



## **FINAL REPORT**

Judicial Council Study Committee  
on Technology Brought into the Courtroom

April 10, 2012



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## **COMMITTEE CHARGE**

Conduct a study of the public's access to information on trial court proceedings, the issues surrounding technology being brought into courtrooms and its impact on court operations, security and safety, and issues relating to the possible use of recording equipment in justice courts.

The Committee's principal focus should be on the first issue, namely, the pros and cons of expanding media coverage in trial courtrooms to include the use of video technology. However, the study should also be used to bring together several independent inquiries including: the Board of District Court Judges' inquiry on the use of phones and cameras in courtrooms and jury rooms and the impact of that technology on courtroom security; the Judicial Outreach Committee's study of social media; and the Board of Justice Court Judges' monitoring of the Davis County pilot program on the use of recording technology in the justice courts. These inquiries, along with the issue of video technology in trial courtrooms, should be coordinated and consolidated into a single report covering all trial courtroom technology issues.

The Committee should report back to the Judicial Council by April 2012, their findings and recommendations, including, if any, proposed rule changes.

## **INTRODUCTION**

In February 2011, the Judicial Council established a committee to study issues surrounding technology being brought into courtrooms and its impact on court operations, security and safety. Specifically, the Study Committee on Technology Brought into the Courtroom (the Committee) was asked to study the pros and cons of expanding media coverage in trial courtrooms to include the use of video technology, and to consolidate into a single report the Judicial Outreach Committee's and the Board of District Court Judges' independent inquiries on the use of electronic portable devices in courthouses and courtrooms. The Committee was also asked to report on the Board of Justice Court Judges' monitoring of the Davis County pilot program on the use of recording equipment in justice courts. Finally, the Committee was asked to report its findings and recommendations to the Judicial Council by April 2012, including any proposed rule changes.

## **CAMERAS IN THE COURTROOM**

### **A. Background and Overview**

From the 1970s through the 1990s, many state courts implemented experimental rules allowing electronic media coverage of judicial proceedings. Nearly all of these experimental state rules have now been made permanent. Presently, every state in the nation permits some type of electronic media coverage of its trial or appellate courts. The District of Columbia is the only jurisdiction that prohibits such coverage.

State rules permitting electronic media coverage vary widely in scope and approach. Restrictions on coverage generally fall into three categories: (1) restrictions based upon type of court (i.e., trial court vs. appellate court); (2) prohibitions on coverage of certain types of proceedings, witnesses, or trial participants, such as juveniles, sexual

assault victims, or jurors; and (3) consent-based restrictions (i.e., coverage prohibited unless parties, witnesses, or other trial participants consent).

Some states, including Nevada, Colorado, and Washington, have adopted a presumption that electronic media coverage is permitted in proceedings that are open to the public. A decision to prohibit or limit such coverage requires the judge to make particularized findings on the record after consideration of various factors such as fair trial rights, privacy interests, safety interests, and other factors bearing on the fair administration of justice.

Some states expressly prohibit electronic media coverage of certain types of proceedings, witnesses, or trial participants, such as juveniles, sexual-assault victims, or jurors. Other states do not codify such exceptions, but afford the judge presiding over the proceeding broad discretion to impose limitations on photographic coverage to protect compelling interests, such as privacy interests, personal safety, and fair trial rights.

The Radio Television Digital News Association, which maintains a state-by-state guide to cameras in state courts, divides state rules concerning electronic media coverage of the courts into the following three tiers:

Tier 1: States that allow the most electronic media coverage of their courts: (19 states) California, Colorado, Florida, Georgia, Idaho, Kentucky, Michigan, Montana, Nevada, New Hampshire, New Mexico, North Dakota, South Carolina, Tennessee, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

Tier 2: States with restrictions prohibiting coverage of certain types of cases or proceedings or prohibiting coverage of all or large categories of witnesses who object to coverage: (16 states) Alaska, Arizona, Connecticut, Hawaii, Indiana, Iowa, Kansas,

Massachusetts, Missouri, North Carolina, New Jersey, Ohio, Oregon, Rhode Island, Texas, and Virginia.

Tier 3: States that allow appellate coverage only or that have such restrictive trial coverage rules that coverage is essentially prohibited: (15 states) Alabama, Arkansas, Delaware, Illinois, Louisiana, Maine, Maryland, Minnesota, Mississippi, Nebraska, New York, Oklahoma, Pennsylvania, South Dakota, and Utah.<sup>1</sup>

The arguments for and against cameras in the courtroom have remained constant over the years. Camera proponents base their arguments on First and Sixth Amendment guarantees of freedom of the press and public trials, and on the belief that televised court proceedings serve to educate the public and inspire confidence in the justice system. Opponents raise concerns about the adverse impact cameras can have on trial participants and argue that broadcast coverage may, in fact, diminish the public's confidence in the justice system.

The concern most often raised about electronic media coverage is that such coverage may harm the decorum of the proceedings and negatively impact trial participants. The extensive empirical research and broad-based experience of other states, however, suggest that these concerns are unfounded. For example, several states, including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, New York, Ohio, Virginia, and Washington, have studied the impact of electronic media coverage on courtroom proceedings, focusing particularly on the effect that cameras have upon courtroom decorum and

<sup>1</sup> Under existing Rule 4-401, Utah Code of Judicial Administration, video recording and audio recording of appellate proceedings is permitted to preserve the record and as permitted by procedures of those courts, but is prohibited in trial proceedings except to preserve the record. Still photography of trial and appellate proceedings is permitted at the discretion of the judge presiding over the proceeding.

upon witnesses, jurors, attorneys, and judges. *See* Kelli L. Sager & Karen N. Fredericksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1543 (1996) (“*Televising the Judicial Branch*”).

