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## Transparency at the courthouse

Sociologist Alice Goffman wanted to learn firsthand what it was like to live in an American inner-city neighborhood. So she traded an Ivy League dorm room for an apartment in a low-income section of Philadelphia.

She describes her experiences during the six years she lived there in her new book, "On the Run: Fugitive Life in an American City" (University of Chicago Press, 2014).

A major theme is the relationship between the police and low-income African-American men. The combination of the War on Drugs, "broken windows" enforcement of minor offenses and increased use of stop-and-frisk tactics has created a cycle of citations, court appearances, unpaid court costs and the resulting bench warrants.

A person with an open warrant is referred to in the neighborhood as being "dirty." Thus, for a large number of young men, their lives revolve around avoiding contact with the police and the court system. They are always — literally — on the run.

Goffman noticed the central role court proceedings played in their lives. Court appearances served as "social occasions" and "de facto rites of passage." She describes them as "the weddings, graduations, and school dances of the fugitive community." Social status is conferred by who sits with whom. The woman next to the defendant's mother will now be considered the defendant's main partner. It is significant which of his friends attend and which do not. A court appearance shows which people are most important in the defendant's life.

Yet the friends and family present at criminal court proceedings play a far greater role than a merely social one. In an article to be published in the

Harvard Law Review, NYU law Professor Jocelyn Simmons contends that the people who make up the audience in a criminal courtroom also play a crucial constitutional role that has been undervalued for far too long. Jocelyn Simmons, "The Criminal Court Audience in a Post-Trial World," 127 Harvard Law Review — (2014) (forthcoming).

Traditionally, we have considered the jury and the audience to be the two methods for ensuring public accountability at criminal trials. The Sixth Amendment explicitly provides for both through the right to jury trial and the right to a public trial, respectively.

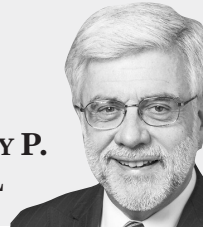
Yet in a world of guilty pleas more than 95 percent of the time, jury trials are now the infrequent exception, rather than the rule. Thus, "Instead of a complement to the jury system, the audience is the public representation in the criminal courtroom." This is true for several reasons.

First, the importance of the audience in a criminal courtroom can be seen through two separate constitutional guarantees. The defendant, of course, has a Sixth Amendment right to a public trial. But the public itself has a separate right to access criminal proceedings under the First Amendment. The Supreme Court has held that "free speech" also carries with it the "freedom to listen" to criminal court proceedings. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 576 (1980).

Second, Simmons argues that the First Amendment interests should mean that the public has a right to observe not only the trial but pretrial and post-trial proceedings as well. The presence of the public in a criminal courtroom protects the ability of citizens to participate in a democracy. The article urges the Supreme Court to recognize this expanded definition of a

### CRIMINAL PROCEDURE

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"criminal trial," which at this point has only been recognized by some lower courts.

Simmons' third point applies directly to Alice Goffman's observation about the centrality of attendance at court proceedings for poor communities and communities of color; for it is these communities that possess the least political power that are most involved in the criminal justice system today.

Simmons argues that the public's presence at pretrial and post-trial proceedings, as well as the trials themselves, is not merely cosmetic. The act of observing is powerful in itself. She notes a phenomenon known as "The Hawthorne Effect" in behavioral psychology. This is the tendency of people to work harder and perform better when they know they are being observed. Audiences can do the same for court officials.

Unfortunately, Simmons notes a number of trends that are resulting in the public being excluded from criminal proceedings. Some courthouses categorically ban spectators from certain non-trial proceedings. Exclusion also takes place because of lack of space in courtrooms. She even

found examples of judges turning off microphones to prevent spectators from hearing the proceedings.

The most hopeful recent signal from the U.S. Supreme Court is *Presley v. Georgia*, 130 S.Ct. 721 (2010) (per curiam). This is the first time the court has addressed the Sixth Amendment's right to a public trial in 24 years. The court reversed the conviction because the Georgia judge excluded Presley's uncle — the only spectator — from the voir dire.

*Presley* is significant for several reasons. First, it extended the Sixth Amendment right to a public trial to include voir dire. Years ago, the court had found there was a First Amendment right of the public to attend voir dire, and *Presley* held that the Sixth Amendment should be no different.

Second, the court held that the burden is on the judge to allow public attendance at a criminal proceeding; the burden is not on the public to assert it.

Third, it held that the wrongful exclusion of even one spectator was structural error that required automatic reversal.

Simmons urges courts to expand the concept of "public trial" to extend all the way from bail hearings and arraignments to sentencings. She argues that court administrators have a duty to provide courtrooms large enough to accommodate the public that wishes to be there. Effective courtroom design and proper sound systems are necessary to allow spectators to understand what is occurring.

The public has a constitutional right to attend criminal court proceedings. For Simmons, the Constitution itself requires "opening doors, turning on microphones, and speaking in ways that acknowledge the audience's presence."

As always, sunshine is the best disinfectant.