience. Most probative of this point was his protracted review of the photographs of a battered Nicole Brown Simpson, who allegedly suffered the injuries pictured in the photographs during altercations with Simpson. The prosecution sought to introduce into evidence many of these photos to prove Simpson's proclivity for domestic violence.³⁵⁴ The ultimate goal of this strategy was to reduce Simpson's public image, which, prior to the trial, had been quite positive.³⁵⁵ The prosecution also believed that proof of Simpson's status as a wife abuser substantiated the motive for murder.³⁵⁶

Many of the photographs were graphic, showing Brown Simpson's face and body bruised, bloody and swollen.³⁵⁷ Prior to their viewing by the jury, Judge Ito reviewed this evidence to determine which of the photographs should be introduced. This procedure ensured that the prejudicial nature of the photographs did not overshadow their probative value.³⁵⁸ Ordinarily this process is expeditious, with the judicial decision-maker speedily determining which photos should be introduced or excluded. Contrary to this customary handling, Judge Ito's review was protracted and intermina-

trial statement acknowledging that the world watched the proceedings). For more regarding peripheral cues, see *supra* note 324 and accompanying text.

³⁵³ See Darden, *supra* note 248, at 261 (noting Judge Ito's concern for maintaining media attention and remaining in the spotlight); Clark, *supra* note 342, at 147 (asserting that Judge Ito was overly consumed by his own press coverage throughout the trial); see also Allen, *supra* note 46 at 1011 (commenting that Judge Ito's subpar performance in the Simpson trial was due to "the glare of the media and the omnipresent cameras in the courtroom.").

³⁵⁴ See Why O.J. Simpson Won, *supra* note 38.

³⁵⁵ See *id.*; see also note 51 and accompanying text (commenting on Simpson's status as a celebrity).

³⁵⁶ See *supra* notes 72, 74 and accompanying text (referring to the strategic use of the domestic violence issue in the Simpson case).

³⁵⁷ See Darden, *supra* note 248, at 134 (describing the pictures of Nicole Brown Simpson as extremely bloody and brutal); Norma Meyer, Press Views Autopsy Photos the O.J. Jury Had to See, *S.D. Union-Trib.*, June 13, 1995, at A3 (indicating that crime scene photos, including those of the slain bodies of Nicole Simpson and Ronald Goldman, were graphic and horrifying).

³⁵⁸ Jonathan H. Levy, Note, Limiting Victim Impact Evidence and Argument After *Payne v. Tennessee*, 45 *Stan. L. Rev.* 1027, 1029 (1993) (stating that it is the court's responsibility to determine whether victim impact evidence is so prejudicial that its admission would violate due process rights).

ble.³⁵⁹ One could naturally opine that the enormity of the trial and its high-profile status led to the judge's exceedingly cautious approach. An equally plausible explanation however, might also include Ito's overriding preoccupation with image preservation before a large critical audience. His proclivity for error avoidance and pedantic decision-making comports with the tacit goal to maintain, if not heighten, esteem and reputation.³⁶⁰

Presentational theory might also explain, on a cognitive level, Judge Ito's general failure to control the trial's tempo.³⁶¹ Aside from various attorney squabbles during the trial,³⁶² perhaps the single most time-consuming aspect of the *Simpson* proceedings was the examination of numerous witnesses in the case.³⁶³ Testimonies of some witnesses lasted days, with questioning of those witnesses lacking focus or direction. Protracted testimony, under normal circumstances, is ripe for judicial intervention, as lawyers may utilize trial objections such as "question asked and answered."³⁶⁴ Moreover, the California Code of Evidence, a controlling authority in the *Simpson* case, encourages, if not requires, a judge to ensure the efficient and effective examination of witnesses to preserve the trial process.³⁶⁵ Judge Ito, a seasoned jurist, failed to use this readily available remedy. Employment of this judicial tool might have moved the trial at a more tenable speed.³⁶⁶

Like his protracted review of photographs of Nicole Brown

³⁵⁹ For a brief but cogent explanation of the trial judge's discretion to review photographs and physical evidence, see Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5214 (1978).

³⁶⁰ See *supra* notes 338-40 and accompanying text (explaining self-presentational theory and its relationship to image preservation).

³⁶¹ See *supra* notes 256-58 and accompanying text.