The results from the state studies were unanimous: electronic media coverage of courtroom proceedings—whether civil or criminal—has no detrimental impact on the parties, jurors, counsel, or courtroom decorum. *Televising the Judicial Branch*, 69 S. CAL. L. REV. at 1544, 1547. For example, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm, and reluctance to testify were unfounded. *Id.* at 1543-44. A three-year pilot program permitting electronic media coverage of civil proceedings in six federal district courts and two federal circuit courts reported similar results, as well a favorable view of such coverage by the judges who participated in the program. *See* Federal Judicial Center, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994); *see also* *Televising the Judicial Branch*, 69 S. CAL. L. REV. at 1545; Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1114 (2010) (summarizing state and federal studies on electronic media coverage of judicial proceedings and concluding that the empirical research demonstrates no detrimental impact on trial participants or on courtroom decorum).

The United States Supreme Court weighed in on the debate in 1965 and again in 1981, ultimately recognizing the right of states to allow such coverage. In *Estes v. Texas*, 381 U.S. 532 (1965), the Supreme Court overturned the conviction of Billy Sol Estes, holding that coverage of the trial, which included some use of cameras, violated Estes’ due process rights. Four justices of the five member majority found that televising trials, at least under then-existing technology, was inherently unconstitutional. The fifth justice took a narrower view based on the specific

circumstances of the *Estes* case and suggested that technological advancements might one day lead to a different result.

In *Chandler v. Florida*, 449 U.S. 560 (1981), the Supreme Court revisited the issue of cameras in the courtroom and unanimously upheld the Chandler defendants' burglary convictions even though a brief part of the trial was televised over their objections. Chief Justice Warren Burger, writing for the Court, held that states should be free to develop their own procedures for broadcasting trials, and that such television coverage was not an inherent violation of due process. After *Chandler*, states rapidly began to open their doors to television cameras on a permanent or experimental basis.

Federal courts, by comparison, expressly prohibit electronic media coverage of criminal proceedings under Rule 53 of the *Federal Rules of Criminal Procedure*. In 1988, the federal judiciary appointed a committee to study the issue, and that committee recommended a three-year pilot program, for civil cases only, in several federal district and circuit courts of appeals. The pilot program was in effect from 1991 through 1994. Notwithstanding the Federal Judicial Center's ultimate recommendation that federal trial courts allow cameras in civil proceedings, the federal judiciary declined to continue the program when the study period expired.

In 1996, the U.S. Judicial Conference rescinded its camera-coverage prohibition for courts of appeals and allowed each appellate court the discretion to permit broadcasting of oral arguments. Presently, two courts of appeals—the Second and the Ninth—allow such coverage. In September 2010, the U.S. Judicial Conference approved a new pilot project to evaluate the effect of cameras in federal district courtrooms and of the public release of digital video recordings of some civil proceedings. The pilot project is national in scope and is expected to last for approximately three years.

## **B. Findings and Recommendations**

Every state in the nation permits some type of electronic media coverage of its trial or appellate courts. Presently, Utah is one of the most restrictive states in the country. If adopted as recommended, proposed Rule 4-401, set forth in its entirety behind Tab 7, will place Utah in the ranks of states that allow the most electronic media coverage of their courts. The Committee concluded that the potential public benefits flowing from electronic media coverage of open judicial proceedings are substantial. While relatively few judicial proceedings are likely to attract electronic media coverage, those that do are likely to be of significant public interest and concern. Permitting electronic media coverage will allow the public to actually see and hear what transpires in the courtroom, and to become better educated and informed about the work of the courts. At the same time, electronic media coverage of trial court proceedings raises concerns about fair trial rights, personal privacy, safety, security interests, and other legitimate interests. Accordingly, the proposed revision of Rule 4-401 balances those interests by permitting electronic media coverage of open judicial proceedings while allowing a judge to prohibit or restrict such coverage to protect fair trial rights, privacy, security, and other important interests.

## **C. Summary of Revised Rule 4-401:**

Section 1 of revised Rule 4-401 defines the terms “judge,” “proceeding,” “electronic media coverage,” and “news reporter.” The definition of “news reporter” under the proposed rule is consistent with the definition of “news reporter” under Utah’s reporter’s shield rule, which is codified in Rule 509 of the *Utah Rules of Evidence*.

Section 2 creates the presumption that electronic media coverage by a news reporter is permitted in courtroom proceedings that are open to the public, subject to the limitations set forth in the rule. Limitations on electronic media coverage must be

supported by reasons found by the judge who is presiding over the proceeding to be sufficiently compelling to outweigh the presumption. Section (2)(B) identifies nine factors that may guide judges in exercising their discretion. Section (2)(C) requires the judge to make particularized findings on the record supporting a prohibition of electronic media coverage or restricting such coverage beyond the limitations provided by the proposed rule. Such findings can be made orally or in a written order.

Section 3(A) requires news reporters who desire permission to provide electronic media coverage to file a written request with the court at least 24 hours prior to the proceeding (the current rule), but allows the judge to grant such a request on shorter notice or to waive the requirement for a written request upon a showing of good cause. Section 3(B) allows the judge to terminate or suspend electronic media coverage at any time without prior notice under certain circumstances.

