

Essays

THE APPEARANCE OF JUSTICE: COURT TV, CONVENTIONAL TELEVISION, AND PUBLIC UNDERSTANDING OF THE CRIMINAL JUSTICE SYSTEM*

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I. INTRODUCTION

In his book *Homicide*,¹ David Simon writes of the year he spent with the homicide investigators of the Baltimore police department. In the course of the book, Simon laments the damage to the jury system caused by television.² "More than anything else, it's the cathode-ray tube—not the prosecutor, not the defense attorney, certainly not the evidence—that gives a Baltimore juror his mindset. Television ensures that jurors are empaneled with ridiculous expectations."³ Police recover fingerprints in ten percent of the cases, and laboratory work rarely makes a case, says Simon; nevertheless, a juror "wants to see hairs and fibers and shoe prints and every other shard of science gleaned from *Hawaii Five-O* reruns."⁴ To give a juror "the utter certainty about crime and culpability that pervades television is impossible."⁵ The result is a jury composed of "a dozen brain-deads telling each other that the defendant seems like a nice, quiet young man, then laughing at the prosecutor's choice of tie."⁶

In contrast, lawyers involved in the criminal justice system often become blind to anything but the intricacies of procedure.⁷ Apply fair rules impartially, their thinking goes, and just results will follow. The system may seem ungainly and weighted down with regulations and protocol, but lawyers believe these

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1. DAVID SIMON, *HOMICIDE* (1990).

2. *Id.* at 456.

3. *Id.*

4. *Id.*

5. *Id.* at 456-57.

6. *Id.* at 457.

7. Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1603 (1989) (in contrast with the general public, lawyers think of procedure and due process as "the very essence of fairness and the rule of law").

procedures will lead to an equitable outcome.

This legalistic point of view disregards an important truth illustrated by Simon's "brain-deads": The appearance of justice, accurate or not, may be more important than justice itself.⁸ This idea is especially significant today, when popular culture virtually creates the picture people have of criminal justice. Because few individuals have direct experience with the system, the overwhelming number of citizens get their knowledge of the courts and crime through the media. This information comes through television in the form of news,⁹ entertainment programming with crime-oriented themes,¹⁰ and so-called "infotainment."¹¹

The information television presents about the criminal justice system is often misleading and frequently wrong.¹² The implications of this inaccuracy go far beyond concerns with legal precision in entertainment.¹³ The courts and the criminal justice system are public institutions. In order for our democracy to function, citizens must be able to hold their institutions accountable.¹⁴ Accountability requires accurate information. Erroneous information in popular culture may damage the ability to make correct assessments of institutions and policies, and may even affect the law itself.¹⁵ Thus the appearance of the criminal justice system on television may profoundly affect what happens within that system.

In July of 1991,¹⁶ a new portrayal of the judicial system entered millions of American homes: The Courtroom Television Network. This cable television network, known as Court TV, offers continuous live coverage of notable trials from all over the nation, most of them criminal. Despite initial doubts concerning viewer interest,¹⁷ Court TV's coverage of the trial of William Kennedy Smith on rape charges in December 1991 brought the network national publicity.¹⁸ After more than two years on the air, Court TV continues to present live trials, and also offers trial highlights and occasional features.¹⁹

Many²⁰ have attempted to differentiate Court TV from conventional

8. *Id.* at 1604-05 (the public takes a result-oriented view of law; legal institutions are legitimate, in this sense, only if they are *perceived* that way).

9. *See infra* notes 209-13 and accompanying text.

10. *See infra* notes 182-208 and accompanying text.

11. *See infra* notes 214-20 and accompanying text.

12. *See infra* notes 221-47 and accompanying text.

13. *See infra* notes 221-47 and accompanying text.

14. *See infra* notes 28-39 and accompanying text.

15. *See infra* notes 36-39, 77-86 and accompanying text.

16. Richard Zoglin, *Justice Faces A Screen Test*, TIME, June 17, 1991, at 62 (Court TV, "a judicial version of CNN," begins broadcasts July 1, 1991).

17. E.g., Joshua Lazerson, *Court TV: Can It Increase Understanding of Law and the Legal Process?*, 76 JUDICATURE 57 (1992) (predicting that the novelty of Court TV "will wear off quickly").

18. E.g., *Nightline* (ABC television broadcast, Dec. 10, 1991) (live and taped interview segments with, *inter alia*, Steven Brill, founder of Court TV, concerning network's coverage of William Kennedy Smith's rape trial); Don Kowet, *Courting a Growing Audience on Cable*, WASH. TIMES, Dec. 12, 1991, at E1 (Court TV may be "the biggest beneficiary of the Palm Beach rape trial").

19. *See infra* notes 134-51 and accompanying text.

20. *See, e.g., Nightline*, *supra* note 18 (Court TV is a superior vehicle for trial coverage); Joshua Lazerson, *supra* note 17, at 57, 100 (unlike traditional television, "Court TV guarantees no neat endings, no resolution of difficult legal or moral questions between the beginnings and ends of hours"); Dottie Enrico, *Will Court TV Appeal? The Verdict's Not In Yet*,

television's portrayal of the criminal justice system. Court TV presents virtually unedited versions of trials; this allows the public to observe the entire judicial process. No television producer selects a thirty second slice of the day's proceedings, based on the potential to entertain or boost ratings. The viewer can "attend" the whole trial. Thus Court TV makes the criminal courts accessible to virtually anyone with cable television. The network also presents experts to interpret events.²¹ Presumably, this may make for exactly the informed accountability our democracy needs, and will also encourage and enrich the public debate on the broader issues raised by the trials presented.²² This addition of Court TV to popular culture might mean, if nothing else, that the appearance of justice would more closely resemble reality.

This essay compares the portrayal of the criminal justice system²³ presented by conventional television²⁴ and by Court TV.²⁵ Court TV's cham-

NEWSDAY, Dec. 16, 1991, at 35 (critics "full of praise" for Court TV's unusual coverage); Steven Brill, *How the Willie Smith Show Changed America*, AM. LAW., Jan.-Feb. 1992, at 3, 101 (differentiating Court TV from traditional presentation of trials by conventional television).

21. See *infra* notes 163-65 and accompanying text.

22. E.g., Brill, *supra* note 20, at 101 (televising of Smith rape case highlighted issue of acquaintance rape, stimulating public discussion of the issue).

23. In this essay, I will focus on the criminal justice system, rather than the justice system as a whole, for two reasons. First, the criminal justice system regularly presents important social issues for debate. Acquaintance rape (the William Kennedy Smith case), battered woman's syndrome and domestic violence (the Betty Broderick case), and the insanity defense (the Jeffrey Dahmer case) are just a few of the issues that have surfaced recently through criminal trials. Second, to the extent that television has any interest in the justice system, it almost always focuses on criminal cases. By "criminal justice system," I mean the courts that handle criminal cases at all levels, the police, and the judges, attorneys, defendants, witnesses and others who act within the system.

24. I will use the phrase "conventional television" to describe the combination of entertainment and informational programming offered by television since its beginnings, whether in cable or broadcast format. See, e.g., Steven Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes*, 42 U. MIAMI L. REV. 229, 230 (1987) (examines prime time television's "preoccupation with the law and what it means," arguing that crime-oriented television drama has changed "the public's perception of lawyers, the police, and the legal system").

25. Of course, media other than television present the public with information about the criminal justice system. The amount of this information in newspapers, books, and movies is, of course, huge. E.g., Anthony Chase, *Lawyers and Popular Culture: A Review of Mass Media Portrayals of American Attorneys*, 1986 AM. B. FOUND. RES. J. 281 (reviewing portrayals of lawyers in popular books, movies, and television); Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 WIS. L. REV. 527 [hereinafter *Toward a Legal Theory*] (the images of law and lawyers in popular cultural materials are important subjects for scholarly study); Stewart Macaulay, *Images of Law in Everyday Life: The Lessons of School, Entertainment, and Spectator Sports*, 21 LAW & SOC'Y L. REV. 185 (1987) (law as portrayed through education, mass media entertainment, and sports); Robert C. Post, *On the Popular Image of the Lawyer: Reflections in a Dark Glass*, 75 CAL. L. REV. 379 (1987) (reviewing novels, movies, and philosophy); Rhoda Estep & Patrick T. McDonald, *Crime in the Afternoon: Murder and Robbery on Soap Operas*, 29 J. BROADCASTING & ELECTRONIC MEDIA 323 (1985). The fact is, however, that Americans get most of their information from television, not other sources. Elliot E. Slotnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (most of the public reports that television is its main or only source of information and news). By 1978, the average American spent over twenty-eight hours each week watching television. See George Traub, *Who Watches Television—and Why*, CHANNELS, Jan.-Feb. 1985, at 27; see also FRANK MANKIEWCZ & JOEL L. SWERDLOW, REMOTE CONTROL 254 (1978). Quite simply, no other medium can match television for its pervasiveness. Ronald K. L. Collins & David M. Skover, *Pissing in the Snow: A Cultural Approach to the First Amendment*, 45 STAN. L. REV. 783, 785 (reviewing JAMES B. TWITCHELL, CARNIVAL CULTURE: THE TRASHING OF TASTE IN AMERICA (1992)) ("TV talk is the talk of our times So much of

pions are correct: The network presents a more accurate and comprehensive picture of what happens at a criminal trial than does other television news and entertainment programming. The idea of presenting trials intact, rather than in the form of either short news stories, documentaries, or entertainment programs,²⁶ allows the viewer to see the event almost²⁷ unfiltered. The viewer can draw conclusions without the mediating role of editors or script writers.

Even so, Court TV's portrayal of criminal justice has its own unique flaws; if Court TV does not deceive the public in the same ways conventional television does, it may still mislead in its own fashion. First, Court TV focuses almost exclusively on trials. In fact, trials are atypical events in the criminal justice system; the full-fledged, due process-laden adjudication of facts in front of a jury has become an anomaly. In reality, courts resolve most criminal cases without an adversarial contest. Second, while Court TV may offer a complete picture of the trial, the trial exists abstracted from the rest of the system. Adjudication occupies only one point on the continuum of the criminal process, but the rest of the process is invisible on Court TV. Third, Court TV selects the trials it televises for their appeal to viewers. To the extent that these cases contain a larger than normal dose of weighty, topical issues, involve celebrities, lascivious detail, or grotesque or macabre trivia, the public receives a distorted image. In sum, while it surely represents an improvement over conventional television crime fare, Court TV alone does not supply viewers with a completely accurate picture of the system.

Section II will begin this essay by discussing the importance of the appearance of justice. Section III describes Court TV—its historical context, founding, and programming. Section IV explores the portrayal of the criminal justice system in conventional television programming, and lays the groundwork for a comparison of Court TV and conventional television. Section V shows that Court TV does a far better job of depicting the criminal justice system than conventional television does. As section VI makes clear, however, Court TV presents problems of its own. Section VII proposes a solution to these difficulties.

II. THE IMPORTANCE OF THE APPEARANCE OF JUSTICE

Why is the appearance of justice important? The answer might seem too obvious or too trivial. It is neither. In fact, it is so significant that there are mechanisms, rules, and procedures designed into our legal institutions to insure that our courts and laws not only are just, but that they also appear just. Many are so basic to our assumptions that we almost forget that they exist. Since most people have little or no personal experience with the criminal justice system,

who we are, what we think, how we express ourselves, and how we perceive and react to our world are tied to television.”). The other reason I focus on television is that Court TV is television, too. Therefore, a comparison between the presentation of ideas and information about criminal justice on conventional television and Court TV would seem more valid, since they share the same technology, accessibility to the public, and other qualities, than would a comparison between Court TV and other popular cultural offerings.

I do not intend to present television criticism of Court TV or conventional television. Rather, I wish to compare conventional television and Court TV as communicators of information about the criminal justice system.

26. See *infra* notes 182–220 and accompanying text.

27. I use the word “almost” because of Court TV’s use of experts, edited highlights, and feature programs. See *infra* notes 136–37, 143–51, 163–65 and accompanying text.

they know only the system's appearance.

Therefore, this discussion will approach the appearance of justice in several ways. First, the accurate public perception of the system is basic to our form of government and to confidence in its laws. This point will be illustrated with examples. Second, whatever the importance of the appearance of the criminal justice system in the past, the pervasive portrayal of crime and associated issues on television magnifies the significance of such perceptions. Third, the appearance of justice in popular culture may influence legal culture, and in turn the law itself; thus appearance may have substantive impact upon laws and legal institutions.

A. Democracy and Information: Accountability, Legitimacy, and Confidence

In a democracy,²⁸ political leaders govern as representatives of the citizens who elect them.²⁹ Voters cast ballots for a candidate because he or she best represents that voter's interests. The ability to make this choice assumes that the voter has enough information to make a rational choice between candidates.³⁰ Only by knowing a candidate's positions, as well as the institutional environment in which the candidate will work, can voters make informed decisions.³¹

These same assumptions apply to all of our governmental systems and institutions. For example, if the public perceives that Congress performs poorly and wants this to change—perhaps by doing away with perquisites and privileges—voters try to elect candidates who will do this.³² Thus the availability of accurate information necessary for intelligent voting translates into something more—accountability for our institutions. To the extent that we know how our institutions do and do not work, we can make better judgments about them and about what actions citizens and public officials might take to

28. For a definition of democracy, we may rely on Professor Ely: "[R]ule in accord with the consent of a majority of those governed," with certain important qualifications, represents the core concept of American democracy. JOHN HART ELY, *DEMOCRACY AND DISTRUST* 7 (1980).

29. *Id.* at 5-7.

30. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 14-15 (1975) ("Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential"); *Brown v. Hartlage*, 456 U.S. 45, 53 (1982) ("The free exchange of ideas provides special vitality to the process traditionally at the heart of American constitutional democracy—the political campaign."); Peter Clarke & Eric Fredin, *Newspapers, Television, and Political Reasoning*, 1978 PUB. OPINION Q. 143 (the hope that "news media remain free so they may educate the public in making political choices" supports the theory of representative government).

31. In addition to the availability of information, this statement also assumes that, in fact, voters make rational and informed choices. Clarke & Fredin, *supra* note 30, at 145 (in survey exploring reasons for choice of candidate for senator, many have no choice or can articulate no reasons for their choice; others present only the most "discouragingly conventional" reasons for their choice; only "[a] tiny minority" do any better).

32. Americans did this in a big way during the 1992 election, electing freshman representatives intent on reforming Congress. Maureen Dowd, *Revenge of the Righteous: Reform Comes to Capitol*, N.Y. TIMES, Mar. 16, 1993, at A1 (according to some members, the U.S. Congress of 1993 "is shaping up to be the political version of 'The Revenge of the Nerds'" in its almost overdone reformist outlook).

change them.³³

These principles work the same way for institutions in the criminal justice system. While judges may be elected or appointed and preside over only their individual courts and cases (and not the whole system), voters can have a significant impact on how the justice system works. For example, should people feel judges ought to sentence offenders more severely, they can elect representatives who will enact laws to accomplish this. If curtailing domestic violence is a high priority, people can vote for representatives who will pass laws that increase penalties or that mandate that police arrest perpetrators.

Of course, voting is only one way that concerned citizens can attain such goals. They could, for example, orchestrate or participate in lobbying campaigns, or bring issues to the attention of the press. Whichever method is used, one principle remains the same: The availability of accurate information will affect—some would say even govern—the framing of the issues and set the agenda for public debate.³⁴

Thus the appearance of justice should concern anyone interested in public accountability for the criminal justice system. If the portrayal of the system in the media is inaccurate, it may lead the public to inaccurate perceptions and judgments. If these judgments lead to policy changes in an attempt to “fix” perceived weaknesses, damage may result instead of improvement. In other words, how the system looks may affect what happens to it and within it.

Further, the appearance of justice will affect public perception of the system’s legitimacy. A system consistently seen as unjust will eventually lose the allegiance of its citizens. If people perceive the courts as less than fair decision makers, the moral force courts depend on to ensure compliance with decisions they make diminishes.³⁵

As negative perceptions about justice grow, so does the danger they pose. Ours is a government of laws, not people.³⁶ This principle represents part of the bedrock of our legal system. Put in the context of the criminal justice system, the idea is that a person may only be punished for violations of the law, no matter how reprehensible the individual’s acts.³⁷ The same laws must govern

33. *E.g.*, *Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment protects political expression “to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *Buckley*, 424 U.S. at 14–15 (ability of citizens to make informed electoral changes “is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation”).