³⁶² See *supra* note 38 and accompanying text.

³⁶³ See Richtel, *supra* note 39, at 979-80 (stating there were 126 witnesses examined during the trial); see also *The Prosecution Rests*, L.A. Times, July 7, 1995, at A26 (summarizing that Mark Furhman testified March 9-16, Kato Kaelin testified March 21-28, Dennis Fung testified April 3-18, Robin Cotton testified May 8-15, and Dr. Lakshmanan Sathyavagiswaran testified June 2-15).

³⁶⁴ See Edwin A. Heafey, Jr., *California Trial Objections* 56 (G. Blandin Colburn & Curtis M. Karplus eds., 1967).

³⁶⁵ Cal. Evid. Code § 765(a) (West 1995) ("[t]he court shall exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment.").

³⁶⁶ Darden, *supra* note 248, at 249 (accusing Judge Ito of letting a three-month trial mutate into a "year-long joke" by "surrender[ing] the gavel to the defense").

Simpson,³⁶⁷ Ito's failure to control the trial seems logically related to his concern for a positive image before a vast television audience.³⁶⁸ Exercising judicial power in an overt and heavy-handed manner might have jeopardized that goal and led to negative public perceptions of the judge.

Paradoxically, Ito's attempt for a positive public image in the Simpson trial appeared to backfire. Post-trial critiques of his performance during the trial were harsh.³⁶⁹ Instead of cultivating a positive public image, his cautious efforts led to embarrassment and low esteem-results that were contrary to his tacit goals.

3. Residual Problems Associated with Self-Presentational Conduct

Judge Ito's plight underscores image preservation's inherent danger. The risk that emanates from this presentational strategy is that the actor, uncertain about the audience's expectations, makes calculated assumptions concerning the conduct necessary to appease that audience. Acting on these assumptions, she can employ strategies that are, at best, precarious and dubiously effective.³⁷⁰ These strategies remain high-risk, given the speculative nature of public expectation assessment. Despite her calculated efforts, the actor has no guarantee of success. In fact, the very tactics employed may elicit contrary results.³⁷¹ Yet the actor, motivated by

³⁶⁷ See *supra* notes 354-59 and accompanying text (describing Ito's review of photographs of a bruised Nicole Brown Simpson).

³⁶⁸ See *supra* notes 339-40 and accompanying text (providing an overview of self-presentational theory).

³⁶⁹ See Allen, *supra* note 46, at 1011-15 (describing Judge Ito's actions as a disgrace and identifying key problems with his performance); see also Darden, *supra* note 248, at 261-62 (criticizing Judge Ito for self-servingly exploiting media coverage of the trial by inviting celebrities into chambers, posing for pictures, and submitting to interviews); Clark, *supra* note 342, at 129-31 (opining that Judge Ito lacked good judgment and was not the right choice for the case). For other perspectives related to Judge Ito's behavior, see Richard E. Redding, Does Law Need an Analyst? Prospects for Lacanian Psychoanalysis in Law, 54 Wash. & Lee L. Rev. 1119, 1131 n.73 (1997) (reviewing David S. Caudill, *Lacan and the Subject of Law: Toward a Psychoanalytic Critical Legal Theory* (1997)).

³⁷⁰ For example, see *supra* notes 343-51 and accompanying text (discussing Christopher Darden's failed strategy to compel Simpson to try on the bloody glove); see also *supra* notes 354-60, 368 and accompanying text (relating Judge Ito's reluctance to control the tempo of the trial).

³⁷¹ See *supra* note 369 and accompanying text (noting that Judge Ito's reluctance to exercise control of the Simpson trial, a strategy arguably designed to heighten self image, resulted in harsh criticism rather than praise and high esteem).

the overpowering desire for a positive public image and high esteem, will continually engage in this exercise when confronted with a sizeable critical audience. This compulsion is natural, intuitive and, to a large extent, unavoidable.