Section 4 regulates conduct in the courtroom. It also places responsibility for pooling arrangements on the shoulders of news reporters rather than the judge who is presiding over the proceeding or court staff. Section 5 addresses sanctions for violations of the rule.

Section 6 sets forth several categorical restrictions on electronic media coverage under the rule, including prohibitions against photography of minors, of jurors unless dismissed, in camera hearings, confidential communications, and of documents not part of the official public record. Subparts (6)(A), (6)(B), and (6)(C) exist under the current rule. Subparts (6)(D), (6)(E), and (6)(F) are new under the proposed rule.

# **ELECTRONIC PORTABLE DEVICES IN COURTHOUSES AND COURTROOMS**

## **A. Background and Overview**

The near universal use of electronic portable devices presents challenges for the judiciary: security and personal safety; maintaining dignity and decorum in the courtroom; and conducting fair and impartial hearings. But the judiciary has faced these challenges for centuries. The challenges are, perhaps, heightened by the proliferation of evolving technologies, but they are, in concept, nothing new.

### **1. Social Media Subcommittee of the Judicial Outreach Committee's Report and Recommendations**

The Social Media Subcommittee of the Judicial Outreach Committee, whose membership consisted of judges from each court level, court executives and practicing attorneys, studied the issue of electronic portable devices in courtrooms for several months. The Subcommittee reviewed studies and recommendations by the National Center for State Courts, the American Trial Lawyers Association, various media advocacy groups and policies already in place in other judicial systems. The Subcommittee also reviewed emerging case law before it unanimously recommended to the Judicial Outreach Committee a policy that it believed fairly balanced the interests of the public with the interests of the judiciary. The Subcommittee's proposed policy, set forth in its entirety behind Tab 9:

1. Recognized the growing need for lawyers to use mobile devices in court and acknowledged that the silent use of mobile devices by members of the media was not disruptive and enabled the media to better report on judicial proceedings;

2. Distinguished between the possession and use of mobile devices in court facilities and the possession and use in courtrooms, with there being greater restrictions on the latter;
3. Generally allowed the use of portable devices by lawyers and members of the public in both facilities and courtrooms, subject to certain restrictions enumerated in the policy, including a ban on using the devices to record proceedings;
4. Allowed an individual judge to further restrict or totally prohibit the possession or use of mobile devices in his/her courtroom based on certain articulated circumstances related to safety, security, the fair administration of justice, privacy and other factors;
5. Prohibited juror use in courtrooms and possession while deliberating; and
6. Allowed for the screening of mobile devices upon entry to court facilities and confiscation where appropriate.

The Subcommittee's proposed policy, with minor non-substantive changes, was approved by the Judicial Outreach Committee on a vote of 6-4 and subsequently sent to this Committee for debate and consideration.

## **2. Board of District Court Judges' Report**

A subcommittee of the Board of District Court Judges undertook a study of the issue of cell phones in the courts and provided a report to the Board in early 2011. The subcommittee report, located behind Tab 10, was adopted by the Board and submitted to this Committee for consideration. As the report indicates, the Board reviewed a number of reported circumstances where the administration of justice was significantly undermined by the presence of cell phones in the courtroom. The Board concluded that the potential damage caused by electronic devices in the courtroom

and jury room could not be ignored and that a policy prohibiting their use should be implemented. Ultimately, the Board proposed that:

1. No electronic devices of any kind may be brought into the courthouse except by:
  - a. Attorneys appearing before the court;
  - b. Court employees;
  - c. Law enforcement or Department of Corrections employees;
  - d. Electronic dictionaries for interpreters; or
  - e. A device for which the patron has obtained written approval from the judge whose court the patron will be attending.
2. Members of the press may apply for an exception to this rule using the same procedure to request permission to take photographs in the courtroom.
3. Court security will not hold or store any electronic devices. Patrons who bring such devices to the courthouse will be required to return them to their vehicles or store them elsewhere. Notice should be posted to this effect along with the notices regarding weapons.
4. Jury instructions should be drafted to inform the jury of the restrictions regarding electronic media, including the ban of such media in the courthouse and the prohibition against utilizing any form of electronic media to research or communicate about the case.

5. The judiciary should recommend that the legislature enact a statute making a juror's violation of these instructions a Class B misdemeanor. Jurors should be instructed of the possible penalty for failure to abide by the court's instructions.

## **B. Findings and Recommendations**

The Committee recommends a policy which attempts to balance the interests of the public and the judiciary. The proposed policy is built on the philosophy that the judiciary should focus on regulating conduct that is injurious to the judicial process and not on regulating the types of electronic devices that may or may not be allowed in the courthouse or individual courtrooms.

The majority of the members of the Committee concluded that electronic portable devices such as personal digital assistants (PDAs), smart phones, and tablet and laptop computers have become a common and necessary tool for people observing or participating in judicial proceedings. They are the everyday tools of lawyers and the clients they represent: as necessary today as pen and paper and books have always been. Jurors, witnesses, consultants, parties and the public at large have come to expect that their ability to communicate - and to continue the business of their everyday lives - will not automatically cease when entering a courthouse. Members of the press are increasingly using these technologies to report on judicial proceedings in a more effective and timely manner.

