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The Tyco Mistrial: Should the Media be Banished from the Courtroom?

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When Justice Michael J. Obus of the New York State Supreme Court declared a mistrial in the case of Tyco International executives L. Dennis Kozlowski and Mark H. Swartz last week, he found himself in a situation having more ethical issues than a porcupine has quills.

A trial of this magnitude -- the two men were accused of looting $600 million from Tyco -- guarantees significant media attention. In this case, however, the media itself also became an issue. In the midst of contentious jury deliberations, one juror widely was reported to have flashed a circular-thumb-and-forefinger "OK" sign to the defense -- an incident that led to repeated requests for a mistrial.

Judge Obus gamely labored to keep the six-month trial on course. But two media outlets, the **New York Post** and the **Wall Street Journal**, named the juror before the trial was concluded -- in ways that were legal but also ethically discouraged by long journalistic custom. Acting uncustomarily, these outlets argued that the juror, by her extraordinary actions, had become news and had to be named. But last Friday, after the juror received a threatening letter from someone in the public, the judge pulled the plug on the trial. Result: defense lawyers disappointed that their clients hadn't been vindicated, prosecution lawyers determined to seek a retrial, and a colossal waste of time and treasure for an inconclusive end.

What went wrong? The largest of the ethical quills here involves the presence of the media in the courtroom. Had no one reported the juror's name, it's doubtful that any intimidation would have occurred. So should we, as some have suggested, ban the media from court?

That raises a classic right-versus-right dilemma. On one hand, it's essential that lawyers and juries do their work outside the glare of publicity, primarily to protect the legal process and keep their attention on their clients rather than on the public. Otherwise there are constant temptations, not only of intimidation but of using the trial for self-promotion.

On the other hand, it's essential that courts in a democracy operate in full sunlight. Since the entire citizenry can't attend every trial, we send in watchdogs to tell us what's happening. Such vigilance keeps our legal system from slipping into the closed trials, arbitrary punishments, and unexplained disappearances of prisoners that characterize closed societies around the world.

If what you want is the best possible outcome in a particular trial, excluding the media may work. But if what you want is a legal system that, over time, produces the best results, transparency is essential and the media needs to be present. Yet that presence, as the Tyco trial demonstrated, raises two more ethical concerns:

- The Tyco juror was known to have been at odds with her fellow jurors, possibly to the point of refusing to deliberate. She apparently felt strongly that the defendants should not be convicted. Did the mistrial grant her wish? Did she flash that sign on purpose? Has she now proved that one juror can single-handedly abort a trial? Have jurors now learned that if they don't like the direction the deliberations are taking, they should make a public spectacle, get named in the press, and perhaps produce a mistrial?

- But suppose she's innocent. Some reporters thought she was not making an OK sign but instead was brushing back a stray shank of hair. Even so, there's another lesson here: that a single letter of intimidation, sent to the right juror at the right time, can wreak havoc with a trial. All you need to do is discover a juror's name, wait until a delicate moment, and then threaten harm if you don't get the right outcome.

These three ethical issues -- naming a juror, having a juror telegraph her intentions, or intimidating a juror -- all have an uncomfortable commonality. Each speaks to the ways that a handful of people with no particular permission to act -- a few editors, one juror, a single letter writer -- can influence the outcome of world-class issues. By the way, that's one of the characteristics of terrorism. A few students with guns at school, a couple of snipers in the Washington area, a few hard-core militants setting bombs in Madrid, also can create world-class havoc.

I'm not suggesting for a moment that editors, jurors, and letter writers are terrorists. But neither am I willing to accept the argument that since *most* editors wouldn't do this, *most* jurors aren't engaged in such curious telegraphy, and *most* people don't write such letters, then there's no problem. Terrorism teaches us two things: that preventing *most* people from building bombs isn't good enough, and that terrorism depends on media exposure to spread its fear.

The point: There's a larger theme that deserves examination in twenty-first-century culture. It has to do with the ability of lone individuals in a news-drenched era to influence the big public issues. Simply squelching the media isn't the answer.