34. *See, e.g.*, *Clarke & Fredin*, *supra* note 30, at 144 (“Agenda setting by media is widely recognized now”), and materials cited therein.

35. For example, in the aftermath of the acquittal of four white Los Angeles police officers accused in state court of using excessive force against black motorist Rodney King, many people expressed the feeling that the trial was a prototypical example of the fact that blacks could not expect justice at the hands of the white-run, racist criminal justice system. This perception grew in the public’s mind as four black men accused of beating a white man nearly to death during the riots following the acquittal were treated differently than the white police officers. Seth Mydans, *The Courts On Trial*, N.Y. TIMES, Apr. 8, 1993, at A14 (King verdict has resulted in perception of the justice system as racist, and trial of four black men accused of beating white man, while factually distinct, has strengthened this perception); *see also* Friedman, *supra* note 7, at 1603 (public values fair results over fair procedure).

36. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

37. HERBERT PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 79–80 (1968); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 25 (1987) (the idea that “no conduct is criminal and punishable unless and until the legislature makes the conduct a crime” is called “the

all individual cases, whether the defendant is rich or poor. If negative misperceptions about the justice system abound, people understandably lose confidence in the system's ability to deal fairly with them.³⁸ Conversely, damage can also result from erroneous positive perceptions. That is, if people think that the criminal justice system works well and fairly when it does not, they may fail to recognize the need for critically important changes or reform.³⁹

Examples abound which illustrate the significance of the appearance of justice. They are old and new, amusing and serious, narrow archetypes and whole schools of thought. Four examples follow: rules of ethics for lawyers, rules of ethics for judges, an old—but funny—story, and the writings of Jerome Frank on judges and their trappings.

1. Rules of Ethics for Lawyers

The Model Code of Professional Responsibility⁴⁰ requires that an attorney not take certain inappropriate actions.⁴¹ An attorney must also refrain from acts that only *look* inappropriate. Canon 9 commands directly that attorneys avoid even the "appearance of impropriety."⁴² In other words, lawyers must not only follow the rules; they must also conduct themselves so that no one will have reason to question the principles or the integrity of either themselves or of the profession. The phrase "appearance of impropriety" "evoke[s] the potential erosion of confidence in the profession that may occur if its members are seen in situations that carry the potential for improper conduct

principle of legality").

38. See, e.g., Mydans, *supra* note 35, at A7 (acquittals in state trial of police officers accused of Beating Rodney King shook confidence in criminal justice system); see also GEORGE P. FLETCHER, A CRIME OF SELF DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 2-3 (1988) (shooting of four black teenagers, in the course of an alleged mugging on the New York subway, made man eventually accused of shooting into an appealing public figure). The Goetz case, and the elevation of Goetz to the status of hero for many people, demonstrate that if people see the courts as ineffective or unwilling to impose just punishment on wrongdoers, self help and vigilantism, which the courts were meant to replace, becomes more attractive.

39. See David A. Harris, *Justice Rationed in Pursuit of Efficiency: De Novo Trials in the Criminal Courts*, 24 CONN. L. REV. 381, 383, 423 n.242 (de novo trial courts resist reform because, among other things, they remain invisible to the public most of the time).

40. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1983). For each provision of the Model Code mentioned, there are often parallel provisions in the Model Rules of Professional Conduct, see *infra* note 44 and accompanying text, which is more recent.

41. Among these are revealing client confidences, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1983), acting as counsel when the lawyer has become a witness, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-102 (1983), and communicating directly with an adverse party the lawyer knows to be represented without permission, MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104 (1983). There are, of course, many other prohibitions.

42. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 9 (1983) ("A lawyer should avoid even the appearance of professional impropriety"). The Model Rules of Professional Conduct, *infra* note 44, contain no provisions which are exactly equivalent. The drafters of the Model Rules felt that the "appearance of impropriety" standard was too vague; however, there is still general agreement that maintaining the integrity of the profession is critical. This idea is, in fact, part and parcel of a number of the Model Rules' provisions. See GEOFFREY C. HAZARD & WILLIAM H. HODES, THE LAW OF LAWYERING (1992); see also *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671-72 (Ark. 1990) ("The fact that Canon 9 is not in the Model Rules does not mean that lawyers no longer have to avoid the appearance of impropriety [T]he principle [of Canon 9 still] applies because its meaning pervades the Rules and embodies their spirit.").

even if in particular cases there is no actual misconduct."⁴³

This same idea anchors other rules governing lawyers' ethics. For example, the Model Rules of Professional Conduct⁴⁴ state that lawyers "should demonstrate respect for the legal system and for those who serve it."⁴⁵ Even if challenge to official acts is the signal quality of the adversary system,⁴⁶ "it is also a lawyer's duty to uphold legal process."⁴⁷ The message is clear: The need for public respect for the profession and the law requires that no reason emerge to question the integrity of the system.

2. Rules of Ethics for Judges

As central figures in the legal system, judges play a particularly important role in the public perception of justice. Therefore it does not seem surprising that the Model Code of Judicial Conduct⁴⁸ contains a number of commands designed to safeguard the appearance of justice.

In its preamble, the Code begins by characterizing the judge as the very "symbol of government under the rule of law."⁴⁹ Because "[o]ur legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us,"⁵⁰ judges, as the embodiment of the process, must appear above reproach at all times if the system itself and the rule of law are to receive respect.⁵¹ The text of the Code reinforces this idea. Canon 1 explicitly connects the ideas of justice and an honorable and independent judiciary; it requires that judges act at all times in conformance with the highest standards "so that the integrity and independence of the judiciary will be preserved."⁵² Canon 2 explicitly states the importance of the appearance of justice: "A judge should avoid impropriety *and the appearance of impropriety* in all his activities."⁵³ Section 2A and the commentary following Canon 2 make the same connection between the public's observation of judges and its perception of the integrity of the judicial system: "Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges."⁵⁴ In other words, Canon 2 concerns not just actions but impressions of judges, all of which effect the way citizens perceive the system itself.

Canon 3 continues this theme, when it mandates that "[a] judge should perform the duties of his office impartially and diligently."⁵⁵ Section 3E of Canon 3 puts this idea in tangible form in its discussion of judicial self-disqualification. While it contains a noninclusive list of situations in which

43. ANDREW L. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 54 (2d ed. 1984) (emphasis added).

44. MODEL RULES OF PROFESSIONAL CONDUCT (1991).

45. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1991).

46. See, e.g., REPORT OF THE ATTORNEY GENERAL'S COMM. ON POVERTY AND THE ADMINISTRATION OF JUSTICE 11 (1963).

47. MODEL RULES OF PROFESSIONAL CONDUCT Preamble (1991).

48. MODEL CODE OF JUDICIAL CONDUCT (1990).

49. MODEL CODE OF JUDICIAL CONDUCT Preamble (1990).

50. *Id.*

51. *Id.*

52. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1990).

53. MODEL CODE OF JUDICIAL CONDUCT Canon 2 (1990) (emphasis added).

54. MODEL CODE OF JUDICIAL CONDUCT Canon 2, § A, commentary (1990).

55. MODEL CODE OF JUDICIAL CONDUCT Canon 3 (1990).

disqualification is appropriate,⁵⁶ Section 3E frames the idea not in terms of whether a given situation demonstrates impartiality conclusively, but rather asks whether the court's impartiality "might reasonably be questioned."⁵⁷ Again, the Code requires not only correct conduct; it mandates that conduct *appear* proper.

Canon 4, which regulates judges' extra-judicial activities,⁵⁸ mandates that such activities not conflict with judicial obligations. Consistent with the canons discussed above, it does not stop with actions; rather, it highlights the importance of the appearance of the system by prohibiting any actions that might "cast reasonable doubt" on the judge's impartiality or "demean the judicial office."⁵⁹ These include jokes that demean on the basis of race, sex, religion, national origin, and other similar categories.⁶⁰

3. Rabelais' Judge Bridlegoose

Students of the works of Francois Rabelais⁶¹ have no doubt come across the story of Judge Bridlegoose.⁶² After Bridlegoose had served for many years as a respected judge, earning great popular admiration for his wisdom and skill, the authorities put him on trial when they discovered his method of deciding cases. Having heard the arguments and reviewed the pleadings and papers of the parties and their counsel, Bridlegoose would retire to the privacy of his chambers and cast dice, one on behalf of each party; the party whose die showed the greatest number won the case.⁶³ Bridlegoose did not rush the process; rather he waited, sometimes an extended period of time, to pronounce his "decision." All the while he received painstakingly prepared and expensive pleadings.⁶⁴

Bridlegoose explains to his accusers that he uses this method for several reasons. First, Bridlegoose says, formality is necessary if the process and result are to be perceived as having value.⁶⁵ Second, he casts the dice for exercise.⁶⁶

56. MODEL CODE OF JUDICIAL CONDUCT § 3E (1990).

57. *Id.*

58. MODEL CODE OF JUDICIAL CONDUCT Canon 4 (1990) ("A judge shall so conduct the judge's extra-judicial activities as to minimize the risk of conflict with judicial obligations.").

59. MODEL CODE OF JUDICIAL CONDUCT §§ 4A(1)-(2) (1990).

60. MODEL CODE OF JUDICIAL CONDUCT Canon 4, commentary ("Expressions which may [cast reasonable doubt on the judge's capacity to act impartially] include jokes or other remarks demeaning individuals on the basis of their race, sex, religion, national origin, disability, age, sexual orientation or socio-economic status.").

61. FRANCOIS RABELAIS, *THE COMPLETE WORKS OF FRANCOIS RABELAIS* (Donald M. Frame trans., 1992); *THE PORTABLE RABELAIS* (Samuel Putnam ed. and trans., 1974).

62. The Frame translation refers to Bridlegoose as Bridoye. RABELAIS, *supra* note 61, at 375-90.

63. *THE PORTABLE RABELAIS*, *supra* note 61, at 493-95. Incredible as it may seem, a judge in New York City made use of a technique similar to Bridlegoose's casting of die in 1982. William G. Blair, *Flip of Coin Decides Jail Term in a Manhattan Criminal Case*, N.Y. TIMES, Feb. 2, 1982, at A1 (judge decided whether defendant received twenty or thirty day sentence by coin flip). The judge later resigned from the bench because of the furor stemming from this and other conduct (including deciding the credibility of witnesses in a criminal case by a show of hands by courtroom spectators) and was barred from ever serving as a judge in New York again. E.R. Shipp, *Freiss Is Barred From Ever Being New York Judge*, N.Y. TIMES, Apr. 7, 1983, at B3.

64. *THE PORTABLE RABELAIS*, *supra* note 61, at 497.

65. *Id.* In fact, Bridlegoose says that formality is the value itself, and that it destroys "materialities and substance." Throughout the story, Bridlegoose's distinctive manner of explaining his methods—his constant overuse of humorously inappropriate Latin maxims,

Third, the passage of time is itself a net good, since it allows the case to "ripen" and exhaust the parties, so that the loser will be less likely to take further action after his loss.⁶⁷ In the end, Bridlegoose is pardoned not only because of his age and simple mindedness, but because each of the judges trying him have themselves upheld all of his decisions.⁶⁸

The idea of formality as a critical part of the legal process is what makes Bridlegoose's story recognizable even today as a sharp parody of the justice system. For purposes of this discussion, the point is not that Bridlegoose's decisions were or were not incorrect, but that he was respected because they *appeared* to be correct. Bridlegoose's decrees had legitimacy because of their form and appearance, regardless of how they were reached.

Of course, this is not to say that the substance of what the criminal justice system does is irrelevant. Reasoning backward from Bridlegoose's story, however, we can say that if the system *appears* to be unjust, few may notice its substance. Thus the appearance of justice has everything to do with the public's acceptance of the judicial system and the perception of its legitimacy.

4. *The Cult of the Robe*

For most people, the criminal justice system remains shrouded in mystery.⁶⁹ They know little about the system; what they think of the system often comes not from facts or knowledge, but from the symbols of the court's office: The raised bench, the gavel, the order of the bailiff to rise when the judge enters.

In his book *Courts On Trial*,⁷⁰ Judge Jerome Frank, one of the preeminent legal realists, discussed the accrual of judicial power and authority through the use of powerful symbols. He directed some of his most caustic comments to judges and their on-the-bench dress, what he called "the cult of the robe."⁷¹ The problem, as Frank saw it, was that the robe may act as such a potent symbol of the judge's office that it may hide what really goes on in the court. As a result, even an incompetent judge or a bad set of procedures may receive undeserved respect.⁷² Wearing the robe, "the bigoted judge, the ignorant judge, can often affect a false show of dignity. Become a judge, the mediocre lawyer can avail himself of the robe to conceal his incompetence...."⁷³ Frank thought that "much of the esoteric judicial vocabulary" served the same purpose.⁷⁴ Keeping the courts shrouded in mystery ill serves democracy, Frank argued; maintaining the illusion of the infallibility of courts and judges clouds public perception,

making him sound like a sixteenth century version of Mrs. Malaprop—becomes a parody of the formality of the legal system.

66. *Id.* at 498-99.

67. *Id.* at 499.

68. *Id.* at 506.

69. *E.g.*, Jack B. Weinstein & Diane L. Zimmerman, *Let the People Observe Their Courts*, 61 JUDICATURE 156, 157 (1977) ("Modern court procedure is to most people more like a mysterious private rite than an exercise in public governance.").

70. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949).

71. *Id.* at 254.

72. *Id.* at 256.

73. *Id.*

74. *Id.* at 258-59. It is interesting to note the same theme of obscure vocabulary running through Rabelais' tale of Bridlegoose. See *supra* note 65.

and hinders attempts at reform.⁷⁵ Frank made explicit the connection between erroneous perceptions of the courts and democracy:

It is the essence of democracy that the citizens are entitled to know what all their public servants, judges included, are doing, and how well they are doing it. The best way to bring about the elimination of those shortcomings of our judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts.⁷⁶

Frank's comments explain just how important the appearance of justice can be. If we clothe the courts in the accouterments of honor and respect to the extent that we do not see beyond these trappings, we do the system—and ourselves, its citizen-proprietors—no favor. The symbols and rituals of courts may hide significant systematic injustices behind undeserved dignity and respect. If this is true, the appearance of justice will be only that—an appearance, a delusion that makes us feel confident when we should be critical.

B. Popular Culture and Popular Legal Culture

A growing body of literature⁷⁷ examines the materials of popular culture—books, films, television shows, songs, even advertisements—as vehicles through which to understand law. Legal scholars have been urged to put aside their “mandarin materials”⁷⁸ and study the common understanding of law and lawyers. This point of view carries particular potency in this essay. If the perception of justice makes a difference, popular culture will be the source of this appearance for most people. To the extent that Court TV offers another popular cultural source of information upon which people may base their perceptions, it may make an important contribution.

In his article *Law, Lawyers, and Popular Culture*,⁷⁹ Professor Lawrence M. Friedman explains the interrelationship between popular culture, popular legal culture, and legal culture. He defines the popular culture as “the norms and values held by ordinary people, or at any rate by non-intellectuals” as communicated in works “whose intended audience is the public as a whole”⁸⁰ Legal culture, Friedman says, means “ideas, attitudes, values and opinions about law held by people in a society.”⁸¹ Between them stands popular legal culture, “attitudes about law which ordinary people or more generally lay people hold.”⁸²

Popular culture and legal culture reflect each other, Friedman says. With

75. FRANK, *supra* note 70, at 1–3.

76. *Id.* at 2–3.

77. *See supra* notes 24–25.

78. *Toward a Legal Theory*, *supra* note 25, at 545 (quoting Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120 (1984)); *see also* Friedman, *supra* note 7, at 1587 (“[T]he main danger in legal theory, it seems to me, is the tendency to ignore the ‘real’ events, and to focus attention on the internal world of legal thought ... as it is refracted through [sic] the minds and writings of the ‘mandarins’”).

79. Friedman, *supra* note 7.

80. *Id.* at 1579.

81. *Id.* (quoting LAWRENCE FRIEDMAN, TOTAL JUSTICE 30, 31 (1985)).

82. *Id.* at 1580. By this he means not the “conscious theorizing of legal philosophers or professors of law. It is the mind-set of the people who interact with legal institutions—lay people, bankers, merchants, policemen, women who want a divorce, and so on.” *Id.* at 1584.

popular legal culture as a medium, popular attitudes concerning law move into the legal culture. Legal culture then "acts as an intervening variable, a mechanism for transforming norms of popular culture into legal dress and shape."⁸³ Thus according to Friedman, the portrayal of the legal system in popular culture becomes important because it ultimately helps shape the legal culture,⁸⁴ which in turn influences the law itself.