The Committee's recommended policy on the possession and use of electronic devices in court facilities, set forth in its entirety behind Tab 11, acknowledges the realities of today's technologically sophisticated and dependent society; reflects a reasoned approach and a fair accommodation of the needs of all participants in the judicial process; and preserves the fair and impartial administration of justice.

The Committee considered input from various stakeholders, including the Court Security Director, and modified the Social Media Subcommittee's proposed policy to reflect that input. However, three members of the Committee, all trial judges, voted against the recommendation to allow cell phones in the courthouse. These dissenting members favored adopting the recommendations of the Board of District Court Judges. These votes were premised on the idea that there should be some places in society where decorum and undivided attention are expected. These votes also represent the view that if cell phones are allowed in the courthouse, it is not unreasonable to ask that they only be used in the halls and waiting areas of the courthouse and not in the courtroom.

## **AUDIO RECORDING IN JUSTICE COURTS**

When the Committee charge was drafted in January 2011, it was an open question whether audio recording of justice court proceedings was a good idea. To test the idea, Judge Jerald Jensen volunteered to conduct a yearlong pilot project in the Davis County Justice Court to test the use of digital audio recordings. That pilot program began in April 2011 and Judge Jensen reports that it has been a very positive experience.

During the 2011 legislative session, the Utah legislature preempted the debate by passing legislation requiring verbatim audio recording of all justice court proceedings, effective July 1, 2012. In preparation for that deadline, the Judicial Council amended the Rules of Judicial Administration to establish technical standards for each level of justice court. Also, some funding for implementation has been provided to each justice court through a grant from the Security, Education and Technology fund.

In light of Judge Jensen's experience with digital audio recording in Davis County, the Committee concluded that it would be helpful to identify for the Judicial Council

significant issues and challenges the courts can expect to face as justice courts implement the digital audio recording mandate statewide. These issues include:

1. Funding - Financing for audio equipment, particularly in Class I and Class II justice courts, will be largely funded by local government. In many cases, that cost will be significant. Technical standards for Class III and Class IV justice courts are much less costly and should be fully funded through the Security, Education and Technology grants.
2. Records - It is critical that individual justice courts maintain control and dissemination of the audio records. The records are clearly a public record; however, questions such as how the recordings can be used and who may have ready access to them are yet to be clarified.

The issues and challenges that have surfaced to date, and those issues which will likely arise when full implementation takes place, are beyond the scope of this committee's assignment. Therefore, the Committee recommends that these issues be assigned to another committee or perhaps to the Justice Court Board itself for further monitoring and follow up.

## **CONCLUSION**

The Committee recommends the adoption of proposed Rule 4-401 and the proposed policy on the possession and use of electronic devices in court facilities.

# Tab 1



[South Carolina](#) - broad discretion in presiding judge  
[Tennessee](#) - broad discretion in presiding judge/coverage of minors is restricted  
[Vermont](#) - broad discretion in presiding judge  
[Washington](#) - broad discretion in presiding judge  
[West Virginia](#) - broad discretion in presiding judge  
[Wisconsin](#) - broad discretion in presiding judge  
[Wyoming](#) - broad discretion in presiding judge

**TIER II:** States with restrictions prohibiting coverage of important types of cases, or prohibiting coverage of all or large categories of witnesses who object to coverage of their testimony.

[Alaska](#) - requires sex offense victim consent  
[Arizona](#) - coverage of juvenile/adoption proceedings prohibited  
[Connecticut](#) - coverage of certain types of cases prohibited  
[Hawaii](#) - coverage of certain cases and witnesses prohibited  
[Indiana](#) - appellate coverage only; pilot program for coverage of trials in designated courtrooms.  
[Iowa](#) - need victim/witness consent in sexual abuse cases; regularly scheduled Supreme Court hearings are *not* subject to witness or party objections.  
[Kansas](#) - consent of parties/attorneys not required, but coverage of many types of witness may be prohibited  
[Massachusetts](#) - coverage of certain types of hearings prohibited  
[Missouri](#) - coverage of certain cases and witnesses prohibited  
[North Carolina](#) - coverage of certain cases/witnesses prohibited  
[New Jersey](#) - coverage of various types of cases prohibited  
[Ohio](#) - victims and witnesses have right to object to coverage  
[Oregon](#) - witnesses discretion to object to coverage of certain cases  
[Rhode Island](#) - coverage of certain proceedings, including criminal trials prohibited  
[Texas](#) - no rules for criminal trial coverage, but such coverage allowed increasingly on a case by case basis  
[Virginia](#) - coverage of sex offense cases prohibited

**TIER III:** States that allow appellate coverage only, or that have such restricting trial coverage rules essentially preventing coverage.

[Alabama](#) - consent of all parties/attorneys required  
[Arkansas](#) - coverage ceases with objection by a party, attorney or witness  
[Delaware](#) - appellate coverage only/currently experimenting with trial-level coverage of civil, non-jury cases in before certain courts  
[Illinois](#) - appellate coverage only  
[Louisiana](#) - appellate coverage only  
[Maine](#) - coverage only permitted in appellate proceedings, civil trials, criminal arraignments, sentencing and other non-testimonial criminal proceedings  
[Maryland](#) - consent of all parties/attorneys required; coverage of criminal trials is prohibited.  
[Minnesota](#) - consent of all parties required at trial level  
[Mississippi](#) - coverage of certain types of cases and witnesses prohibited.  
[Nebraska](#) - appellate coverage/audio trial coverage only  
[New York](#) - appellate coverage only  
[Oklahoma](#) - consent of criminal parties/attorneys  
[Pennsylvania](#) - any witness who objects may not be covered, coverage of non-jury civil trials permitted  
[South Dakota](#) - Supreme Court coverage only  
[Utah](#) - appellate coverage/trial coverage - still photography only