Expectation assessment by the actor curiously induces a dependency on the very audience that she seeks to please. At the commencement of the assessment process, the actor often solicits information from segments of the audience to determine what strategies would be most effective. After implementing these strategies, the actor then canvasses the audience to determine the effectiveness of those strategies.³⁷² In the Simpson case, the judge and lawyers' behavior, which included appeals to the public opinion and interviews with the press, exemplifies this phenomenon to some extent.³⁷³ This cycle of dependence inevitably intensifies the actor's consciousness of audience scrutiny, and fuels continuation of this process throughout the trial's duration.³⁷⁴

4. Value of Social Facilitation as Normative Proof of Television's Impact

Social facilitation and its subset, self-presentational theory, evoke obvious criticism. These theoretical constructs are intuitive and possess little empirical data to substantiate their premises. Further, some studies performed have produced mixed or conflicting results. Certain experiments testing facilitative theories sometimes indicate that an invisible audience creates less interference than a visible audience.³⁷⁵

Yet the invisible audiences in generalized facilitation studies were neither vast nor critical. In fact, the audience's size and influence were not known to the actors. Like those studies specifically designed to test the camera's effect on court participants,³⁷⁶

³⁷² See Kevin Cole & Fred C. Zacharias, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System: The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. Cal. L. Rev. 1627, 1627-28 (1996) (arguing that the prosecution and defense used the press to their advantage throughout the trial to sway public opinion).

³⁷³ See *supra* notes 37, 253 and accompanying text.

³⁷⁴ See *id.*

³⁷⁵ See Pascal Huget et al., *Social Presence Effects in the Stroop Task: Further Evidence for an Attentional View of Social Facilitation*, 77 J. Personality & Soc. Psychol. 1016-17 (1999).

³⁷⁶ See *supra* notes 266-89 and accompanying text (citing studies which found either minimal or significant effects of cameras on trial participants).

the situations in social facilitation experiments generally fail to embody the contextual factors that typify the high-profile trial.³⁷⁷ This deficiency leaves their conclusions dubiously relevant to the high-profile case scenario. The television audience, which in the high-profile trial tends to be large, unique and omnipresent, can significantly impact proceedings. Studies to date cannot adequately document this reality.

Observe, too, that unlike those who are cast in experimental situations, participants in a high-profile trial often seek and receive continual feedback from the invisible audience.³⁷⁸ The milieu of the high-profile trial includes daily and seemingly unending reports of the participant's conduct and strategies.³⁷⁹ Key among this commentary are legal pundits who dissect each move and misstep of the participants.³⁸⁰ Consequently, the high-profile trial's behemoth and vocal television audience becomes a powerful and incomparable peripheral cue that general psychological experiments fail to replicate.

While social facilitation does not definitively prove television's negative impact on case proceedings, its theories substantiate the nexus between the television audience's presence and a participant's resultant performance. However, counterarguments to this premise naturally ensue. One may speculate that continual and consistent performance before an audience in a high-profile proceeding should increase a participant's comfort level and commensurately reduce negative effects caused by that audience's presence. In short, practice should make perfect. This argument falters, however, if one truly appreciates the distinctive nature of high-profile cases. These cases occur infrequently, with few opportunities for acclimatization. Moreover, each high-profile matter constitutes a unique situation that defies replication.³⁸¹ Thus, the experience gained in one high-profile matter would not necessarily

³⁷⁷ See *supra* notes 49-77 and accompanying text (explaining generally the features of high-profile cases).

³⁷⁸ See *supra* notes 372-74 and accompanying text (discussing the cycle of dependency related to self-presentation).

³⁷⁹ See Clark, *supra* note 342, at 149 (noting that press coverage was exhaustive, demonstrated by the reports of Clark's changing hairstyle); Darden, *supra* note 248, at 260 (stating that, during the Simpson trial, the newspapers rated individual performances and tallied points for actors in the trial).

³⁸⁰ See Darden, *supra* note 248, at 260-61.

³⁸¹ See *supra* notes 290 and accompanying text.

prepare an individual to cope with the difficulties faced in another case.

The conclusion from this analysis is evident. Within the context of the high-profile trial, theories of facilitation establish a cognitive link between participants' performance and the audience enlarged by the television camera. Decision-makers must appreciate this intuitive dynamic as they consider the propriety of televising the trials of these unique cases.

D. A Revised Standard of Proof Applicable to Television's Access to High-Profile Trials—The Probability Test

Discussion of anecdotal studies and theoretical constructs of facilitation theories suggests the need for an alternate methodology that fully assesses the normative effects of television cameras on high-profile trials. Any proposal must accommodate submission of contextual evidence that substantiates television's intuitive effects.