Thus, popular culture is important if it forms or helps form popular legal culture, what people think about law; and what people think about law is important because this is a "public opinion" society, which makes heavy use of referenda, and in which government does not lift a finger or move a muscle, without reading the tea leaves of public desire.⁸⁵

In other words, leaders respond to public reaction to the judicial system, and may attempt (or avoid) changes or reforms based on those reactions. Thus popular culture may have a direct effect on the institutions of justice themselves. The public's perception of justice therefore influences courts, laws and judges because popular culture influences the democratic process. The very legitimacy of our judicial institutions is affected as well. "[C]lues to the legitimacy of courts, and other agencies of law," Friedman says, "are not to be found in the structure of doctrine, or in the formal texts of jurists, but in the broad messages traveling back and forth between the public and the organs of popular culture The jurists and system-makers are talking only to each other."⁸⁶ Therefore, if Court TV might add to the stream of information that feeds popular culture, it merits serious examination.

C. Television: Pervasive Source of the Appearance of Justice

For most people, television has become an important (and for some, the only) source of information.⁸⁷ Almost nowhere is this more true than in the field of law.⁸⁸ Legal issues are often the subject of television news coverage. Descriptions of noteworthy trials have long been a fixture of television.⁸⁹ Reporting on legal issues often takes place in the absence of any actual case; the virtually constant stream of news stories on the issue of abortion is an example.

83. *Id.* at 1579.

84. *Id.* at 1597.

85. *Id.*

86. *Id.* at 1605.

87. *E.g.*, Slotnick, *supra* note 25, at 22 (most people get most or all of their information and news from television); Brian Lowry, *In King Trial Wake, News Media Will be the Message*, DAILY VARIETY, Apr. 7, 1993 (Roper Organization study indicates that "69 percent of Americans, the highest percentage yet, view television as their primary source of news and information."); *cf.* Clarke & Fredin, *supra* note 30, at 145 (public depends on newspapers "somewhat more than television" for political information).

88. See Doris A. Graber, *Evaluating Crime-Fighting Policies: Media Images and Public Perspective*, in EVALUATING ALTERNATIVE LAW-ENFORCEMENT POLICIES 179, 188 (Ralph Baker & Fred A. Meyer eds., 1979); see also GEORGE COMSTOCK, TELEVISION IN AMERICA 120-21 (1980).

89. The trial of Billy Sol Estes, *see infra* text accompanying notes 104-09, was only one of the earliest examples; it was not the end of television coverage, even if it marked the beginning of temporary exile of cameras and microphones from courtrooms. The list of trials given extensive television coverage just in the last few years is long: William Kennedy Smith's rape trial, the trial of the four Los Angeles police officers accused of beating Rodney King, the trial of the young men accused of sexually assaulting a retarded female classmate in Glen Ridge, New Jersey, and hotelier Leona Helmsley's tax evasion trial were just a few.

Even if news reporting on cases and legal issues were to suddenly stop, however, the images of courts, cases, judges and defendants on television would continue. This is so because much of the information television viewers get about the legal system comes not in the form of news, but in the form of entertainment programming. Lawyer shows, police shows, courtroom dramas—all have been staples of television broadcasting since its inception,⁹⁰ and a part of radio broadcasting before that.⁹¹ These entertainment offerings may surpass the amount of law-oriented information that the television viewer gets from news programming.⁹²

Research shows that this information, especially the often erroneous material that surfaces in entertainment programming,⁹³ makes a great deal of difference in the way people perceive not only the courts and the legal system, but also the ways in which legal issues affect the world around them.⁹⁴ Thus if the appearance of justice matters, what people see on television matters. If Court TV can contribute positively to the information available to form the public's perception of justice, it may make a difference.

III. COURT TV: HISTORICAL CONTEXT AND DESCRIPTION

An understanding of Court TV's history shows just how far the televising of court proceedings has come. Court TV represents the culmination of a long struggle to put cameras in courtrooms that began with the advent of motion pictures with sound. A description of Court TV's programming illuminates both the scale of its effort and the seriousness of purpose with which it brings its product⁹⁵ to the public.

A. History and Background

Court TV can trace its ancestry to the nineteen thirties. In that decade, committees of the American Bar Association began formulating standards for press coverage of judicial proceedings.⁹⁶ Overall, these first rules restricted the ability of the press to cover the courts. Regulations took the form of presumptions or outright prohibitions against court coverage. While focused on the

90. Stark, *supra* note 24, at 230–31 (crime shows represented a major part of television programming by the 1950s; since 1958, almost one-third of all entertainment shows have been about crime).

91. *Id.* at 240–42 (crime shows were a mainstay of popular radio broadcasting).

92. In news programming, legal information comes out “in tiny bites that convey upshots, not theories, results, not reasoning.” Friedman, *supra* note 7, at 1605.

93. See *infra* notes 182–208 and accompanying text.

94. See *infra* notes 221–47 and accompanying text.

95. By the word product, I mean the programming the network presents to its viewers. Court TV does offer other commercial products. For example, Court TV offers a “trial training video series, *The Art and Science of Litigation*, hosted by Charles Nesson, Professor of Law at Harvard Law School.” Letter from Sara Moore Litt, Associate General Counsel and Director of the Court TV Video Library Service, to David A. Harris (Feb. 5, 1993). Each of the videotapes in this ten-tape series focuses on a different aspect of litigation, illustrating its lessons with “the powerful combination of real courtroom footage and expert analysis” *Id.* Other products offered by Court TV include a two-hour videotape concerning the first trial of four Los Angeles police officers accused of beating a civilian, *The Rodney King Case: What The Jury Saw in California v. Powell*. In addition, every trial Court TV broadcasts can be purchased in videotape form, and condensed versions of other trials from the *Trial Story* program, see *infra* notes 138–40 and accompanying text, can also be purchased.

96. See *infra* notes 99–103 and accompanying text.

print media and still photography, these efforts formed the basis for all of the rules that followed.

Modern media coverage of criminal trials began in 1935, with the trial of Bruno Hauptmann for the kidnapping of the Lindbergh baby.⁹⁷ The use of motion picture and sound recording during the trial created a circus-like atmosphere and disrupted the proceedings.⁹⁸ After the spectacle ended, the American Bar Association enacted Canon 35 of the Code of Judicial Conduct to control press coverage of criminal trials.

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.⁹⁹

Canon 35 banned the use of cameras and microphones to record or transmit court proceedings. The A.B.A. based Canon 35 on assertions¹⁰⁰ that photographing, filming, recording and broadcasting would compromise the rights of defendants to fair trials, and that these activities, as then conducted, were inherently disruptive.¹⁰¹

Except in a few jurisdictions,¹⁰² Canon 35 remained largely unchanged¹⁰³

97. *New Jersey v. Hauptmann*, 180 A. 809 (Ct. Err. & App.) cert. denied, 296 U.S. 649 (1935).

98. *Estes v. Texas*, 381 U.S. 532, 596-97 (1965) (Harlan, J., concurring) (noting that "spectacular publicity and broadcast" of Hauptmann's trial prompted A.B.A. studies which led to enactment of Canon 35); *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 770 (Fla. 1979) (same).

99. 62 A.B.A. REP. 1134-35 (1937).

100. These assertions were presented as facts. This was not, however, the only time that this was true. See, e.g., *Estes*, 381 U.S. at 544-50.

101. *Report of the Special Committee on Cooperation Between Press, Radio, and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 A.B.A. REP. 860 (1937). The most recent version of Canon 35 reads:

A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

MODEL CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982). This change in the Model Code came despite the A.B.A.'s refusal in 1979 to liberalize Canon 3A(7). See *Petition of Post-Newsweek Stations*, 370 So. 2d at 771. The 1990 Code omits any mention of this provision "because the subject is not directly related to judicial ethics and is more appropriately addressed by administrative rules adopted within each jurisdiction." A.B.A. COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990).

102. *Estes*, 381 U.S. at 601 (Harlan, J., concurring) (quoting brief of *amicus curiae* American Bar Association at 8 ("A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another."); *id.* at 580-81 & n.38 (Warren, C.J., concurring) (Canon 35 adopted in states "[w]ith only two, or possibly three exceptions"); *Petition of Post-Newsweek Stations*, 370 So. 2d at 770 (same). But see JUDICIAL CANON 28, INTEGRATED STATE BAR OF TEXAS, leaving photographic and television coverage of court proceedings to the court's discretion.

103. Another Special Committee of the American Bar Association in 1952 produced a report that resulted in the amendment of Canon 35 to add a prohibition of the televising of court

and in place when the Supreme Court of the United States first addressed the effect of cameras and broadcasting on trials in *Estes v. Texas*.¹⁰⁴ In that case, a swindler whose name, face, and alleged crimes were already notorious before his trial began¹⁰⁵ claimed that the disruptive media presence in the court had denied him a fair trial.¹⁰⁶ The Supreme Court agreed; its opinion¹⁰⁷ catalogued a long list of actions inimical to the right to a fair trial.¹⁰⁸ In his concurrence, however, Justice Harlan allowed that at some point in the future, when television technology emerged from its infancy, cameras and broadcasting might have a place in the courtroom.¹⁰⁹

Florida's experimentation with television coverage of court proceedings beginning in the 1970s¹¹⁰ provided the next occasion for the Supreme Court to address the broadcasting of criminal trials. In *Chandler v. Florida*,¹¹¹ the indictment of several police officers in a burglary scheme¹¹² attracted state-wide interest, and broadcasters televised it.¹¹³ The Supreme Court ruled that the television coverage had not deprived the defendants of a fair trial.¹¹⁴ The Court reasoned that neither the Constitution nor the *Estes* case imposed any *per se* ban on the televising of criminal trials.¹¹⁵ Furthermore, the Court refused to

proceedings. *Petition of Post-Newsweek Stations*, 370 So. 2d at 770.

104. 381 U.S. 532 (1965).

105. *Id.* at 534 n.1, 535 (detailing crimes and national notoriety of case).

106. *Id.* at 534-35.

107. Justice Clark wrote the opinion; he was joined by Justices Douglas and Goldberg and Chief Justice Warren. Justice Harlan concurred in the opinion "subject to the reservations and to the extent indicated in his concurring opinion."

108. The list was both specific and general. The Court noted the presence of twelve cameramen, cables and wires "snaked across the courtroom floor," numerous microphones and considerable disruption at pretrial proceedings; at trial, the cameras were restricted to a large booth at the back of the courtroom. *Estes*, 381 U.S. at 536. As for general principles, the Court cited the impact of television on jurors, *id.* at 545, impairment of the quality of testimony, *id.* at 547-48, the additional responsibilities television coverage places on the judge, *id.* at 548-49, and the impact of television on the defendant, *id.* at 549-50. All of these dangers are assumed, with little or no authority. Justice Clark's comment is telling: "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced." *Id.* at 544.

109. *Id.* at 595-96 (Harlan, J., concurring).

110. *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764 (Fla. 1979) (detailing Florida's liberalization of rules banning televising courtroom proceedings and studies of this effort). States were able to experiment because each state bar would enact its own version of the Canon 3 A(7) of the A.B.A.'s MODEL CODE OF JUDICIAL CONDUCT. Some tracked the strict rule closely; others were more liberal, *see, e.g., infra* note 113.

111. 449 U.S. 560 (1981).

112. *Id.* at 567.

113. Florida's rule, revised after study and experimentation, *In re* Petition of Post-Newsweek Stations, Florida, Inc., 370 So. 2d 764, 781 (Fla. 1979), reads:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

Id.

114. *Chandler*, 449 U.S. at 574-83.

115. *Id.* at 570-74. The *Chandler* Court said that Justice Harlan's concurring opinion in *Estes*, necessary to form that case's majority, made this clear by its explicit balancing of broadcasting's possible negative impact on the trial against its educational and informational value. *Id.* at 571-74.

countenance any absolute ban on broadcasting just because it might, in some instances, endanger the fairness of a trial;¹¹⁶ indeed, it noted the lack of any reliable data showing that the presence of broadcast media always interferes with a fair trial, notwithstanding years of bald assertions to the contrary.¹¹⁷

Chandler reflected the changes in attitude toward broadcasting in a number of jurisdictions. By 1979, two years before the Supreme Court decided *Chandler*, more than twenty states allowed some electronic media coverage in parts of their court systems, and willingness to experiment was growing.¹¹⁸ This trend continued, and by the early 1990s, well over forty states permitted audio and video coverage for broadcast media in a wide variety of courts and cases.¹¹⁹ It was into this world of wide electronic media access to courtrooms¹²⁰ that Court TV was born.

B. The Emergence of Court TV

Court TV was the brainchild of Steven Brill, the founder, president and chief executive officer of American Lawyer Media, L.P.¹²¹ American Lawyer Media publishes eleven different newspapers and magazines for the legal profession, including *The American Lawyer*, *Texas Lawyer*, and *Legal Times*.¹²² In the late 1980s, Brill began to develop his idea for a cable television network dedicated to the presentation of trials.¹²³ In March of 1989, Time Warner, Inc., the communications giant, announced that it would acquire a majority interest in American Lawyer Media; within a year, the two companies announced plans for a courtroom cable channel.¹²⁴ As presently constituted, Court TV is a joint venture of four companies,¹²⁵ all of which are subsidiaries of large, for-profit communications companies: Time Warner, Inc., Liberty Media Corp., Cablevision Systems Corp., and the National Broadcasting

116. *Id.* at 573-74.

117. *Id.* at 576 n.11 ("At the moment, however, there is no unimpeachable empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.").

118. David Graves, *Cameras in the Courts: The Situation Today*, 63 JUDICATURE 24, 25-27 (1979). All of this came despite the fact that the A.B.A. itself rejected changes to Canon 3A(7) recommended by its own Committee on Fair Trial and Free Press. See Alfred T. Goodwin, *A Report on the Latest Rounds in the Battle over Cameras in the Courts*, 63 JUDICATURE 74, 75-76 (1979).

119. RADIO-TELEVISION NEWS DIRECTORS ASS'N, SUMMARY OF EXPANDED MEDIA COVERAGE OF STATE COURTROOM PROCEEDINGS (1993).

120. The federal courts remain a notable exception to the rule. See, e.g., *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 19 & n.5 (1984) (quoting General Rule 7 of the United States District Courts for the Southern and Eastern Districts of New York, a typical federal court rule "apparently adopted pursuant to Recommendation D of the Judicial Conference of the United States, 87 F.R.D. 518 (1980) (tracking a 1962 resolution to the same effect)"). One could see this readily in the fact that the federal trial of the police officers accused of beating Rodney King was not televised, while the first trial, which occurred in California's state court, was. The Supreme Court of the United States is no exception. Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1055-57 (1993) (Court "remains impervious to broadcast media").

121. COURTROOM TELEVISION NETWORK, VIEWER'S GUIDE 24 (1992) [hereinafter VIEWER'S GUIDE].

122. *Id.*

123. *Kavanau v. Courtroom Television Network*, 23 U.S.P.Q.2d (BNA) 1938, 1940 (S.D.N.Y. 1992).

124. *Id.*

125. Eventually, the Time Warner and American Lawyer Media units carrying out this effort merged with two other companies developing a competing network. *Id.* at 1940-41.

Company.¹²⁶ American Lawyer Media manages the network.¹²⁷

Given this level of corporate and financial backing, it should not surprise anyone that the investors in Court TV expect a worthwhile return on their investment.¹²⁸ Court TV is not a public service venture or a broadcasting outlet devoted to educating the public without regard to profits. Rather, it is a commercial venture, just like traditional broadcast and cable networks; it airs advertising. It differs from traditional networks in what it offers viewers—trials and other proceedings in real courts. Court TV may help educate and inform the public, but it does so with the aim of selling of its advertisers' products. This is how it makes money, and what will determine, in large part, whether or not it stays on the air.¹²⁹

Court TV premiered in July of 1991.¹³⁰ It offered viewers broadcasts of real trials and proceedings from courts across the country. The network received much media attention initially.¹³¹ In December of 1991, Court TV offered full coverage of the rape trial of William Kennedy Smith from Palm Beach County, Florida. From the first news reports of the allegations, the public's interest in the case remained high. By the time of the trial, national preoccupation with the case had peaked. Not all of this attention stemmed from the legal issues in the case; surely, the involvement of a member of the Kennedy family, as well as the salacious nature of the charges, had much to do with the public's curiosity.¹³² Court TV's full coverage of the trial raised its profile in the public consciousness.¹³³ The network could hardly have dreamt of a better opening act.