## Alabama

Trial and appellate courtroom coverage is permissible if the Supreme Court of Alabama has approved a plan for the courtroom in which coverage will occur. The plan must contain certain safeguards to assure that coverage will not detract from or degrade court proceedings, or otherwise interfere with a fair trial. If such a plan has been approved, a trial judge may, in the exercise of “sound discretion” permit coverage if: (1) in a criminal proceeding, all accused persons and the prosecutor give their written consent and (2) in a civil proceeding, all litigants and their attorneys give their written consent. Following approval of their coverage plans, appellate courts may authorize coverage if the parties and their attorneys give their written consents. In both trial and appellate contexts, the court must halt coverage during any time that a witness, party, juror, or attorney expressly objects. In an appellate setting, it must also halt coverage during any time that a judge expressly objects to coverage.

Authority: [Canon 3A\(7\), 3A\(7A\), and 3A\(7B\), Alabama Canons of Judicial Ethics, Ala. Code, Vol. 23A \(Rules of Alabama Supreme Court\)](#).

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## Alaska

The news media, which includes the electronic media, still photographers and sketch artists, may cover court proceedings in all state trial and appellate courts. Administrative Rule 50 permits media coverage anywhere in the state court facility and is not limited to courtrooms. Under the permanent rule, the media must apply for and receive the consent of the presiding judge prior to commencing coverage. Requests for coverage must be made 24 hours prior to the proceeding, and applications that are timely filed are deemed to have been approved, unless otherwise prohibited. The consent of all parties is required for coverage of divorce, domestic violence, child custody and visitation, paternity or other family proceedings. Jurors may not be photographed, filed or videotaped in the courtroom at any time.

Victims of a sexual offense may not be photographed, filmed, videotaped or sketched without the consent of the court and the victim. A procedure is prescribed for suspension of an individual’s or an organization’s media coverage privileges for a period of up to one year for violation of the media coverage plan.

Authority: [Rule 50, Rules Governing the Administration of All Courts, Alaska Rules of Court \(West\)](#).

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## Arizona

Electronic and still photographic coverage of proceedings in all state courts and “areas immediately adjacent thereto” is permitted, provided the media follow certain guidelines that set forth rules for coverage. Audio recording by media is also generally permitted, provided that the audio recording does not create a distraction in the courtroom and is only used as personal notes of the proceedings. Coverage of juvenile proceedings is prohibited, and the judge has sole authority to decide whether to permit coverage of all other matters. The photographing of jurors in a way that permits them to be recognized is strictly forbidden. Requests for coverage should be made to the judge of the particular proceeding “sufficiently in advance” of the sought-after coverage event. Only one television and one still camera is allowed in the courtroom at one time, and the media are responsible for arranging pooling agreements. No flash bulbs or additional

artificial lights of any kind are allowed in the courtroom without the notification and approval of the presiding judge.

Authority: [Rule 122, Rules of the Arizona Supreme Court, Ariz. Rev. Stat., Vol. 17A.](#)

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## Arkansas

A judge may authorize broadcasting, recording, or photographing in the courtroom and adjacent areas provided that “the participants will not be distracted, [n]or will the dignity of the proceedings be impaired.” An objection to the coverage by a party or attorney precludes media coverage of the proceedings and an objection by a witness precludes coverage of that witness. Coverage of juvenile, domestic relations, adoption, guardianship, divorce, custody, support and paternity proceedings is expressly prohibited. Similarly, coverage of jurors, minors without parental or guardian consent, sex crime victims, undercover police agents and informants is also prohibited. Only one television and one still camera is allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: [Administrative Order Number 6, Rules of Civil Procedure - Appendix, Arkansas Code of 1987 Annotated \(Court Rules\).](#)

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## California

Media coverage of State Court proceedings is governed by Rule 980 of the California Rules of Court. Personal recording devices may be used with advance permission of the judge for personal note-taking only. Media coverage is permitted by written order of the judge following a media request for coverage filed at least five court days before the proceeding to be covered. Any such requests must be made on the official form provided by courts. Coverage of jury selection, jurors, spectators, proceedings held in chambers, proceedings closed to the public or conferences between an attorney and a client, witness or aide, between attorneys or between counsel and the judge is prohibited.

Effective January 1, 1998, Rule 4.1 restricting media coverage within the courthouse unless specifically authorized by the presiding judge was added to the Los Angeles County Superior Court Rules. This rule also prohibits the filming or photographing of any person wearing a juror badge in the court.

Authority: [Rule 1.150, California Rules of Court](#); [Rule 4.1 Los Angeles County Superior Court Rules \(West\).](#)

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## Colorado

Canon 3A(7) of the Colorado Code of Judicial Conduct gives judges the power, implemented in Canon 3A(8), to authorize media coverage of court proceedings, subject to several guidelines. Judges also have the power to prohibit or limit coverage upon a finding of substantial likelihood of interference with a fair trial, disruption or degradation of the proceedings, or harm which is distinct from that caused by coverage by other types of media. Those wishing to cover a particular

proceeding must submit a written request to do so to the presiding judge at least one day in advance of the proceeding desired to be covered and must give a copy of the request to the counsel for each party participating in the proceeding. Coverage of jury selection, in camera hearings and most pre-trial hearings is prohibited. No close-up photography of the jury, bench conferences or attorney-client communication is permitted. Consent of the participants is not required. The judge may also terminate coverage if the terms of the canon or any additional rules imposed by the Court have been violated. Only one television and one still camera are allowed in the courtroom at one time and the media are responsible for arranging pooling agreements.