Because of the camera's natural influence on trial actors,³⁸² decision-makers should actualize the evidentiary standard required to establish possible prejudice from the broadcast of high-profile proceedings. When a trial is significantly high-profile³⁸³ and accordingly experiences media coverage similar to the frenzy that engulfed the Simpson matter,³⁸⁴ the burden of proof needed to limit broadcasts of that proceeding should shift from actual to probable prejudice—a probability test. This test requires decision-makers to address the following inquiry: *Does a case's profile and intense pre-trial publicity increase the probability that broadcasts of proceedings will impair trial efficacy?* This revised standard is not a rigidly structured formula designed to restrict television access. Rather, it functions to broaden consideration of information relevant to television's potential influences. The probability test permits introduction of evidence that demonstrates that a high-profile matter's contextual aberrations could lead to media frenzy, and the probable impact that frenzy may have on trial efficacy.³⁸⁵

³⁸² See supra note 245 and accompanying text.

³⁸³ See supra notes 49-77 and accompanying text.

³⁸⁴ See discussion infra Part II.A (depicting the media frenzy that surrounded the Simpson case).

³⁸⁵ For more on trial efficacy, see supra notes 27, 359, 361 and accompanying text

Note that this revised standard also compels detailed documentation of a case's high-profile features. It also facilitates admission of anecdotal and theoretical evidence of television's effects in the unique high-profile context. Implementation of this test creates a moderate, yet rebuttable, presumption that the broadcast of high-profile trials potentially diminishes the efficacy of those proceedings.³⁸⁶ Reduced efficacy in turn impacts fairness.

The probability test should pass constitutional muster given its limited applicability. Bear in mind that the test arises only in matters that are high-profile or, as Justice Harlan aptly describes in *Estes*, proceedings of "widespread public interest."³⁸⁷ Its lower standard of proof comports with *Chandler*, which tacitly endorses a more cautious approach to broadcasts of notorious trials like *Estes*.³⁸⁸ In fact, the Supreme Court in *Chandler* seems to endorse the case-by-case evaluation that the probability test promotes.³⁸⁹

The probability test differs from the reasonable likelihood test that the Supreme Court rejected in *Press Enterprise II*.³⁹⁰ In that case, California's test lowered the burden of proof needed to limit access by *all* press, including print medium, to preliminary hearings and proceedings in *all* criminal cases.³⁹¹ The probability test applies only to the very limited context of broadcast media access to high-profile trials. Any restraint on media from this test's implementation should be minimal at best. Criticism of this test

(noting the probable effect of the camera on such matters as the review of evidence and trial length).

³⁸⁶ See supra note 27 and accompanying text (explaining trial efficacy in terms of efficiency and fairness).

³⁸⁷ *Estes v. Texas*, 381 U.S. 532, 587 (1965).

³⁸⁸ *Chandler v. Florida*, 449 U.S. 560, 582 (1981); see also supra note 206 and accompanying text.

³⁸⁹ *Chandler*, 449 U.S. at 582; see also supra notes 208-12 (explaining Chief Justice Burger's endorsement in *Chandler* of Justice Harlan's lower proof standard applicable to notorious cases). For more regarding the possible impact of television on court proceedings, see discussion supra Part IV.A-C.

³⁹⁰ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

³⁹¹ *Id.* at 7-8, 13, 15; see also supra notes 154-57 (discussing fully the Court's rejection of the State of California's "reasonable likelihood test," used to limit general press access to preliminary hearings). For more detailed discussion of the presumptions against prior restraints attaching to the traditional press, see *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 563-75 (1980); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 556-62 (1976); supra notes 107-34 and accompanying text.

might relate to concerns relevant to unlawful prior restraints on broadcast media.³⁹² Its narrow applicability should, however, alleviate these fears.