126. *Id.* at 1941.

127. *Id.*

128. *E.g.*, John Lippman, *We, The TV Jury: Courtroom TV, A New 24-Hour Cable Channel, Goes for the Reality*, L.A. TIMES, June 10, 1991, Calendar at 5 (four corporations bankrolling Court TV may invest \$60 million over four years before network becomes profitable); Enrico, *supra* note 20, at 35 (network does not expect profits immediately, but has strong financial backing).

129. In pointing out Court TV's commercial nature, I do not criticize the network for that reason alone. In fact, I disagree with those who say that there is something inherently wrong with a commercial network broadcasting trials. *See* Dershowitz, *infra* note 295, and accompanying text. However, in order to comprehend the network's achievements and its shortcomings, it is important to understand from the outset that Court TV remains a profit-motivated, market-oriented organization.

130. COURTROOM TELEVISION NETWORK, FACT SHEET (1992).

131. *E.g.*, Lippman, *supra* note 128, at 5; Bill Carter, *TV in the Courtroom: 2 Plans to Capture Real Trials, Drama*, N.Y. TIMES, June 19, 1991, at C11; James Endrst, *Can Real-Life Drama Survive the Law of TV Jungle?*, HARTFORD COURANT, June 30, 1991, at G1.

132. *E.g.*, Dick Dahl, *Cable Goes to Court*, MASS. LAW. WKLY., Mar. 16, 1992, at 37 (in addition to education on the importance of reasonable doubt and other legal concepts, Court TV's live coverage of Smith's trial delivered titillation, sex, violence and celebrities in abundance).

133. *E.g.*, Judith Colp, *The Trials of Fred Graham; In the Wake of the King Case, Court TV's Anchor Defends Jury System*, WASH. TIMES, May 18, 1992, at D1 (Smith case "accomplished for Court TV what the Persian Gulf War did for CNN: the trial affirmed its existence"); Enrico, *supra* note 20, at 35 (Court TV was "one of the biggest winners" as a result of the trial); *Nightline*, (ABC television broadcast, Dec. 10, 1991) (featuring Brill and commentary on Court TV's coverage). Mr. Brill feels that Court TV's coverage of the trial was not only a boon to Court TV, but a watershed event in America. Brill, *supra* note 20, at 3 (trial and its coverage "will be remembered as a pivotal turn in how Americans view our system, how the media covers trials, and how lawyers and nonlawyers react. For this was the criminal trial that America watched en masse.").

C. Court TV's Programming

Court TV usually broadcasts live trials. Of course, it can only do so while courts hold sessions somewhere; this limits the network's live coverage to Mondays through Fridays from 8:30 a.m. to 8:00 p.m. Eastern Time.¹³⁴ The network breaks these eleven hours into morning, afternoon, and evening sessions.¹³⁵ Monday, Tuesday, Wednesday, and Friday nights, from 8:00 p.m. to 2:00 a.m., Court TV runs either almost unedited highlights of the day's coverage, under the title *In Court Today*,¹³⁶ or *Prime Time Justice*, a two-hour program of legal news, selected short trial highlights, and expert commentary.¹³⁷ On Thursday evenings, the network presents *Trial Story*, a two-hour long, edited version of a completed trial.¹³⁸ Court TV fills the overnight hours with rebroadcasts of the previous day's programming.¹³⁹ On Saturdays and Sundays, the network's programming consists of *Trial Week*, highlights of the week's trial coverage, the *Trial Story* program, *Prime Time Justice* and *In Practice*, videotapes of continuing legal education seminars for lawyers.¹⁴⁰

Occasionally, Court TV departs from its regular schedule to offer special programming, such as the Senate confirmation hearings of Clarence Thomas.¹⁴¹ It also offered International Court of Justice proceedings from The Hague in the case in which the United States and Britain argued for the extradition of two Libyans allegedly involved in the bombing of Pan Am Flight 103 which exploded over Lockerbie, Scotland.¹⁴²

During the Spring of 1993, Court TV began introducing new programming. In addition to *Prime Time Justice*, these shows include a one-hour program called *Instant Justice*,¹⁴³ which featured taped excerpts of the events in a magistrate's court, i.e., the type of court that makes probable cause determinations, sets bail, and hears requests to institute criminal charges based on complaints by one citizen against another. Each *Instant Justice* program consists of several segments; in each, a different type of case is aired and discussed. For example, on the February 2, 1993, version of *Instant Justice*, a man complained of an assault by his drunken spouse, and the magistrate discussed issues causing violence in their home.¹⁴⁴ In another segment, police brought in two women involved in a fight, the beginnings of which the police did not witness; after extensive questioning, one woman was released and made the complainant in an assault case, and the other was made the defendant.¹⁴⁵ At the conclusion of the

134. VIEWER'S GUIDE, *supra* note 121, at 28 (entitled "Court TV Programming Schedule," dated September 1992). Presumably, the last few hours of any such live broadcasts come from the western United States, where courts might still be in session. All times discussed in this section are Eastern Time.

135. *Id.*

136. *Id.*

137. COURTROOM TELEVISION NETWORK, COURT TV'S NEW PRIME TIME PROGRAMMING (1993).

138. VIEWER'S GUIDE, *supra* note 121, at 28.

139. *Id.*

140. *Id.* The continuing legal education programming shown on Court TV is produced by others. COURTROOM TELEVISION NETWORK, PROGRAMMING (1992).

141. VIEWER'S GUIDE, *supra* note 121, at 21.

142. *Id.*

143. *Instant Justice* (Courtroom Television Network, 1993).

144. *Instant Justice* (Courtroom Television Network broadcast, Feb. 2, 1993).

145. *Id.*

program, the magistrate gave his views of the function of his court.¹⁴⁶ Other new programming includes televised parole hearings under the title *Lock and Key*.¹⁴⁷ It also includes a show on consumer's legal rights,¹⁴⁸ a series called *The System*, which will focus on "those aspects of the criminal justice system that are the subject of public frustration,"¹⁴⁹ *Verdicts*, a show which will feature "the extraordinary newsmaking moments" when defendants hear verdicts in their cases,¹⁵⁰ and *Washington Watch*, a Washington-based discussion of legal news.¹⁵¹

D. Court TV's On-Air Format

Court TV's on-air format has several distinctive features. The first and most important is daily live coverage from the inside of a courtroom. Other characteristics include on-screen subtitles to convey background information about the proceedings, the use of anchorpersons or hosts for the programming, the use of experts as commentators, the selection of trials for broadcast, and commercial interruptions.

1. Daily Courtroom Coverage

Turn on Court TV and you will likely see the inside of a courtroom. The scene varies from trial to trial, but almost always depicts the judge, the witness stand, counsel tables with both attorneys and defendants, and sometimes members of the jury.¹⁵² The image usually does not change much during the course of the proceedings; while occasionally the camera may zoom in on one of the participants or pan from side to side, the viewer sees the faces of the judge and witness (if a witness is present), and back or side views of the attorneys and defendant. Audio is generally adequate, but occasionally fades. In most trials, the visual and audio impression is rather flat, a slow-moving presentation that hardly changes for long periods. In the age of MTV, Court TV's regular fare stands out because of its tediousness. It has all the pizzazz of a pair of orthopedic shoes.¹⁵³ When there is drama or excitement, it emerges from context and content, not production values.

This dull appearance comes from the technology Court TV uses. Laws

146. *Id.*

147. COURTROOM TELEVISION NETWORK, COURT TV'S NEW PRIME TIME PROGRAMMING (1993).

148. *Id.*

149. Courtroom Television Network, *Court TV Launches Fall Season "Witness The Difference" Campaign*, IN SESSION (Sept. 1993).

150. *Id.*

151. *Id.* At its inception, Court TV's programming consisted almost entirely of either live trial coverage or nearly unedited taped highlights of the days events. Over time, while live trial coverage remains the centerpiece of Court TV, the amount of edited programming, for example, features like *Trial Story* or *Instant Justice*, has increased. See *infra* note 252 and accompanying text, and *infra* note 294, for discussion of the issues this raises.

152. Not all states allow courtroom cameras to show the members of the jury. See RADIO-TELEVISION NEWS DIRECTORS ASS'N, *supra* note 119 (some states that allow television coverage of trials do not allow jury members to be shown, or allow them to be shown only in "background shots").

153. If you prefer another metaphor, see Lazerson, *supra* note 17, at 57 ("[w]atching Court TV for a protracted period of time is like chewing gum: the first time we do it, we notice that the flavor is lost quickly").

allow cameras in courtrooms in most states.¹⁵⁴ Although the specifics of these laws vary, all have one requirement: The equipment used to carry sound and pictures out of the courtroom must not be noticeable.¹⁵⁵ Technology that fits this requirement emerged only in the nineteen seventies; cameras became smaller and did not require tangles of wire and supplementary lighting.¹⁵⁶ Court TV usually employs only one camera, controlled from outside the courtroom.¹⁵⁷ No camera operator sits in the courtroom. Fixed microphones account for the fact that the sound quality varies during the trial.¹⁵⁸ Thus Court TV is both the beneficiary and the prisoner of technology: Smaller, simpler tools allowed television into courtrooms, but coverage is limited to the basics, nothing flashy or slick.

2. On-Screen Background Information

Viewers frequently receive background information on a case through the use of on-screen subtitles. The information may be very simple, such as the name of the case and the charge (e.g., "State v. Jones. Defendant charged with manslaughter in death of wife"). More specific information appears, too, such as the identity and role of the current witness (e.g., "Police officer who witnessed shooting") and the substance of the witness's testimony (e.g., "Witness has identified defendant as murderer"). Court TV presents this information frequently, because most of its audience does not follow all of a trial.¹⁵⁹ The goal of the information is to allow the viewer to tune in and understand what is being shown in a brief time.¹⁶⁰

3. Anchorpersons and Reporters

Like many television news operations, Court TV uses anchorpersons. However, these anchorpersons do more than simply read the news from prepared copy. When the network cuts away from its live coverage, the anchorperson in Court TV's studio appears on camera or delivers a voice-over explaining the status of the trial (e.g., "The defense attorneys have finished questioning the witness who identified the defendant, and the next witness will be the doctor"), initiates a discussion with a guest expert, or simply says that the coverage will resume after a break. The anchorpersons also conduct interviews with expert commentators,¹⁶¹ and discuss the cases with Court TV reporters who sometimes attend the proceedings. All of these anchorpersons are attorneys.¹⁶²

4. Use of Experts

Court TV uses experts to deliver explanation, criticism and commentary

154. See *supra* note 118-19 and accompanying text.

155. VIEWER'S GUIDE, *supra* note 121, at 8.

156. *Id.* at 5. Compare *Estes v. Texas*, 381 U.S. 532, 550 (courtroom was "a mass of wires, television cameras, microphones, and photographers") with Appendix to the Opinion of Chief Justice Warren (photographs showing same).

157. VIEWER'S GUIDE, *supra* note 121, at 8.

158. *Id.*

159. *Id.* at 16.

160. *Id.*

161. See *infra* notes 163-65 and accompanying text.

162. VIEWER'S GUIDE, *supra* note 121, at 24; COURTROOM TELEVISION NETWORK, PROFILES (1992).

of trial proceedings. The anchorpersons question the experts during breaks in the trial and when the proceedings recess or end. The experts, known as "guest commentators,"¹⁶³ offer information about the proceedings, speculate about what will or should come next, and critique the performance of the attorneys.¹⁶⁴ Court TV chooses its experts on the basis of their experience with the type of case on the air, and their ability to explain a trial without using legal terminology.¹⁶⁵

5. Selection of Trials

Even with a twenty-four hour a day format, Court TV can only cover a few cases at any one time. At some point, network officials must make an editorial decision: Which cases merit coverage? While one particular case sometimes dominates the national media and becomes an obvious choice,¹⁶⁶ this is not always true. How does Court TV choose among cases from around the nation which present a multitude of issues?

The answer to this question has two parts. First, the network must become aware of the case. As discussed, the case is sometimes at the top of the public consciousness by the time the trial starts, so the choice presents no difficulty.¹⁶⁷ In cases not making national headlines, however, Court TV relies on the "network of more than 200 editors and reporters"¹⁶⁸ who work for it and the legal publications owned by American Lawyer Media. Court TV has organized these people into a system it calls "trial tracking"¹⁶⁹ to find the cases around the nation most worthy of coverage.

Second, once the network is aware of the case, Court TV must determine whether the case is "worthy of coverage." The criteria Court TV uses to select trials include 1) the importance of and public interest in the issues in the case, 2) the "notoriety and newsworthiness of both the case and the people involved," 3) the "quality of the 'story,'" 4) the educational value of the case, and 5) the likely duration of the trial.¹⁷⁰ The relative importance of these criteria and the order in which they are weighted remain unclear. What is plain is that at least three of these five criteria concern themselves with whether viewers will be interested by factors other than what they learn about public issues and institutions. In other words, if one week presents the opportunity to present two cases about acquaintance rape, each of which would present equal opportunities for public understanding of the issue, the case with a better "story," perhaps involving celebrities, will more likely be televised. The point to note is that these criteria have as much to do with entertainment as with "increas[ing] [the public's] understanding of the justice system...."¹⁷¹

163. VIEWER'S GUIDE, *supra* note 121, at 11.

164. For example, few who saw it will forget F. Lee Bailey's scathing criticism of prosecutor Moira Lasch in the William Kennedy Smith case. *Florida v. Smith*, on COURTROOM TELEVISION NETWORK, Dec., 1991.

165. VIEWER'S GUIDE, *supra* note 121, at 11.

166. The trial of William Kennedy Smith for rape is a good example. See *supra* notes 132-33 and accompanying text.

167. *Id.*

168. VIEWER'S GUIDE, *supra* note 121, at 24.

169. *Id.* at 10.

170. *Id.*

171. VIEWER'S GUIDE, *supra* note 121, at 30. To be fair, as much as Court TV and its founder do look to achieve the admirable goal of educating the public and thereby increasing

6. Commercial Interruptions

Court TV shares this characteristic with all commercial television networks. Since Court TV relies primarily on advertising revenue,¹⁷² it carries commercials.¹⁷³ Given its programming, commercial interruptions present a greater problem for Court TV than they do for conventional television. Most conventional television is created to accommodate commercial interruptions. The audience sees most entertainment programming in discrete blocks of approximately ten minutes; indeed, this is also true for news programming. The built-in pauses between these blocks allow broadcasters the opportunity to present advertisements several times in small, digestible pieces.

On Court TV, the programming exists independent of the television coverage; it is not constructed to serve as a sales vehicle, as is almost all other television programming. Breaks in the flow of a trial come when appropriate for the case or its participants, not the network and its advertisers. Thus it is unavoidable that Court TV interrupts live coverage of its trials. It does so for two reasons: To offer explanations of the proceedings by experts, reporters, and anchorpersons, and to present commercial and news messages.¹⁷⁴ According to Court TV, the network "tr[ies] never to do this when important testimony is being heard."¹⁷⁵

E. Court TV's "Mission"

Presumably, given Court TV's programming, its goals are different from conventional networks. This is certainly the way the network portrays itself.

Why a network dedicated to our legal system? At Court TV, we feel strongly that trials can be educational as well as entertaining. The framers of our constitution intended that trials that were important to a community be open to that community.... While [conventional news] reporting can be valuable in helping us to sort out the issues involved, it can never replace the understanding we can gain from viewing actual proceedings. Consequently, many of us have become jaded or just plain misinformed about the workings of our judicial system.

public confidence in the system, there has never been any denial of the fact that entertainment must be part of the package if viewers are to be attracted. *E.g., id.* at 3 ("[a]t Court TV we feel strongly that trials can be educational as well as entertaining"); Endrst, *supra* note 131, at G1 (Brill and Court TV vow to "entertain, inform, educate but not to exploit"); Carter, *supra* note 131, at C11 (Court TV expects "'to be very soap-opera competitive'"); Colp, *supra* note 133, at D1 (Fred Graham, Court TV's chief anchor, worries that "Court TV eventually could become pressed to put audience appeal before good taste and responsibility").

172. Mr. Brill's long-range plan is for Court TV to obtain fifty percent of its revenues from advertising and to attract thirty million subscribers. "The rest of Court TV's revenues come from fees it charges cable systems who carry the channel" (ten to eleven cents per subscriber). Enrico, *supra* note 20, at 35.