Authority: [Canon 3\(A\)\(8\), Colorado Code of Judicial Conduct, Colo. Rev. Stat., Vol. 7A \(Court Rules\), Appendix to Chapter 24; Form.](#)

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## Connecticut

Sections 70-9 and 70-10 of the Rules of Appellate Procedure (governing media coverage in the Appellate and Supreme Courts) and Sections 1-10 and 1-11 of the Rules for the Superior Court (governing coverage in trial courts) permit the coverage of judicial proceedings under specific circumstances.

In appellate courts, those wishing to cover a particular proceeding must submit a written request to do so to the appellate clerk “not later than the Wednesday which is thirteen days before the day in which that proceeding is scheduled to occur.” In trial courts, those wishing to cover a particular proceeding must submit a written request to do so at least three days prior to the commencement of the trial to the administrative judge of the judicial district where the case is to be tried. In both courts, coverage of family relations matters, trade secrets cases, sexual offense cases, and cases otherwise closed to the public are prohibited. In jury trials, no coverage of proceedings held in the jury’s absence is permitted. Additionally, in criminal cases, sentencing hearings may only be covered if the trials are covered. Photographing or televising individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken.

Authority: §§ [70-9, 70-10](#), Rules of Appellate Procedure; §§ [1-10, 1-11](#), Rules for the Superior Court, Connecticut Rules of Court (West).

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## Delaware

Rule 53 of the Delaware Superior Court Criminal Rules, Rule 53 of the Delaware Family Court Criminal Rules, and Rule 53 of the Criminal Rules of Delaware Courts of Justices of the Peace forbid coverage. By order dated April 29, 1982, the Delaware Supreme Court issued guidelines for its one year appellate experiment. Under those guidelines, coverage is permissible so long as it does not impair or interrupt the orderly procedures of the Court. Consents of the parties are not required. This experiment was extended indefinitely by order of the Delaware Supreme Court, dated and effective May 2, 1983.

On April 5, 2004, the Delaware Supreme Court issued its Administrative Directive No. 155, which established a six-month trial court experiment, which was originally scheduled to end on October 15, 2004. In this experiment, media coverage was permitted in the Sussex Court of Chancery, and courtrooms in New Castle, Kent and Sussex Counties. Broadcast of non-confidential, non-jury, civil proceedings was permitted.

Administrative Directive No. 155 was amended on October 25, 2004, and the experiment was extended until May 16, 2005. As of this writing, no further action has been taken.

Authority: Canon 3A(7), Delaware Judges' Code of Judicial Conduct, adopted by Rule 84, Rules of the Delaware Supreme Court, Del. Code, Vol. 16; Rule 53, Delaware Family Court, Criminal Rules, Del. Code, Vol. 16; Rule 53, Delaware Superior Court Criminal Rules, Del. Code, Vol. 17; Rule 31, Delaware Courts of Justices of the Peace, Criminal Rules, Del. Code, Vol. 16. See also Rule 169, Rules of the Delaware Court of Chancery, Del. Code, Vol. 17 (as modified by above-referenced orders).

Authority: [Court Rules](#); [Administrative Directive 155](#); [Administrative Directive 155, amended](#)

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## District of Columbia

Rule 53(b) of the Superior Court Rules of Criminal Procedure, Rule 203(b) of the Superior Court Rules of Civil Procedure, Superior Court Juvenile Proceedings Rule 53(b), and Superior Court Domestic Relations Rule 203(b) forbid “[t]he taking of photographs, or radio or television broadcasting” coverage of trial proceedings. That said, in certain circumstances, photography may be permitted under Juvenile Court Rule 53(b)(2) or Criminal Court Rule 53(b)(2), which permits photography “in any office or other room of the division” upon the consent of the person in charge of the office or room and the person or people being photographed.

Coverage is also prohibited in Appellate proceedings.

Authority: All rules cited in the foregoing paragraph are contained in [D.C. Code Ann.](#) (Court Rules-D.C. Courts).

Webcast: [D.C. Court of Appeals](#) (no archives)

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## Florida

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Coverage is subject only to the authority of the presiding judge who may prohibit coverage to control court proceedings, prevent distractions, maintain decorum, and assure fairness of the trial. Exclusion of the media is permissible only where it is shown that the proceedings will be adversely affected because of a “qualitative difference” between electronic and other forms of coverage. *Florida v. Palm Beach Newspapers*, 395 So. 2d 544 (1981). Two still cameras operated by one photographer are allowed in trial and appellate courtrooms at one time. In trial proceedings only one television camera is allowed, while in appellate proceedings, two television cameras operated by one camera person is allowed. The media are responsible for arranging pooling agreements.

Authority: [Rule 2.170](#), Rules of Judicial Administration, Florida Rules of Court (West) (2007).