A safeguard against the probability test's impermissible restraint against broadcast media relates to its narrow procedural applicability. Employment of the test arises primarily during attempts to limit television's broadcast of trials—high-profile trials. Decision-makers would seldom use the test to restrict broadcasts of other proceedings, e.g., preliminary hearings.³⁹³ Observe also that high-profile matters like *Hauptmann*, *Estes* and *Simpson* are rare; thus, use of the probability test, which only applies to high-profile proceedings, will also be rare. In fact, broadcast media should continue to enjoy access to many prominent cases, despite employment of the probability test.³⁹⁴

Another significant rejoinder to the charge that the test promotes improper restraints lies in its applicability to only the most graphic form of media coverage. The probability test pertains only to contemplated restrictions on broadcast media, while other forms of press, including the traditional print media, continue to enjoy unlimited access to high-profile trials. The test's limited applicability ensures minimal intrusion on public/press access rights and also protects defendants' right to a fair trial.³⁹⁵

The probability test applies primarily to defendants' attempts to restrict broadcast media. But should this test apply to efforts by the judge or parties other than the defendant who seek limitations on television's access to high-profile trials? Application of the test

³⁹² Note that references to prior restraints as they relate to broadcast access is not meant to suggest that the two are doctrinally synonymous. While questions of access and prior restraint function similarly, they have conceptual variances which make them distinct. See discussion *supra* III.C.2.

³⁹³ Arguably, the trial judge should have the discretion to utilize this less burdensome proof standard in circumstances that warrant its implementation. Courts in many states already provide the trial judge with broad discretion to limit television broadcasting in various case matters. See *supra* note 214 and accompanying text (noting the 47 states which provide for trial judge's discretion in the allowance of television broadcasting of various case proceedings).

³⁹⁴ For example, television broadcast the relatively notorious trials of Ray Lewis, Louise Woodward and Mary Kay LeTourneau. See *supra* notes 235-39 and accompanying text (reexamining why broadcasts of these high profile trials met little opposition).

³⁹⁵ See discussion *supra* Part III for a thorough examination of the Supreme Court's continual attempt to balance Sixth Amendment fair trial rights with First Amendment implied rights of public access to trials.

to the requests of those other than the defendant becomes a legally precarious exercise. If one views fair trial rights as personally vested in the defendant,³⁹⁶ then the defendant's discomfort with the camera's influence on the trial constitutes the only relevant determinant of broadcast media's right to access. The Supreme Court's position in *Waller*, which apparently eschews closures over the defendant's objection, seems to support this narrow vesting of fair trial rights.³⁹⁷ Without the defendant's concurrence, objections to television access must rely solely on the proponent's interests, which, if identifiable, seem minuscule in comparison to press access rights guaranteed under the First Amendment.³⁹⁸

But realistic preservation of the fair trial must accept the trial judge as the most competent arbiter of courtroom decorum and order. The judge's independent assessment of trial fairness becomes, in effect, a valid paternalistic exercise. The Court's decision in *Chandler*, which endorsed Florida's experimental program that granted trial judges significant discretion over television access in trial courts, tacitly endorsed this position.³⁹⁹ Application of the probability test to a trial judge's independent evaluation of broadcast access to high-profile trials thus becomes a plausible, if not justifiable option. The judge's decision regarding the need to restrict television's access to certain proceedings also requires a degree of deference. Many state courts already accord such deference, authorizing judges to decide the propriety of television access to case proceedings.⁴⁰⁰

³⁹⁶ See supra notes 95-104 and accompanying text (discussing the historical and fundamental constructs of public trial rights); see also *Gannett Co. v. DePasquale*, 443 U.S. 368, 380 (1979) (stating that the public trial is for the benefit of the defendant).

³⁹⁷ *Waller v. Georgia*, 443 U.S. 39 (1984) (rejecting the closure of a defendant's preliminary hearing over his objections); see also supra notes 147-50 and accompanying text (discussing the Court's rationale in striking down a lower court order closing defendant's preliminary hearing to the press).

³⁹⁸ See supra notes 121-50 and accompanying text (discussing *Richmond Newspapers*, *Globe Newspaper Company*, and *Press-Enterprise I*, and those decisions' articulation of the implied First Amendment right of public access to criminal trials); see also *Chandler*, 449 U.S. at 566 (confirming the judge in the Florida program "has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial.").

³⁹⁹ *Chandler*, 449 U.S. at 566 (permitting states, like Florida, to experiment with television cameras in courts). For a discussion of the Supreme Court's tacit endorsement of trial judge discretion in these matters, see supra notes 208-12 and accompanying text.