173. This very feature has been denounced as using the tragedies of the people whose cases appear on Court TV to sell products to viewers. Dershowitz, *infra* note 294; *Nighline*, *supra* note 18 (quoting attorney Gerry Spence: "While they're selling cornflakes, I'm supposed to be getting justice, and somehow that seems to me that there's been an utter reduction of the kind of justice system we've been very proud of in this country for a long time"); Colp, *supra* note 133, at D1 (quoting Dershowitz, who says "Court TV uses every rape and cannibalism case, no matter how boring the legal issues They're in it to sell a product.").

174. VIEWER'S GUIDE, *supra* note 121, at 16.

175. *Id.* The question that should be asked is whether these interruptions distort what the viewer sees and hears. If so, it could be argued that the network presents programming about courts and issues of public concern, but only to the extent that these comport with the needs of its advertisers.

Frankly, Court TV's goal is to substitute real law for *L.A. Law*. We want to teach people that constitutional rights aren't technicalities used by soft judges and slick lawyers, but are the bedrock of a system of rule of law [sic] that is the envy of the world.¹⁷⁶

In sum, Court TV aims to do well by doing good. It desires to inform better than either TV news or drama, and to still be entertaining enough to attract viewers, and with them advertisers.

With this picture of Court TV's programming as a basis for comparison, the next question is whether Court TV succeeds in presenting a more accurate—and thus more beneficial—picture of the criminal justice system than conventional programming does. To this end, the next section will discuss crime-oriented programming on conventional television.

IV. THE CRIMINAL JUSTICE SYSTEM ON CONVENTIONAL TELEVISION

The portrayal of the criminal justice system on television offers a wealth of material for analysis. Part of television's heritage since the beginning of the medium,¹⁷⁷ crime and trials have made up much of television fare. This remains true today; while crime-related programming has changed, it remains a staple.¹⁷⁸ In fact, television has taken the dramatic vehicle of the trial into completely unexpected settings.¹⁷⁹

Unfortunately, as crime on television endures, appearing in new formats and dramatic structures, so has television's penchant for giving viewers erroneous information about the criminal justice system. These inaccuracies go beyond the criticism that law- and crime-related programming does not portray lawyer's lives, cases, or even trials accurately.¹⁸⁰ Rather, the ideas conventional television communicates about criminal justice leave the public with significantly mistaken beliefs about the courts, the police, and crime.¹⁸¹ This can result in a world view and political opinions out of kilter with reality. Perhaps the addition of Court TV to the cacophony of television offerings concerning crime will improve this situation.

In order to explore these ideas, this section begins by describing three

176. VIEWER'S GUIDE, *supra* note 121, at 3-4.

177. Stark, *supra* note 24, at 231 (crime has been the mainstay of television programming since the 1950s).

178. E.g., John J. O'Connor, *Playing the Games of TV's Cops and Robbers in a New Climate of Cynicism*, N.Y. TIMES, Mar. 2, 1993, at B1 (crime shows are still common, but more morally ambiguous than they used to be).

179. E.g., Paul Joseph & Sharon Carton, *The Law of the Federation: Images of Law, Lawyers, and the Legal System in "Star Trek: The Next Generation"*, 24 U. TOL. L. REV. 43 (1992).

180. Stephen Gillers, *Taking L.A. Law More Seriously*, 98 YALE L.J. 1607, 1612, 1618 (*L.A. Law* concededly presents inaccurate views of trials, typical law practice, and lawyer's lives, but it presents the moral and even ethical issues involved well); Lazerson, *supra* note 17, at 57, 100 (Court TV lacks tradition television's "neat endings" and quick and easy resolutions of difficult issues); David S. Machlowitz, *Lawyers on TV*, A.B.A. J. 52, 55 (Nov. 1988) (criticism that *L.A. Law* is inaccurate "seems silly. This is television, not real life."). The same complaints have also been made about an earlier generation of lawyer shows. Stark, *supra* note 24, at 255-56 (as depictions of "lawyers and their day-to-day existence, [earlier shows] fell short").

181. E.g., Machlowitz, *supra* note 180, at 55 (law-oriented television is a learning experience for its millions of viewers).

broad categories of television programming that concern themselves with crime. It then discusses research that shows at least five significant incorrect perceptions that may result from the portrayal of criminal justice in conventional television programming.

A. Three Types of Programs Involving Crime

At least three types of current television programs involve crime or law. First, there are entertainment programs, fiction that includes police, lawyers, or criminals and their activities; these have long been staples on television. Second, news programs, both the typical evening news broadcasts and "news magazine" programs, often cover crimes and trials as news stories. The third category consists of hybrids of the first two categories—so-called "infotainment" or "docudrama" programs—that focus either solely on crime or make it a frequent subject.

1. Crime-Oriented Entertainment Programs

Without doubt, this category represents one of the largest chunks of all television programming.¹⁸² Police shows became part of television early in its history;¹⁸³ the prototypical example, *Dragnet*, began in 1951.¹⁸⁴ These shows did not always focus on police; rather, they centered around private detectives, lawyers, even a forensic pathologist.¹⁸⁵ The title character of *Perry Mason*, which began in 1957, became the best-known television lawyer.¹⁸⁶ Indeed, it is probably fair to say that the Mason character interested and even encouraged many young viewers to become lawyers themselves.¹⁸⁷

Between *Perry Mason* and now, the amount and nature of crime-related television has at times changed, but always returned to substantial levels.¹⁸⁸ Shows involving police or private detectives have probably been the most common offering. Police in these shows almost always make an arrest; more

182. Stark, *supra* note 24, at 231 (crime-oriented shows have been and continue to be a major part of television programming).

183. *Id.* at 244 (the first such shows were *The Plainclothesmen* and *Martin Kane*, *Private Eye* in 1949; the first forty years of television saw over 500 television series about the law).

184. *Id.* at 244. *Dragnet* was no mere television show; it was a way of viewing law enforcement, "an ideology" *Id.* (quoting scholar David Marc). Its central character, Joe Friday, played by Jack Webb, was on the cover of *TIME* in 1954. *Jack, Be Nimble!*, *TIME*, Mar. 15, 1954, at 47, 54.

185. *Quincy* (NBC Television).

186. Stark, *supra* note 24, at 249 (characterizing Perry Mason as "the most celebrated lawyer in history"). While production of the show ended long ago, the Mason character, played by Raymond Burr, was resurrected for television movies.

187. *Id.* at 250 (Mason was "one of television's first heroes with a postgraduate degree, a role model for the highly educated baby boomers"). There is much irony in the obviously fictional Mason encouraging people to become lawyers. The great Mason seemed to practice in a different universe. He seemed to take only one case at a time, and devoted all of his time to it; nevertheless, the physical trappings of his practice indicated he did quite well. All of his clients were innocent. In Mason's practice, the rules of evidence came down to three words spoken by District Attorney Burger: "Irrelevant, incompetent, and immaterial." Best of all, Mason had a gift for causing the actual culprit (who always watched the proceedings from the gallery) to confess as Mason questioned someone else. Like many trial lawyers, I would dearly love—just once in my career—to try a case in Mason's universe.

188. *Id.* at 251, 256, 259–64 (police shows faded in mid-1960s, replaced by shows about lawyers; lawyer shows declined in late 1960s, replaced by new, more conservative cop shows).

than that, they always arrest the right person.¹⁸⁹ Violence often plays an important role in these shows. The crime involved is usually murder,¹⁹⁰ and the police often use violence themselves to catch the bad guys.¹⁹¹ Constitutional rights and civil liberties at best play minor parts, and at worst are portrayed as technicalities that only impede the police.¹⁹² Even uniformed police come in for unfavorable treatment; while the police may seem at best hamstrung by the law and at worst incompetent and unconcerned, the private detective or the violent police detective characters of the 1970s, concerned less with orthodoxy of investigative methods and legal niceties than regular police must be, cut through the bureaucracy to solve cases.¹⁹³

Television's portrayal of crime, law, and especially lawyers reached a high point in the 1980s with *L.A. Law*. The program centers around the lives, cases, and loves of the lawyers of a fictional Los Angeles law firm. Every case the lawyers handle presents complex issues right out of current headlines: acquaintance rape, the riots in Los Angeles in the spring of 1992, the death penalty, and issues of product liability, for example.¹⁹⁴ The cases are often played out in trials, intertwined around the characters' love affairs, their well-dressed, upwardly mobile "personalities," and the politics of the firm.¹⁹⁵ The trials themselves are not really trials, but miniature morality plays;¹⁹⁶ they have as little to do with what really goes on in courtrooms as the activities of television police officers have to do with real police work. Rather than the painstaking cross-examination of witnesses common to real trials, *L.A. Law*'s lawyers do a neat, clever, and devastating job in less than two minutes. There are no "This-is-what-the-facts-will-show" opening arguments,¹⁹⁷ and no

189. George Gerbner, *Trial by Television: Are We at the Point of No Return?*, 63 JUDICATURE 416, 419 (1980) (ninety percent of all television crimes solved by successful arrest); O'Connor, *supra* note 178, at B1 (television on law enforcement used to be simpler, with the perpetrators always brought to justice so that "viewers went to bed assured that all was for the best in this best of all possible worlds").

190. Stark, *supra* note 24, at 244 (early crime show television writers told that story must always be "concerned with murder"); see also *infra* notes 224-27 and accompanying text.

191. E.g., George Gerbner & Larry Gross, *The Scary World of TV's Heavy Viewer*, PSYCHOLOGY TODAY, Apr. 1976, at 42, 44 (dramatic violence is used in television to resolve problems quickly and neatly); Stark, *supra* note 24, at 262-64 (new cops of 1970s were often violent and dangerous).

192. See, e.g., Stephen Arons & Ethan Katsh, *How TV Cops Flout the Law*, 4 SAT. REV., Mar. 19, 1974 at 11, 12-13 (clear violations of Constitution and brutality and harassment by police quite common on television crime shows).

193. Stark, *supra* note 24, at 262-64 (shows communicated attitude that law was an obstacle to crime fighting, and tough, violent cops and detectives could make a difference).

194. Gillers, *supra* note 180, at 1608 (cases "come from today's headlines"); Machlowitz, *supra* note 180, at 54 (*L.A. Law*'s cases are "taken from the headlines"). To be sure, *L.A. Law* does not focus exclusively on crime or criminal cases. However, it often uses criminal cases as vehicles to discuss moral issues. Sometimes a lawyer from the firm defends an accused criminal; frequently, one of the show's regular characters is a prosecutor whose sole job is representation of the state in criminal cases. In any event, criminal cases surely make up more of the firm's docket on *L.A. Law* than they would in a typical large firm.

195. Machlowitz, *supra* note 180, at 54 (*L.A. Law* has much more to do with "yuppie lifestyle" and materialistic achievements than law).

196. Gillers, *supra* note 180, at 1608 (*L.A. Law* presents "a series of moral questions ... in a legal setting because, for better or for worse, American society often presents moral questions that way").

197. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 42 (3d ed. 1992) (critical aspect of opening argument is to state what the facts will be).

"Here's-what-we-proved-to-you" closings.¹⁹⁸ Rather, lawyers make dramatic, morally wrenching speeches. While *L.A. Law* may do a decent job of explicating the moral and ethical dilemmas its featured cases represent,¹⁹⁹ and even seems more comfortable with ambiguous endings than the usual television program,²⁰⁰ *L.A. Law* is still just television; it must entertain to have viewers.²⁰¹ In the words of Professor Steven Gillers, it is one part L.A., one part law,²⁰² and it regularly sacrifices accuracy for drama.²⁰³ This should not surprise anyone; regardless of its slick packaging, one fact always remains: While *L. A. Law* may use legal issues as tools to create drama, it remains nothing more than entertainment.

A newer crime-oriented program, *Law and Order*,²⁰⁴ presents a single case every week. The first half of the show concerns the investigation of the crime, and the second half focuses on the trial. The program has a gritty, real-world feel. Its characters use enough legal buzz words to pass a third-year law exam.²⁰⁵ Critics have given the program (and other new programs like it) accolades for the genuineness of its presentation.²⁰⁶

This essay is not intended to discuss or even name every entertainment program which has featured (or which *now* features) crime or law. Others have already done a thorough job of this,²⁰⁷ even carrying it beyond television.²⁰⁸ Suffice it to say that this type of entertainment has been ubiquitous on television since its beginning. The point is simply that, because of its pervasiveness, the impact of this entertainment programming on public attitudes concerning crime and criminal justice is, at least, worth considering.

2. News

Crimes and criminal trials often become noteworthy enough to merit coverage by television news programs. Sometimes this results from the bizarre or brutal nature of the crime.²⁰⁹ Sometimes well-known people become

198. *Id.* at 297-98 (closing should feature what counsel said to expect in opening and how evidence bares this out).

199. Gillers, *supra* note 180, at 1612-18 (in the morally ambiguous universe lawyers inhabit, "*L.A. Law* tries to capture these morally ambivalent professional dilemmas as few other popular entertainments have," and "makes an earnest effort to pose these questions in a serious way").

200. *Id.* at 1610, 1615, 1618 (*L.A. Law* leaves legal issues unresolved, even if individual cases have results).

201. *Id.* at 1622.

202. *Id.* at 1607.

203. *Cf. id.* at 1612, 1618 (since *L.A. Law* does such a good job explicating legal and moral problems, the sacrifices the show makes to drama are inconsequential).

204. *Law and Order* (NBC television).

205. Episodes of *Law and Order* regularly use terms like probable cause, hearsay, the Fourth Amendment, and the warrant requirement and exceptions, often in the context of lawyer-to-lawyer discussions and hearings.

206. O'Connor, *supra* note 178, at B1 (show features current plots and well-explicated ambiguity).

207. *E.g.*, Stark, *supra* note 24; see also Rhoda Estep and Patrick T. McDonald, *Crime in the Afternoon: Murder and Robbery in Soap Operas*, 29 J. BROADCAST & ELECTRONIC MEDIA 323 (1985).

208. *E.g.*, *Toward a Legal Theory*, *supra* note 25 (discussing law in the context of movies, novels, and popular songs, in addition to television); Macaulay, *supra* note 25 (discussion law as portrayed in education, mass media entertainment, and sports); Post, *supra* note 25 (discussing law in novels, movies, and philosophy).

209. The case against serial killer Jeffrey Dahmer, carried by Court TV, is a good

perpetrators or victims, sparking public interest in a case that might otherwise go unnoticed.²¹⁰ Other cases become public issues themselves, or focus public attention on issues of broader concern.²¹¹

Since news programming would seem to aim at informing rather than providing dramatics, one would expect a more accurate portrayal of the criminal justice system than in entertainment programming. This is not always true. News coverage of crime and criminal justice can and often does suffer from incompleteness. Given the demands of the typical half-hour newscast, even top news stories on television seldom get more than "tiny bites" of air time.²¹² This almost guarantees oversimplification. Thus the public seldom sees more than a fraction of actual trial proceedings, if any. In these constraints, with perhaps ten or fifteen seconds to devote to film of the event itself, those producing television news programs naturally pick the most dramatic slice of the day's events that they can.²¹³

3. "True" Crime: Infotainment or Docudrama Programs

The 1980s saw the advent of a new type of crime-oriented television show. These programs use stories and film footage of real crimes and trials, and turn it into crime entertainment. The viewer "witnesses"²¹⁴ the execution of a search warrant, the arrest of a perpetrator, interviews with participants, or court proceedings, all in a half-hour package. To fit this time constraint, these shows' creators videotape the actual events and edit heavily, using only small portions. Such shows are structured for dramatic impact; the selection of cases, the editing, and the overall presentation of events is intended not just to inform viewers, but to entertain them. For example, on the show *Cops*, the viewer rides along with an officer in a police car, observing arrests, uses of force, and

example.

210. The rape trial of William Kennedy Smith is a good example. See *supra* notes 132–33 and accompanying text.

211. The trial of four Los Angeles police officers accused of using excessive force against Rodney King is a good example; while it might have been remarkable for its extraordinary videotaped evidence alone, its crystallization of the larger issue of police brutality, and the perception on the part of African Americans that the justice system is biased against them, has kept the case in the national consciousness.

212. Friedman, *supra* note 7, at 1605 ("the public learns its law from the evening news, in tiny bites that convey upshots, not theories, results, not reasoning").

213. E.g., V. M. Mishra, *How Commercial Television Networks Cover News of Law Enforcement*, 56 JOURNALISM Q. 611, 631 (1979) (television news coverage "reflects a policy of showmanship rather than social responsibility").