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## Georgia

Rule 18 of the Probate Court Rules, Rule 11 of the Magistrate Court Rules and Rules 26.1 and 26.2 of the Juvenile Court Rules provide guidelines for extended media coverage of those judicial proceedings. If the court elects to grant approval for expanded media coverage of a proceeding must be “without partiality or preference to any person, news agency, or type of electronic or photographic coverage.” Those requesting coverage in these proceedings must file a “timely written request” on a form provided by the court with the judge involved in the specific proceeding prior to the hearing or trial. The judge, at his or her discretion, may allow only one television or still photographer in the courtroom at any one time, thereby requiring a pooling arrangement. Any additional lights or flashbulbs must be approved by the judge beforehand. Lastly, under the Juvenile Court Rules, pictures of the child in juvenile proceedings are expressly prohibited.

The Superior Court’s Rule 22, in addition to the above requirements, prohibits photographing or televising members of the jury, unless “the jury happens to be in the background of the topics being photographed.”

In the Court of Appeals, written requests for coverage must be submitted at least seven days in advance. Further, radio and television media are required to supply the Court with a video or audio tape, respectively, of all proceedings covered. Only one “pooled” television camera with one operator and one still photographer, with not more than two cameras, is allowed in the courtroom at any one time.

In the Supreme Court, coverage is allowed without prior approval from the Court and the Supreme Court retains exclusive authority to limit, restrict, prohibit and terminate coverage. No more than four still photographers and four television cameras will be permitted in the courtroom at any time. All television cameras are restricted to the alcove of the courtroom, while still photographers may sit anywhere in the courtroom designated for use by the public.

Authority: Rules [75-91, Supreme Court Rules](#); Rules [26.1](#) and [26.2](#), Juvenile Court Rules; [Rule 18, Probate Court Rules](#); [Rule 11, Magistrate Court Rules](#); [Rule 22, Superior Court Rules](#), Georgia Rules of Court Annotated (West).

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## Hawaii

Electronic media and still photography coverage of proceedings is allowed in both the appellate and trial courts. Consent of the judge prior to coverage of a trial proceeding is required, but prior consent of the judge is not required for coverage of appellate proceedings. The judge may rule on the request orally and on the record or by written order if requested by any party. A request for coverage will be granted unless good cause is found to prohibit it. Good cause for denying coverage is presumed to exist when the proceeding is for the purpose of determining the admissibility of evidence, when child witnesses or complaining witnesses in a criminal sexual offense case are testifying, when testimony regarding trade secrets is being given, when a witness would be put in substantial jeopardy of bodily harm, or when testimony of undercover law enforcement agents involved in other ongoing undercover investigations is being received. Coverage of proceedings, which are closed to the public is prohibited. These proceedings include juvenile cases, child abuse and neglect cases, paternity and adoption cases, and grand jury proceedings. Coverage of jurors or prospective jurors is prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at one time (although the judge may allow more at his/her discretion) and the media are responsible for arranging pooling agreements.

Authority: Rules [5.1](#), [5.2](#), Rules of the Supreme Court, Hawaii Court Rules (West).

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## Idaho

Rule 45 of the Idaho Court Administrative Rules (ICAR) allows extended coverage of all public proceedings, provided permission to cover a proceeding is obtained in advance from the presiding judge, and ICAR Rule 46 provides guidelines for the use of cameras in appellate proceedings.

In trial courts, the presiding judge may prohibit coverage or order that the identity of a participant be concealed when such coverage would have a substantial adverse effect upon that participant. Coverage of the jury, adoptions, mental health proceedings and other proceedings closed to the public is prohibited. Permission to photograph or broadcast a proceeding must be sought, in advance, from the presiding judge. Electronic flash or artificial lighting is prohibited, and the television camera may not “give any indication of whether it is operating”. Only one still photographer and one camera operator is permitted in the courtroom, and any pooling arrangements must be made by the media. Still photographers must keep “the number of exposures . . . to a minimum.”

Pursuant to ICAR Rule 46(a), photography is limited to designated areas of the Supreme Court Courtroom. While video cameras are permitted on a first-come basis, no more than two (2) still photographers are permitted at any one time. Live coverage of proceedings in the Supreme Court Courtroom may be prohibited in the interest of justice. Flash photography or the use of additional lighting for video photography is prohibited. No separate microphones may be used.

In all other appellate proceedings, ICAR Rule 46(b) imposes many of the same requirements as 46(a); however, microphone and video pooling is required.

Authority: Rules [45](#) & [46](#), Idaho Court Administrative Rules (2007).

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## Illinois

Illinois Revised Statutes, Chapter 735, § 8-701 specifies that no witness will be compelled to testify in any court in the State if any portion of his testimony is to be covered. Rule 63(A)(7) allows coverage pursuant to an order of the Illinois Supreme Court, while coverage of trial court proceedings is prohibited. For coverage of appellate proceedings, consents are not required, although the judge or presiding officer, with good cause, may prohibit or terminate coverage at any time. Those wishing to cover a particular proceeding must notify the appropriate clerk of the court not less than five “court” days prior to the date the proceeding is scheduled to begin. Only one television camera and one still camera, each operated by one camera-person, is permitted in the courtroom at any one time. No equipment or clothing of media personnel can have marks that identify any individual medium or network affiliation. Artificial lighting of any kind is not allowed, and the media are responsible for any pooling arrangements.

Authority: [Rule 63\(A\)\(7\), Rules of the Illinois Supreme Court\(2000\)](#); [Chapter 735, §8-701, Illinois Compiled Statutes Annotated\(2000\)](#); Supreme Court Orders of November 29, 1983 and January 22, 1985.