⁴⁰⁰ The analysis here only addresses application of the probability test to judges' de-

The trial judge's function to ensure trial fairness remains a critical variable in any bid to maintain trial efficacy. The judge is uniquely positioned to evaluate the insidious nature of media frenzy and its potential impact on court proceedings. Some might argue self-interest and compromised objectivity caused by the camera's glare should temper confidence in the judge's decision.⁴⁰¹ However, the stringent duty to maintain trial fairness⁴⁰² should encourage honest decision-making on this issue.

Utilization of the probability test encourages more exhaustive examination of evidence that documents television's impact on court participants and proceedings. This revised standard functions to elicit relevant information—not bar court access. The probability test ultimately promotes trial efficacy that also promotes a fair trial.

V. CONCLUSION

Perhaps the most functional legacy of the Simpson criminal case is the legal establishment's continual dialogue regarding the effects of television broadcasts of case proceedings. To produce any tangible benefit however, this discussion must extend beyond the customary abstractions based in free speech and public trial entitlements.

Maintenance of the true fair trial in a high-profile matter requires recognition that the defendant's rights intersect precariously with the interest *and actions* of court participants. It also recognizes that the television camera influences, to some degree, the behavior of court actors. Another scholar has rhetorically queried: "Is it unreasonable to suggest that if people alter their physical ap-

termination of broadcast access to high-profile trials. Given its decision in *Waller*, the Supreme Court would likely reject the test's applicability to parties (other than the defendant) who seek to bar cameras in the courtroom. Cf. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 12-15 (1986) (rejecting a lower proof standard applied to defendant's motion to bar all press from all case proceedings).

⁴⁰¹ Judge Ito's objectivity and judgment in the Simpson case were suspect. See *supra* notes 352-53 and accompanying text.

⁴⁰² *Estes*, 381 U.S. at 548 (1965) (noting the judge's difficult duty to maintain trial fairness); see also *supra* note 257 and accompanying text (indicating the judge's responsibility to ensure trial efficiency).

pearance because of the camera, they might alter their words?"⁴⁰³

The conventional wisdom that media scrutiny leads primarily to an informed public and less biased decision-maker⁴⁰⁴ masks a stark reality: Broadcast coverage of high-profile trials impacts court proceedings and also fails to encourage court participants to appreciate, and therefore compensate for, behavioral changes induced by intense media scrutiny.⁴⁰⁵

Social scientists, through social facilitation theories, confirm television's natural effect on performers. Court participants then, remain subject to the camera's influences, which in turn potentially impact trial efficiency and fairness. As a consequence of this dynamic, decision-makers must carefully consider a case's high-profile proclivities and penchant for intense publicity to determine television's appropriate function in a proceeding. Arguments concerning motions to restrict broadcast access to trial proceedings provide the perfect forum for this inquiry.

Some may scoff at social facilitation's exposure of the television camera's effect. This unfortunate skepticism arises because facilitation constitutes theory rather than empirical fact—but such criticism is intellectually disingenuous. If one accepts the largely theoretical policies (e.g., educative effect, bias reduction, public confidence) that undergird television's access to court trials, then constructs of social facilitation should garner similar acceptance.

This Article does not seek to create a presumptive restriction on broadcasters. It hopes to provide a more prudent balance between broadcast access rights and the defendant's right to a fair trial in the high-profile setting. It also aims to foster the broader, societal goals of judicial economy, process integrity and public confidence in the judicial system.

⁴⁰³ Geis & Bienen, *supra* note 10, at 198 (quoting a commentator's critique of television's influences on the Simpson trial participants).

⁴⁰⁴ See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (noting the significance of trial openness which reduces the chance of undetected deviation and enhances the appearance of fairness and impartiality); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (articulating the importance of public trials to ensure proper and unbiased judgments by discouraging perjury, misconduct, and secretive decisions).

⁴⁰⁵ See *supra* note 49 and accompanying text (referencing Peter Arenella's profound observation that television, with its cameras capturing court moment during a trial, fails to alert court actors to inevitable changes in their conduct).

The majority in *Estes* acknowledged that “the chief function of our judicial machinery is to ascertain the truth.”⁴⁰⁶ More thoughtful examination of television’s influences on high-profile trials does nothing more than further this fundamental construct.

⁴⁰⁶ *Estes v. Texas*, 381 U.S. 532, 544 (1965).