Of course, there is the larger claim that television, including news, has almost totally dropped any pretense of truth-finding in favor of drama. Elizabeth Kolbert, *NBC News Chief Stepping Down Amid Troubles*, N.Y. TIMES, Mar. 4, 1993, at A1 (president of NBC's news division resigned due to furor caused by its staging of a dramatization in which it used toy rockets to ignite a fire in a filmed demonstration about the danger of the fuel tanks on certain GM trucks without revealing that the film was a dramatization). Television is not alone, however, in its pursuit of sensationalism at the expense of truth. William Glaberson, *USA Today Says Photograph On Gangs Was Misleading*, N.Y. TIMES, Mar. 2, 1993, at A6 (newspaper admits it duped subjects in front page photograph into posing with guns by telling them photograph would illustrate community program in which gang members would exchange guns for jobs, and instead used photograph to illustrate possibility of renewed racial violence).

214. One must question the realistic nature of what these programs show. It is a scientific truism that the presence of the observer will affect the behavior of the observed; would this not also be true for arrests or other police work that take place with the officer's full knowledge that cameras are recording everything?

the like.²¹⁵ Viewers get similar messages from each of these shows: You are there, seeing dramatic incidents firsthand as they happen. The fact that the events undergo careful editing and filtering gets little attention.

Arguably, other types of programming fit this category as well. For example, shows now air in which a "judge" hears the arguments of two parties engaged in a real dispute, usually a minor civil case.²¹⁶ The most famous of these programs, *The People's Court*, has become an institution; Judge Wapner, who presides on the show, is a celebrity.²¹⁷ Other shows, such as CBS's *48 Hours*, have aired heavily edited versions of actual criminal trials.²¹⁸

This category of programming might also include docudramas, television movies that dramatize real cases or events. Television seems to delight in presenting such stories, in which producers use the real events of a criminal case as a skeleton to tell a story. In these shows, there is little pretense of educating the public; the objective, rather, is salacious entertainment based on a story that has already captured the public imagination. The best recent examples are the several docudramas based on the story of Amy Fisher, the Long Island, New York teenager who shot her alleged lover's wife. In one period of a few days, a different docudrama about the Fisher case aired on all three major broadcast networks, two of them simultaneously.²¹⁹ Even more recently, a docudrama about the siege and destruction of the Branch Davidian building in Waco, Texas, aired just days after the disaster.²²⁰

B. Conventional Television Programming: Five Implications of Its Inaccurate Portrayal of the Criminal Justice System

Using the broad categories described above, we begin to see that conventional television produces a significant amount of misinformation about

215. For example, on an episode of *Cops* that aired on June 7, 1993, deputies from Broward County, Florida, performed a routine traffic stop; the officer, a white man, did not give the black driver a ticket because, the officer said, the driver displayed a sufficiently respectful attitude. The next segment featured the arrest of an elderly woman for a hit and run accident; the officer said that he would advise her of her Miranda rights before she spoke, but did not do so. The program then turned to a sting operation aimed at escort services that provided prostitutes to customers. Male officers leered at video monitors connected to a video camera hidden in a hotel room that showed prostitutes requesting payment and undressing. Officers then burst in to make arrests. The faces of the women were obscured, but parts of their bodies were visible. Despite the husky-toned male voice-over at the beginning of the program that said that "[a]ll suspects are considered innocent until proven guilty," the comments of the officers involved left little doubt that those arrested were guilty.

216. The formats of these shows, which have included *The Judge*, *Family Court*, *Divorce Court*, and *Superior Court*, vary widely. See Machlowitz, *supra* note 180, at 52-53; Clifford Terry, *TV Trials: Lawsuits Pay Off in the Afternoon*, CHI. TRIB., Aug. 23, 1988, at Tempo 1 (television court shows increasingly popular).

217. For example, when Judge Wapner came to Yale Law School to preside at the final round of the school's mock trial competition, the event made national news. David Margolick, *Elitest Yale Breaks Precedent and Invites a Symbol of Populism to Preside at a Legal Rite*, N.Y. TIMES, Apr. 12, 1991, at B16.

218. E.g., *48 Hours: Fatal Encounter*, (CBS television broadcast, Feb. 17, 1993) (program consisted of edited version of Jacksonville, Fla., homicide trial).

219. See John J. O'Connor, *The Amy Fisher Story*, No. 1: *Her Version*, N.Y. TIMES, Dec. 28, 1992, at C9 (NBC, ABC, and CBS all brought out docudramas of the case within days of each other); John J. O'Connor, *The Line Between Dramas and Lies*, N.Y. TIMES, Dec. 31, 1992, at C11 (calling the three shows "slapdash docudramas" and "instantly disposable programs").

220. *In the Line of Duty: Ambush in Waco* (NBC television broadcast, May 23, 1993).

criminal justice. At least five issues involving the public perception of the criminal justice system emerge that merit serious consideration.

1. *Unattainably High Standards for Police*

While the portrayal of police in conventional television has often been sympathetic, it has conditioned viewers to expect much more of law enforcement, prosecutors, and courts than they can realistically deliver. David Simon's observations at the beginning of this essay capture the situation well. Regardless of the fact that forensic science solves very few cases, jurors expect such evidence, or an explanation for its absence, in every case.²²¹ Jurors become so conditioned by the "law" and "police work" on television that the actual evidence becomes secondary.²²² As an officer interviewed in another study said, jurors expect the impossible: "The public gets the impression that you can take fingerprints off water."²²³

2. *The Perception of a Violent World*

Crime-related television, especially entertainment programming, portrays a world steeped in violence. On television, the most common crime, by far, is murder; around half of all television crimes involve murder.²²⁴ Even when the crime is not murder, violent crime predominates; robberies and violent assaults are also familiar to viewers.²²⁵ This is completely inaccurate; in the real world, the taking and destruction of property remain by far the most common crimes, making up approximately 60% of all cases.²²⁶ The most serious crimes of violence—robbery, murder, and rape—together make up only five percent of all crimes.²²⁷

Heavy consumers of crime-related television view the world as much more dangerous than it really is.²²⁸ They feel themselves threatened much more often, and they trust strangers less.²²⁹ Given the increased threat that they feel from crime, these people may become more receptive to political "tough on crime" arguments than they might be otherwise.²³⁰ Further, the effect of tele-

221. SIMON, *supra* note 1, at 456.

222. *Id.*

223. Alan F. Arcuri, *You Can't Take Fingerprints Off Water: Police Officers' Views Toward Cop Television Shows*, 30 HUM. REL. 237, 243 (1977).

224. Gerbner, *supra* note 189, at 419 ("Nearly 41 percent of all television crimes are murders; the next leading crime amounts to only 5 percent of all crimes.").

225. *Id.*

226. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 8-9 (7th ed. 1990). The FBI report that in 1989, the rate of property crimes—burglary, larceny, theft, and motor vehicle theft—was more than *eight times* higher than the rate of violent crimes—murder, rape, robbery, and aggravated assault. U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 1989, at 48.

227. YALE KAMISAR ET AL., *supra* note 226, at 9; *see also* U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, *supra* note 226, at 48.

228. George Gerbner & Larry Gross, *Living With Television: The Violence Profile*, 26 J. COMM. 173, 191-93 (1976) (heavy viewers exaggerate their own chances of being involved in violence); George Gerbner et al., *TV Violence Profile No. 8: The Highlights*, 27 J. COMM. 171, 176 (1977) (same). Of course, a causal connection cannot be assumed. It may be that viewers with these attitudes simply watch more of this violent programming; their attitudes are not shaped by it.

229. Gerbner & Gross, *supra* note 228, at 191-92 (heavy viewers less secure in their environments and less trusting of others); Gerbner et al., *supra* note 228, at 178 (same).

230. Gerbner & Gross, *supra* note 228, at 193 ("Fear is a universal emotion and easy to

vision violence on children is both profound and long lasting.²³¹

3. "Crime Does Not Pay"

In reality, this old adage remains nothing more than a platitude. In fact, most people who commit crimes get away with them. At each stage of the criminal justice system—reporting of the crime, arrest, preliminary screening or hearings, motions, and trials, for example—great numbers of potential defendants are "screened out," and relatively few ever suffer punishment.²³²

Watching conventional television, one would never know this. In an overwhelming number of cases, law enforcement catches the perpetrator.²³³ This seems only right, given the overwhelming amounts of scientific evidence and inexhaustible resources the police on television have to spend on any one case.²³⁴ In fact, until recently, broadcasting codes mandated that, on television, crime *could not* pay.²³⁵ This attitude remains so strong that two new crime shows that took the opposite tack merited attention in the national press.²³⁶ Thus real police can only suffer by comparison with their fictional brothers and sisters in blue.²³⁷

4. Whites As Victims of Crime

On television, the typical crime victim is white.²³⁸ This is, at best, misleading. Forty-three percent of homicide victims are in fact African-American.²³⁹ Since this percentage far exceeds their proportion of the population, homicide rates among African-Americans are high, at least five times as high as that of whites.²⁴⁰ Homicide remains the leading cause of death among young African-American males and females.²⁴¹ Television's portrayal of crime

exploit ... [television violence] may cultivate exaggerated assumptions about the extent of threat and danger in the world and lead to demands for protection.").

231. Brandon S. Centerwell, *Television and Violence: The Scale of the Problem and Where to Go From Here*, JAMA 3059 (1992) (exposure of young children to television increases aggressive behavior into adulthood).

232. KAMISAR ET AL., *supra* note 226, at 21 (describing this as the "funnel analogy" or "sieve effect").

233. See *supra* notes 189-93 and accompanying text; JAMES M. CARLSON, PRIME TIME LAW ENFORCEMENT: CRIME SHOW VIEWING AND ATTITUDES TOWARD THE CRIMINAL JUSTICE SYSTEM 189 (1985) (on television, crime doesn't pay and is punished).

234. Arcuri, *supra* note 223, at 242-44 (television may "miseducate" the public into thinking that police have inexhaustible means to fight crime).

235. Gerbner, *supra* note 189, at 419 n.12 ("Broadcasting codes requiring that crime must not go unpunished" give the public unrealistic expectations of police); NATIONAL ASS'N OF BROADCASTERS, THE TELEVISION CODE (19th ed. 1976), reprinted in MARY B. CASSATA & MOLEFI K. ASANTE, MASS COMMUNICATIONS: PRINCIPLES AND PRACTICES, Appendix A, at 313-14 (1979) (television programs showing violence and crime should always show consequences and effects).

236. O'Connor, *supra* note 178, at B1 (applauding *Crime and Punishment* and *Homicide* for their ambiguity and originality, because apparent perpetrators get away with their crimes).

237. Arcuri, *supra* note 223, at 242-44.

238. E.g., Gerbner, *supra* note 189, at 419 (on television, "[a] disproportionate number of victims are white").

239. CENTERS FOR DISEASE CONTROL, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, NO. 41, MORBIDITY AND MORTALITY WEEKLY REPORT 3 (May 29, 1992).

240. *Id.* at 7. In fact, in each year since 1978, while the number of homicides per 100,000 people never exceeded 6.2 for whites, it was as high as 38.4 per 100,000 for African Americans.

241. *Id.* at 3 (in the 15-34 age group, homicide is the most common cause of death for

victims as overwhelmingly white plays upon and increases the fears of whites, who in fact have the least to fear from crime,²⁴² and discounts the tidal wave of death and injury suffered by African-Americans at the hands of criminals.²⁴³

5. *The Criminal Justice System: A Series of Technicalities*

Conventional television about crime reduces the United States Constitution and the criminal justice system to a series of petty rules irrelevant to the question of guilt. Constitutional and other legal rules exist on television only to help the guilty escape punishment. Television's private detectives often convey an ominous message: "The Constitution and civil liberties are for criminals; I [the character] am interested in justice, and especially in just deserts for the guilty."²⁴⁴ On television, the police themselves regularly exhibit these same attitudes.²⁴⁵

As with the excessive portrayal of violent crime, heavy viewers of television crime shows feel that civil liberties hamstring the police and benefit undeserving criminals.²⁴⁶ Among these viewers, respect for the criminal justice system and what it does is low. In sum, far from educating viewers about our system of justice, crime-related television may distort their view of the process, and make it seem without significant value to society.²⁴⁷ This depiction of justice—arbitrary, full of rules either for the sake of rules or the sake of criminals—is, at best, unappealing.

Assuming all of this is true, the question remains whether Court TV does a better job on any score than conventional television. Does it educate, as its proponents claim? Is it more accurate? Does this matter? The answer is that while it does portray the criminal justice system much more accurately and thoroughly than any of traditional television does, Court TV has shortcomings of its own.

V. COURT TV: A BETTER IDEA

Whatever one thinks of the portrayal of criminal justice on conventional

African Americans; this is not true for whites).

242. Michael McQueen, *People With the Least to Fear From Crime Drive the Crime Issue*, WALL ST. J., Aug. 12, 1992, at A1 (suburban whites, to whom anti-crime rhetoric of politicians is designed to appeal, are in fact least likely to be crime victims).

243. Other minority groups and women are also portrayed inaccurately in convention television's crime-related programming. For an especially interesting example, see SUSAN FALUDI, BACKLASH 149-53 (1991) (*Cagney and Lacey*, a program that realistically portrayed two tough female police detectives, was changed over its broadcast run to "soften" these characters, because they were insufficiently feminine).

244. Stark, *supra* note 24, at 263.

245. E.g., Arons & Katsh, *supra* note 192, at 13 (random sampling of crime-oriented programs revealed numerous constitutional violations, brutality and harassment by police); CARLSON, *supra* note 233, at 190 (on television, constitutional liberties are technicalities that hinder crime control).

246. E.g., CARLSON, *supra* note 233, at 140 (heavy TV viewers have a "crime control" view, which television encourages by portraying civil liberties as technicalities that obstruct police).

247. *Id.* at 194, n.5 (television, in its promotion of victimization anxiety, denigration of civil liberties, and encouragement of adherence to authority, disserves democracy, which "emphasizes the need for an informed tolerant citizenry that is willing to question authority. Crime shows, it appears, contribute little to the socialization of support for the democratic creed").

television, no one would dispute that Court TV at least does a better job of showing viewers what a trial really is. No slick actors here; rather, we see real attorneys make their way through thickets of complex issues. Even the very good attorneys do not emerge as hot, exciting performers. Rather, we see that slow, careful, patient work represents the lawyer's stock in trade. Painstaking precision, backed by conscientious preparation, wins cases. Flash and excitement seldom show up on Court TV.

Even cross-examination, that great engine of truth finding,²⁴⁸ seldom exhibits individual moments of real drama, in contrast to what one sees in almost any segment of *L.A. Law* or *Perry Mason*. The lawyer who can do an exciting two-minute cross-examination (one of the staples of both of these programs) in an actual case seems not to have been born yet, and for good reason: Real cases present issues of far greater complexity than does television.²⁴⁹ Instead, cross-examination comes across as a process of simply asking one question after another, chipping away bit by bit at the witness's story or the other side's theory, sometimes in portions so small that they remain imperceptible until the closing argument.²⁵⁰ At other times, cross-examination may consist only of using leading questions to elicit helpful information from the witness. Only occasionally do we see moments of tension or suspense in a real cross-examination. Dramatic or not, this is exactly as it should be. As almost any text on the subject says, cross-examiners should avoid asking about the ultimate point, saving it for closing argument; they should not attempt to win the case in a few short questions, but instead should attack little by little, question by tedious question, fact by fact.²⁵¹

Unlike conventional television, what we often see on Court TV is usually not exciting at all. The trials tend to be long, tedious affairs. They lack the short-term snap and excitement so important to portrayals of trials on television. Rather, in the uncut version of the trial that is Court TV's hallmark,²⁵² the viewer sees due process in action. Given this tediousness, "in

248. JOHN WIGMORE, 5 EVIDENCE § 1367 (3d ed. 1940) (cross-examination is the "greatest legal engine ever invented for the discovery of truth").

249. See, e.g., Gillers, *supra* note 180, at 1612 (rather than law's complexity, *L.A. Law* conveys a few of the law's core ideas; "[n]ext to that effort and achievement, what difference does it make if McKenzie, Brackman lawyers consistently ignore the rules of evidence or if they make speeches to witnesses when they should be asking questions?").

250. MAUET, *supra* note 197, at 221 (Cross-examination requires counsel to proceed "bit by bit," "slowly making mountains out of molehills," saving the ultimate point for closing argument).

251. *Id.*; see also Irving Younger, *A Letter In Which Cicero Lays Down the Ten Commandments of Cross-Examination*, 61 LAW INST. J. 804, 806 (1987) ("[s]ave the explanation for summation").

252. Interestingly, during the Spring of 1993, Court TV seems to be reaching for opportunities to move away from using uncut trial footage. While most daytime programming still consists mainly of live trial coverage (or taped coverage replayed in full), the network now offers other programming in the evening. For example, February 1993 saw the addition of a new feature, *Prime Time Justice*, which presents short highlight segments of cases from around the country, and extensive commentary by Court TV anchorpersons and guest experts. The program makes liberal use of taped trial footage, but is heavily edited (leaving it vulnerable to the same types of criticisms leveled at conventional television news reporting on trials). For example, the installment of *Prime Time Justice* that aired on March 23, 1993, contained short segments on a hit and run death case and featured short taped pieces of the testimony of several children; the sentencing of a woman convicted of aiding in the murder of her husband, which included a replay of the moment the guilty verdict was read that featured the defendant and those sympathetic with her literally weeping and wailing and the defendant collapsing on the

action" may not seem like the best term to describe what Court TV presents. In fact, Court TV shows us that due process is usually a *dull* process, often deadeningly so. Beyond people hooked on the legal process for its own sake or those who want to watch a particular case, one wonders whether Court TV will develop a steady audience of people who would watch it in preference to other, more exciting offerings.

Therein lies the dilemma for Court TV. It may be that the legal system itself, as opposed to dramatic depictions of it, does not make especially good or entertaining television. Viewers choose whether to watch Court TV, and the network must therefore compete with other programming sources. It may be that viewers who grew up on comedies, stock melodramas, and police action shows simply will not put up with programming that moves slowly and requires explanation and thought.

The question posed here, however, is not whether Court TV will succeed financially, or even whether its programming makes for good television. Rather, the question is whether Court TV makes a contribution to the public's perception of the criminal justice system. In other words, conventional television offerings communicate to the public an incorrect view of the criminal justice system and many of its important values. Court TV certainly *intends* to communicate something else: The civil liberties protected by the Constitution are "the bedrock of a system ... that is the envy of the world."²⁵³ Do Court TV viewers in fact encounter a different image of the criminal justice system?

We *can*, at least, say this: If Court TV presents a different view, viewers *can* learn from it. In a study in *Judicature*, Professor Paul Raymond sought to find out whether, and how much, people could learn about the legal system from viewing unedited videotape of a trial.²⁵⁴ The trial was just a few hours long;²⁵⁵ still, like much of Court TV's trial programming, it was viewed almost in its entirety.²⁵⁶ Attitudes about the legal system were tested both before and after viewing the tape. While not without limitations,²⁵⁷ the study did show that viewers' knowledge and attitudes about the legal system changed as a result of watching the trial. Those who viewed the trial retained important information about the system and its central principles, among them rules that allow juries to discuss the case only after all the evidence is in, disqualification of jurors by judges and attorneys, and the reasons jury members are sometimes excluded from the courtroom.²⁵⁸ The study also showed that viewers' confidence in the legal system did not decrease, despite the fact that the plaintiff, a poor individual, lost to a big business.²⁵⁹ The experience also made participants more

courtroom floor; and the day's events in the Woody Allen-Mia Farrow child custody case, in which the only videotape was of the famous director entering the courthouse.

253. See *supra* note 176 and accompanying text.

254. Paul Raymond, *The Impact of a Televised Trial on Individual's Information and Attitudes*, 75 JUDICATURE 204 (1992).

255. *Id.* at 206.

256. *Id.* Lengthy recesses were edited.

257. The group of subjects was relatively small, at sixty; the group was predominantly white, female and college educated. *Id.* at 206, 209. For purposes of this discussion, it should also be noted that this was a civil trial. *Id.*

258. *Id.* at 207-08. Raymond notes that these findings are consistent with other studies of the attitudes held and knowledge gained by viewers of television coverage of high-profile cases. *Id.* at 209.

259. *Id.* at 208.

supportive of covering trials with live television.²⁶⁰

Obviously, there are differences between this controlled experiment and viewing Court TV (or indeed any television).²⁶¹ At least some of these differences, however, strengthen the argument that the viewing of real trials might change positively both knowledge and attitudes. For example, trials on Court TV typically run longer than just a few hours; moreover, the typical viewer may see not one trial but many, over an extended, even open-ended, time. This may represent a greater chance for communication of accurate messages about the criminal justice system.²⁶² Along the same lines, the commentary offered by Court TV's anchorpersons and guest commentators may illuminate not only the particulars of the case, but also more broadly applicable concepts. In sum, it seems safe to say that viewers of Court TV will be educated by the experience, at least to some degree. The question becomes, then: What does Court TV teach?

A. A Better View of Justice

In several different respects, Court TV offers a view of the criminal justice system that contrasts markedly with the less than accurate picture presented by conventional television. As such, it represents a chance for a better understanding of how the criminal justice process works.

To be sure, Court TV does not necessarily do a better job than conventional television in the five areas discussed above in which conventional television fails; indeed, Court TV does not address some of them in any way whatsoever, and may even help perpetuate some incorrect ideas. For example, because Court TV focuses almost exclusively on trials, in which by definition someone has been caught and charged, the erroneous idea that "crime does not pay" may be strengthened. Further, since so many of Court TV's cases involve murder or other violent crime,²⁶³ the perception of the world as more violent than it really is may gain additional credence. Court TV does, however, significantly expand public understanding of courts and the Constitution—not just what they are and what they do, but their significance. It may thus help debunk myths relating to what police can do, and, even more importantly, show the law as a vehicle for substantive justice rather than for just technical arguments.

1. The Complete Picture

Even the most accurate part of conventional television, news broadcasts,

260. *Id.* at 209. While none of the changes noted here are dramatic, Raymond notes that "the conditions of the experiment mitigate against dramatic shifts in individuals' attitudes." *Id.* The case shown was deliberately chosen because it was of moderate interest; it was not a high-profile matter. He notes that "attitude change is most likely to occur when an audience is highly interested in a communication." *Id.* Thus Court TV's choice of high-profile cases, even when they are not the most legally interesting, *see supra* notes 166–71, may be the most effective at educating the audience.

261. *See supra* note 257. In addition to the characteristics of the experimental subjects, Raymond also notes that the subjects viewed the trial under conditions that "do not correspond to the environment in which most people will be exposed to televised trials." *Id.* at 209.

262. The use of the word "may" is intentional. Viewers might see Court TV only in tiny portions, and only infrequently. It could also be true that a longer presentation might be less effective at communicating some of these principles, not more effective, because people can only pay attention for so long.

263. *See infra* note 287 and accompanying text.

can offer only an incomplete version of any important trial. The whole event will be summarized in two minutes by a reporter with little or no knowledge of the legal process²⁶⁴. Thus the person interested in a case depends on a highly derivative, filtered source of information.

By contrast, those who see Court TV can make up their own minds about the case and the evidence. Court TV's virtually uncut live coverage of trial testimony allows anyone to see the trial as if present. The viewer sees an almost²⁶⁵ unmediated version of the proceedings, rather than interpretations of the event.

2. Exposure of the Judicial Branch to Public Scrutiny

To the extent that democracy and institutional accountability depend on openness, Court TV's exposure of the courts as they truly work during trials represents an unparalleled step forward. Courts, especially their role in the criminal justice system, have seldom been the subject of more controversy than they are now.²⁶⁶ The issues that underlay these debates often touch upon sensitive questions of morality, legality, racial inequality, and social justice. Yet the public discussion on television and in the press often stays on an emotional plane, consisting only of skin-deep reactions devoid of analysis.²⁶⁷

Court TV offers citizens the chance to actually see their system of justice at work, along with expert analysis and commentary. Rather than react to the latest political scare tactic—the famous Willie Horton ad, for example—people may see the system for what it is. In the bargain, they can learn some of the bedrock principles of our system of constitutional government and criminal procedure. For example, it is one thing to be aware of the presumption of innocence; it is quite another to watch the system do the best that human

264. This problem is widespread, as is obvious from press coverage of almost any trial, and it is not at all confined to reporters in the electronic media. See, e.g., Phil Berger, *Tyson's Accuser Remains Unshaken On Stand*, N.Y. TIMES, Feb. 1, 1992, § 1, at 29 (important point of cross-examination of alleged rape victim was not substance of her testimony, but fact that she was not moved from her basic story while on the stand). As any good trial lawyer knows, the secret of cross-examination is not to shake the witness into changing testimony—only Perry Mason could do this—but rather to chip away slowly, bit by bit, question by question. See MAUET, *supra* note 197, at 220. Generally, the press would not think of covering a basketball game, even at the high school level, with a reporter who had no working knowledge of the sport. Yet, as is obvious from press coverage of trials, newspapers and the electronic media frequently send reporters to cover court proceedings who have absolutely no idea what goes on in a trial. The result is often bad coverage, frequently sensationalistic and inaccurate.

265. I say almost because Court TV does edit, cut, and guide viewers through the use of anchors and experts, and seems to be using edited material more and more as time goes on. See *supra* note 252.

266. E.g., Mydans, *supra* note 35, at A7 (African-Americans question legitimacy of courts, accusing them of racial bias).

267. George Bush's infamous Willie Horton ad in the 1988 presidential campaign is perhaps the prototypical example of a visceral, unthinking (some would say deeply cynical) response to important issues of criminal justice. Perhaps it is a measure of just how serious the problems in the criminal justice system are that public officials are beginning to discuss alternatives to knee-jerk "get tough" criminal justice policies, regardless of the political cost. E.g., David A. Harris, *The Realities of Punishment*, 83 J. CRIM. L. & CRIMINOLOGY 1098, 1110 (1993) (review essay) (deepening fiscal crisis in state governments in general, and in corrections in particular, may force a reexamination of current criminal justice policy); Michael deCourcy Hinds, *Feeling Prisons' Costs, Governors Look at Alternatives*, N.Y. TIMES, Aug. 7, 1992, at A17 (escalating prison costs are forcing governors to examine alternatives, despite risk of being labeled too soft on crime).

institutions can be fair to an individual accused of the most horrible acts imaginable.²⁶⁸ Without doubt, society despises the criminal, whether accused or convicted. When viewers watch the system do its best to protect the accused, they learn important lessons about due process, the presumption of innocence, and the function of law itself.

3. *Focusing the Public on Significant Issues*

The availability of trials concerning issues important to society in general can serve to focus people on these issues and their implications. For example, the trial of William Kennedy Smith for allegedly raping a woman he knew, shown in its entirety on Court TV, served to focus attention on the issue of acquaintance rape.²⁶⁹ Given coverage by Court TV, other issues may receive similar attention.

4. *The Importance of "Legal Technicalities"*²⁷⁰

Many members of the public share the perception, fostered by conventional television, that trials represent the worst of the legal system: A focus on procedure to the exclusion of justice, a gamut of picayune rules designed to trip unwary prosecutors and police. Indeed, the portrayal of the trial process and constitutional and civil liberties as technical impediments to justice may be the most significant damage caused by conventional television.

Court TV, with its continuous coverage, offers the chance for a deeper look at these issues. For example, motions to exclude evidence take on real gravity when we see what the evidence would be, hear the arguments made for the evidence's admission and exclusion, and get the judge's decision, along with an explanation.²⁷¹ The network's use of legally-trained anchorpersons and guest experts can enhance this process. When the public can see not only what is happening but have it explained, people may understand that the procedures used in criminal cases are designed not to give the accused a "sporting chance,"²⁷² but to serve important societal values.

Thus Court TV offers many benefits, and seems superior to what is traditionally available on television. It may improve the accuracy of public perceptions and the supply of information upon which to base the democratic accountability of our judicial institutions. Nonetheless, Court TV carries with it its own problems. To know whether Court TV represents a net improvement over the portrayal of the criminal justice system on conventional television, we must take account not only of the network's potential to educate and elucidate,

268. For instance, the televised hearings for Jeffrey Dahmer were not about whether Dahmer killed the victims. Rather, the question was the mental state of the man who had committed the most grisly crimes, and punishment.

269. See *supra* notes 132-33 and accompanying text. Given nothing more than the Kennedy name, it is likely that public attention would have focused on the case and the issue even without Court TV. However, it is clear that the trial was brought into the national spotlight at least in part once the country became riveted to the images Court TV supplied.

270. See *supra* notes 244-47 and accompanying text.

271. For example, Court TV viewers who watched William Kennedy Smith's rape trial heard arguments concerning the admissibility of affidavits by several other women who alleged that he raped them. The jury did not hear this evidence; the judge excluded it.

272. See A. Kenneth Pye, *The Role of Defense Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, 926; Joseph D. Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 677 (1986).

but of its difficulties as well.

VI. COURT TV: MISLEADING IN ITS OWN RIGHT?

Court TV certainly gives us a more accurate picture of the criminal justice system in terms of what happens at a trial and why. The benefits of Court TV over representations of crime and justice on conventional television seem numerous: Better understanding of our Constitution, our institutions, and the policy choices regarding these issues. Still, however, Court TV itself has the potential not only to inform, but to mislead.

As a starting point, think of the expressions used throughout this discussion to describe both conventional television and Court TV. The terms used included the "picture"²⁷³ of the criminal justice system, or the system's "portrayal"²⁷⁴ by either conventional television or Court TV. This language highlights the basis of the problem. Both traditional television and Court TV transmit representations of the system. Neither conventional television nor Court TV is the criminal justice system. Crime-oriented entertainment programming on conventional television can be thought of as a painting. With conventional television, since the object is to sell advertiser's products, the "artists" who paint the picture have incentives to make it attractive to viewers; therefore any resemblance between the painting and the real world results from borrowing pieces of the real world—police, crimes, or courts—around which to construct a dramatic scenario. Television news programming seems less a painting than a photograph, a snapshot containing a glimpse of a situation. The information in the photograph is limited; it is an attempt to boil the day's complexities down, to make the event simple enough to be "covered" in a minute or two. Court TV, while perhaps a complete picture of the individual trials it covers, is still only a representation of the criminal justice system. It may indeed be more accurate in significant ways; it may be clearer and easier to understand; it may have real potential to increase knowledge and understanding of the legal system. The fact remains, however, that Court TV must select and weave together its own story of the criminal justice system, its own narrative of what the system does, how it functions and why. This is where the potential to mislead arises.

A. *The Trial as Centerpiece*

The predominant feature of Court TV's programming has always been the full-dress trial, usually with a jury. This is not surprising; to the extent that dramatic moments occur, they will happen most frequently in a trial. The trial also sits at the epicenter of the criminal justice system. It is the setting for the resolution of the ultimate question: Is the defendant guilty or not guilty? Trials are also likely to focus less on dry points of law and more on evidence and the interpretation of facts. Facts and the inferences drawn from them are generally less abstract, easier to conjure up in the mind's eye, and require less training or expert guidance to understand than legal points do.

This programming structure ignores an important reality about

273. See *supra* notes 8–9 and accompanying text.

274. See, e.g., *supra* notes 220–21 and accompanying text.

American criminal cases: Few of them actually go to trial.²⁷⁵ In fact, only about six percent of all criminal cases make it to the trial stage.²⁷⁶ The vast majority of cases are resolved without a trial. For example, in 1988, an average of 66 percent of all criminal cases were resolved through plea bargains.²⁷⁷ Another significant share of cases—twenty percent—was resolved not by trial but by dismissal of charges.²⁷⁸ Either category alone—resolution by plea or resolution by dismissal—represents a greater share of criminal cases than trials do; together, they account for most of the cases that pass through the system.²⁷⁹

Thus the focus of Court TV on trials may create the impression of a system that serves each and every defendant a generous helping of due process, when in fact that is true in only a few cases. Resolution of most cases does not take days or weeks, as the Court TV viewer might think; rather, most criminal cases are resolved in a few minutes of mumbled questions and incantations in a crowded courtroom, before a judge taking plea after plea.²⁸⁰ In the typical case, no intricate structure of constitutional law and procedure protects the defendant; rather, the only rights involved are those waived by the defendant in order to plead guilty.²⁸¹ At least in most urban areas, the guilty plea, not trial by jury, is the real face of justice.

The significance of this fact goes back to a point made earlier about the appearance of justice. If the public has a misleading picture of the criminal justice system, this means that decisions concerning accountability and the governance of our courts may be based on faulty information.²⁸² This increases the likelihood of incorrect policy choices. This is true not only of choices to be made with inaccurate information that is negative, but with inaccurate informa-

275. *E.g.*, CONFERENCE OF STATE COURT ADM'RS AND THE NAT'L CTR. FOR STATE COURTS, STATE COURT CASE LOAD STATISTICS: ANNUAL REPORT 1988, at 54 ("Few criminal cases are resolved by formal trial proceedings. The overwhelming majority of criminal cases are disposed by either a guilty plea or a dismissal.").

276. *Id.* at 55. This figure was the average for the states surveyed and the District of Columbia. The numbers are somewhat higher for felonies: an average of 8.8 percent.

277. *Id.* at 57. California, the most populous state, reported guilty pleas in 87.2 percent of all of its cases. *Id.* Plea bargains account for 91 percent of all convictions in felony cases. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 1988, BULLETIN NCJ 126923, at 6, tbls. 9 & 10 (1990).

278. *Id.* at 57, 58-59. This makes dismissal—a decision by the trial court to terminate the proceedings against the defendant, sometimes at the request of the prosecutor—"the second most common method of case disposition," behind plea bargaining. *Id.*

279. This predomination of guilty pleas is not new. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTIC SPECIAL REPORT, THE PREVALENCE OF GUILTY PLEAS 1 (Dec. 1984) ("For at least 60 years defendant pleas of guilty, not trial by jury, have been the most common means" of disposition of criminal cases. Guilty pleas outnumbered trial ten to one.).

There is a broader point here: The focus on trials puts undue emphasis on the judicial stages of the criminal justice system. Court TV is not, of course, alone in this regard; law schools have been accused of the same thing. *See, e.g.*, Lewis D. Solomon, *Perspectives on Curriculum Reform In Law Schools: A Critical Assessment*, 24 U. TOLEDO L. REV. 1, 5 ("The legal analysis skills developed in the first year focus mainly on the deduction of legal rules from common-law appellate cases and the application of these rules to appellate litigation-oriented hypotheticals.").

280. *See, e.g.*, Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 932-35 (1983), and the many pieces of Alschuler's work cited therein.

281. *Id.*; *see also* FED. R. CRIM. P. 11 (requiring court to address defendant in open court, make particular inquiries regarding, *inter alia*, nature of charges, representation by counsel, and constitutional rights defendant gives up when he pleads guilty).

282. *See supra* notes 35-39 and accompanying text.

tion that is positive. For example, if people believe that all (or even most) criminally accused are afforded every opportunity to defend themselves in a full-dress trial, they may not understand or sympathize with the argument that, in general, little is done for defendants and more should be, perhaps in terms of devoting more resources to indigent criminal defense, or employing more public defenders.²⁸³ Thus when it comes to forming opinions on policy choices, the Court TV Viewer may be better informed about certain aspects of the system, but still incompletely or inaccurately informed about others.

B. The Glamorization of Litigation

Court TV's reliance on trials as the centerpiece of its programming has two other, related consequences. The trial process is made to seem significant, even if not so much as on entertainment television, simply by virtue of the camera's focus on it. Second, the cases on Court TV are all important, if not in terms of the public issues they discuss then at least in the seriousness of the offense. In the typical case, neither of these things are true.

As discussed above, trials on Court TV are quite different from trials on entertainment-oriented programming. While the latter snap with dramatic tension, the former may come across as dull, even numbing in their tediousness. Even so, Court TV's focus on trials certainly makes trials seem to be the center of the legal universe. So little of the criminal justice system's business gets done through trials that this is misleading in itself. Further, the work of lawyers may seem more glamorous than it in fact is, since it seems to consist of nothing other than trial work. Never mind that preparation and pretrial work comprise ninety percent of the work on a case even when it goes to trial; Court TV's picture of the legal world is only of the glitz—the trial itself.

Selected as they are from all possible trials around the country, Court TV's trials naturally tend to showcase issues of public importance.²⁸⁴ If they do not feature issues of importance, they spotlight particular crimes well-known for their context,²⁸⁵ or those involving public figures.²⁸⁶ For most lawyers, such a case is a once-in-a-career experience. On Court TV, viewers see such cases every day. The public may therefore think that the criminal courts are continually host to dramas in which real people act out their roles in the most important issues of our time, or to stories featuring either famous people or exceptionally noteworthy cases. Neither, of course, is true with any regularity.

283. There is real debate on these questions. See, e.g., ROGER HANSON ET AL., *INDIGENT DEFENDERS GET THE JOB DONE AND DONE WELL* (Nat'l Center for State Courts, 1992) (arguing that indigent defender systems do as good a job as private lawyers, in terms of rates of acquittals or reduced charges). Compare Andy Court, *Is There A Crisis?*, AM. LAW., Jan.-Feb. 1993, at 46-47 (others see a system in deep crisis in many places; Hanson's data are selective, taken from locations around the country with the best indigent defender systems).

284. COURTROOM TELEVISION NETWORK, *COURT TV TRIALS AIRED TO DATE AS OF APRIL 29, 1993* (issues spotlighted include stalking, battered women's syndrome, post-traumatic stress disorder, child abuse, the necessity defense, surrogate parenthood, and acquaintance rape).

285. E.g., *North Carolina v. Hunt, Gardone and Watkins*, (trial of three U.S. Marines charged with misdemeanor assault for the beating of a patron of Wilmington gay bar while shouting "Clinton must pay!"); all were acquitted).

286. Among the public figures whose legal matters have been televised on Court TV are Woody Allen and Mia Farrow, Christian Brando, son of actor Marlon Brando, newspaper columnist Art Buchwald, actor Eddie Murphy, attorney William Kuntzler, and of course William

Unlike the cases one sees on Court TV, the typical case does not contain serious charges, such as criminal homicide. While a sizable portion of Court TV's criminal cases involve murder or another violent crime,²⁸⁷ most cases in the criminal justice system involve theft.²⁸⁸

C. The "Snapshot" Effect

Earlier in this essay, I compared television news coverage of criminal trials to a snapshot.²⁸⁹ It shows a snippet of the event, a tiny slice of a long and complex process. As such, this type of coverage may do little to inform, and at worst may mislead.

Court TV's coverage is, of course, at the opposite end of the spectrum. It is all inclusive; almost the entire trial is shown to the viewer.²⁹⁰ Therefore, as far as the trial goes, the picture the viewer gets is complete. This is not, however, a full picture of the criminal justice system. It is a full picture of a very interesting part, the most potentially dramatic part, but only one part of the process. Criminal cases merely begin with an offense. After a report to the police, cases go through numerous stages; at each stage, cases are removed from the system—through dismissals, granting of motions, plea agreements, or the like.²⁹¹ Cases which result in a conviction proceed to a (usually separate) sentencing hearing; an appeal may follow.²⁹² These stages of criminal cases do not exhaust the list of features of the criminal justice system; the system also includes the police, the correctional system, and even the legislative and executive branches (in their policy setting, prosecuting and law making roles).

For Court TV, most of these parts of the system remain largely invisible. The network pays occasional visits to sentencing hearings, pretrial motion hearings, and anchorpersons and experts occasionally comment on the other stages in the system, but for the most part Court TV sticks to its bread and butter—trial coverage.²⁹³ The viewer may thus begin to think the complete criminal justice system consists of nothing but the trial process. Again, this could confine societal thinking in policy making. For example, public debate about crime might get mired in questions of the mechanics of due process of law, when the real discussion ought to concern ways to keep people out of the system in the first place, or the use of alternatives to incarceration.

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287. Of the 226 items Court TV has televised as of April 29, 1993 (including a number of nontrial events, such as parole hearings and "days in the life" of municipal or magistrate courts), 89 have been trials involving either homicide or violent crimes such as assault, robbery or carjacking, with homicides the most frequent. COURTROOM TELEVISION NETWORK, COURT TV TRIALS AIRED TO DATE AS OF APRIL 29, 1993.

288. See *supra* note 226 and accompanying text.

289. See *supra* notes 273–74 and accompanying text.

290. See *supra* notes 152–58 and accompanying text.

291. See KAMISAR ET AL., *supra* note 226, at 8–19.

292. *Id.* at 19–20.

293. COURTROOM TELEVISION NETWORK, COURT TV TRIALS AIRED TO DATE AS OF APRIL 29, 1993 (with a few limited exceptions, such as occasional programming including motions hearings, sentencings, parole hearings, and proceedings from small claims and misdemeanor traffic courts, most coverage is of trials). This remains true even with the addition of new programming. See *supra* notes 143–51.

D. The Editing and Selection Problem

Somehow, Court TV must sift through an almost infinite number of trials, in order to come up with programming that will attract an audience. Further, even on Court TV, editing is necessary to make programming fit television's format and advertising requirements. Additionally, as Court TV leans more heavily on edited programming, such as *Trial Story* and *Prime Time Justice*,²⁹⁴ editing decisions and commentary play an ever greater role. Thus to the extent that one of Court TV's main advantages is that it allows the viewer to make up her own mind about cases and issues by viewing the whole trial and not just a segment of it, editing shrinks that advantage.

E. A Net Plus

Notwithstanding all of these problems, Court TV represents a net improvement. Like any television format, it has limitations. Even assuming its live trial coverage is shrinking, Court TV still offers a far more complete view than anything that has come before. There is real potential for Court TV to help people understand the courts and the law. As such, it is a welcome addition to television coverage of the criminal justice system.

VII. HOW TO IMPROVE WHAT COURT TV DOES: TWO PROPOSALS

Assuming one shares the view that, given both its pluses and minuses, Court TV represents an improvement over conventional television's portrayal of the criminal justice system, the question becomes how to improve what Court TV does. The objective of improvement would be to meet the criticisms above, or to enhance the product in other ways.

A. "J-SPAN"

Professor Alan Dershowitz, one of Court TV's critics,²⁹⁵ proposes that instead of a commercial network, the judicial system should receive coverage by a network modeled on C-SPAN, the Cable-Satellite Public Affairs Network, which offers continuous coverage of the United States Congress and related activities.²⁹⁶ Dershowitz's proposed "J-SPAN" would cover the legal system without the need to pick flashy cases that attract audiences on the basis of the notoriety of either the participants or the crimes. Rather, the only criteria would be public education about the court system and the substantive issues that arise in the cases themselves.²⁹⁷

Several problems seem sure to arise under such a plan. First, covering the doings of Congress, as C-SPAN does, requires equipment and technology mainly in only one, relatively small area—the United States Capitol in

294. See *supra* notes 139–40 and accompanying text.

295. Alan Dershowitz, *When Notoriety is the Star*, WASH. TIMES, Feb. 11, 1992; see also John Lippman, *We, the (TV) Jury*, L.A. TIMES, June 30, 1991, Calendar at 5.

296. Thomas E. Baker, *C-SPAN: A Guide for Law Professors*, 40 J. LEGAL EDUC. 295, 297 (1990) (C-SPAN, a nonprofit cooperative, is a creation of the cable industry which provides public affairs programming from Washington, D.C.).

297. Dershowitz, *supra* note 295; see also Colp, *supra* note 133, at D1 (Dershowitz says trials should be broadcast without commentary by a not-for-profit educational company under the supervision of bar associations and law schools.).

Washington, D.C.²⁹⁸ The technology necessary to cover cases in many locations around the country would, by contrast, present a different kind of challenge; J-SPAN might need a larger electronic network of much greater sophistication than C-SPAN has. Since Court TV currently gets the job done every day, the point is not that such a network could not be formed. Rather, the point is that this would not be a small undertaking at all, and perhaps more importantly, not an inexpensive one. J-SPAN would require a considerable investment, perhaps much greater than what C-SPAN costs. Second, who would pay for and control J-SPAN? Assuming the cable industry would not be willing to create a nonprofit cooperative²⁹⁹ like C-SPAN on a much larger scale, government support might be necessary. The prospect of government-run television covering part of the government seems fraught with danger.³⁰⁰ Third, J-SPAN would not address the problem of editing and selection. Although the United States Congress deals with a wide array of problems and issues, holding hearings, discussions, and debates every day, it is relatively small compared with the number and variety of cases handled in the forty-six different states that allow cameras and microphones to be used in their courtrooms. There would be no less a need for the selection of cases to be made, on some identifiable criteria, on J-SPAN than there is on Court TV right now. Perhaps a blue-ribbon panel could select the cases and come up with editorial guidelines, all without regard to the advertising dollars that Court TV must chase. This does not mean that the problem of editing and selecting cases disappears; it only means that different people—perhaps less self-interested people, but people with their own criteria and agendas nonetheless—make these decisions.

B. An Alternative: Supplement Court TV with Community Court TV

An alternative would be to add to the existing Court TV service. Court TV has one major advantage over the hypothetical J-SPAN discussed above: It already exists, and is funded. A number of its shortcomings could be addressed by adding a new service to cable television offerings: Community Court TV. An existing cable channel, perhaps one currently used for so-called "public access"³⁰¹ programming, or some of Court TV's broadcast time, could carry a continuous feed of programming from local court systems.³⁰² The emphasis

298. Coverage of the sessions of the House of Representatives represents about ten percent of C-SPAN's programming. The remainder consists of live and taped congressional hearings, State and Defense Department briefings, public policy conferences, and interviews with public figures from Washington. Occasionally, C-SPAN also covers events outside Washington—the Republican and Democratic Convention, for example.

299. See Baker, *supra* note 296, at 297.

300. The fact that other government efforts to control television content have not worked should give policy makers pause. The fairness doctrine, a policy designed to promote fair access to and diversity of viewpoints in the electronic media, failed to accomplish these goals. The fairness doctrine "undermined not only its policy objectives but core first amendment interests" and "proved to deter rather than facilitate robust and unfettered debate." Donald E. Lively, *Fairness Regulation: An Idea Whose Time Has Gone*, 45 WASH. & LEE L. REV. 1379, 1382 (1988).

301. Joseph Berger, *Forum For Bigotry? Fringe Groups on TV*, N.Y. TIMES, May 23, 1993, § 1, at 29 (defining "public access" channels as channels local cable companies must keep open to any member of the public in exchange for the monopolies cable companies usually enjoy; programming runs from "amateurish entertainment and often lifeless talk, with a handful of compelling programs" to messages of racial hatred).

302. Certain municipalities already have cable channels that cover their local court

would be on the local. Rather than following major stories around the country, Community Court TV could cover whatever matters surfaced in local courts, from the mundane to the sensational. Programming need not carry Court TV's trappings, such as anchorpersons and experts; rather, it could carry whatever is going on in the local courthouse. One regular day or time slot could be regularly devoted to motions hearings, one to pleas of guilty, or to misdemeanor court; trials could be covered end to end, as Court TV does, when this seems appropriate.

Community Court TV would widen the scope of what the Court TV viewer sees; sensational trials would be rare. The viewer-citizen could get an objective look at her own court system, the behavior of local judges, whom she may have elected, and the seriousness of proceedings (or lack thereof) in her own community. In addition, the perception that Court TV might nurture that the criminal justice system is chock-full of serious cases, especially murders, would be countered directly.³⁰³ If openness is the key to democratic accountability for institutions, this community Court TV would take full advantage of the idea.

VIII. CONCLUSION

Conventional television's crime-related offerings have suffered from a variety of shortcomings. They may, perhaps, have made good entertainment, but their portrayal of the criminal justice system has been and remains not only inaccurate but unfortunate. The viewer of conventional television is told that the world is a more violent place than it really is, and that the criminal justice system is constructed to help criminals by making it difficult for upright citizens to bring the guilty to justice.

Court TV is a welcome innovation. It may, perhaps, help change some of these erroneous perceptions. It at least brings us a more accurate perspective on the trial process, its procedures, and underlying values. While it has problems of its own, it surely represents an improvement. Perhaps with time, Court TV's owners will improve it; perhaps an alternative set of broadcasts will complement it. Whatever happens, Court TV will continue to educate and explain our justice system to many who otherwise would not understand it. If nothing else, this education represents a contribution to our culture, and to our form of government.

systems. *See, e.g.,* Raymond, *supra* note 254, at 204 (trial studied was taken from Madison County, Kentucky's local cable system). In Madison County, Kentucky, jury trials are aired on the Madison County Government Access Channel of the Simmons Cable TV system. Which proceedings are aired, and the manner in which they are aired, is within the discretion of the circuit court; the cable company receives the signal from the court, and puts it through the cable system without change. The channel also airs meetings of Madison County Government bodies, and is used to pass messages regarding county government, for example, when and where potential jurors should show up. Telephone Interview with Gene Hardy, Regional Marketing Manager, Simmons Cable TV (June 4, 1993).

303. Court TV fosters the erroneous perception that full-dress murder trials predominate, *see supra* notes 275-83, 287-88 and accompanying text. Community Court TV would show the more common fare—dismissals, pleas, and (to the extent there are trials, trials of more common cases) theft, simple assault, drug possession and distribution, and the like.