## Indiana

Extended media coverage of oral arguments before the Indiana Supreme Court is allowed. Requests for coverage are to be made at least 24 hours prior to the start of the proceeding.

Beginning September 1, 1997 and continuing indefinitely, the Indiana Court of Appeals will allow extended media coverage of its proceedings. Requests for coverage are to be made at least 48 prior to the start of the oral argument.

The Indiana Supreme Court authorized a pilot project for video and audio coverage of proceedings in certain Indiana courtrooms. The project, which lasts from June 6, 2006 through December 31, 2007, permits certain trial judges to consent to media coverage, subject to certain restrictions. Specifically, judges must prohibit coverage of police informants, undercover agents, minors, victims of sexual offenses, jurors, witnesses at sentencing hearings, bench conferences, attorney-client communications, and conversations among counsel. Equipment is limited to no more than one still camera, one video camera, and three audio recording devices, and coverage may not intrude upon the proceedings. Journalists should consult the [implementing order](#) for additional details and a list of eligible courtrooms.

All appellate oral arguments are [webcast](#) live, and the courts maintain an [archive](#) of webcast arguments from 2001 to date.

Authority: Order Nos. 94S00-9901-MS-59 and [94S00-0605-MS-166](#).

[Supreme Court Media Guidelines](#)

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## Iowa

Extended media coverage, defined as “broadcasting, televising, electronic recording, or photographing of judicial proceedings for the purpose of gathering and disseminating news to the public,” is generally permitted upon application to the presiding judge. Iowa’s rules require that permission for extended media coverage be granted, unless the coverage will interfere with the rights of the parties or a witness or party provides a good cause why coverage should not be permitted. In certain types of proceedings, such as sexual abuse or criminal trials, witness or party consent is required.

Extended media coverage is not permitted, however, during jury selection or if a private proceeding is required by law. Prolonged or unnecessary coverage of jurors should be prevented to the extent practicable.

Written requests to use photographic equipment, television cameras, etc. must be made, in advance to the Media Coordinator, and equipment must meet certain specifications. Flash photography and other supplemental light sources are prohibited. Pooling arrangements must be made by the media.

All regularly scheduled Supreme Court oral arguments taking place in the Supreme Court’s courtroom are subject to expanded media coverage and are *not* subject to objections by witnesses or parties. Additionally, all Supreme Court oral arguments are streamed over the internet.

Authority: [Ch. 25, Iowa Court Rules \(2007\)](#).

Webcast: [Supreme Court Oral Arguments](#)

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## **Kansas**

Rule 1001 of the Kansas Supreme Court authorizes extended media coverage of appellate and trial court proceedings and extends coverage to state municipal court proceedings. Under this rule, coverage is permissible only by the news media and educational television stations and only for news or educational purposes.

The media must give at least one week's notice of its intention to cover a proceeding. However, this requirement may be waived upon a showing of good cause. Photographing of individual jurors is prohibited, and where coverage of the jury is unavoidable, no close-ups may be taken. Consents of the participants are not required. The presiding judge may prohibit coverage of individual participants at his discretion; however, if a participant is a police informant, undercover agent, relocated or juvenile witness, or victim/witness and requests not to be covered, the judge must prohibit coverage of that person. Coverage of a participant in proceedings involving motions to suppress evidence, divorce, or trade secrets will also be prohibited, if the participant so requests. Coverage of materials on counsel tables, photographing through the windows or open doors of the courtroom also is prohibited. Moreover, criminal defendants may not be photographed in restraints as they are being escorted to or from court proceedings prior to rendition of the verdict. Only one television camera, operated by one person, and one still photographer, using not more than two cameras, are authorized in any one court proceeding.

Authority: [Rule 1001, Rules of the Kansas Supreme Court, Kansas Court Rules and Procedures - State and Federal \(1999\)](#).

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## **Kentucky**

Electronic coverage is permitted in all appellate and trial court proceedings. Consents of the parties are not required, but coverage is subject to the authority of the presiding judge. Requests for coverage should be made to the judge presiding over the proceeding for which coverage is desired. Coverage of attorney-client conferences or conferences at the bench are prohibited. Only one television camera and one still photographer, with not more than two still cameras are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements. Juvenile proceedings are closed to the public. KRS 610.070

Authority: [Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings](#), Rules of the Kentucky Supreme Court, Ky. Rev. Stat. Ann. (2007).

[Reporters Handbook on Covering Kentucky Courts](#)

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## **Louisiana**

Electronic coverage of appellate proceedings is allowed, while coverage at the trial level is generally prohibited. Those wishing to cover trial-level proceedings should consult with the courts of that district or parish concerning coverage. At the appellate level, obtaining the consent of the involved parties is not required, although the Court may prohibit coverage upon its own motion or if an objection is made by a party. Notice of intent to cover a proceeding must be made at least 20 days in advance or, in expedited proceedings, within a reasonable time before the proceeding is scheduled to occur. No more than two television cameras, each operated by no more than one camera person, and one still photographer, using not more than two still cameras with not more than two lenses for each camera, will be permitted in the courtroom during proceedings. In addition, the media are responsible for any pooling arrangements.

Authority: [Canon 3A\(7\)](#), Louisiana Code of Judicial Conduct & Appendix (1999).

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## Maine

Extended media coverage is authorized in all civil matters but coverage in criminal matters is limited to arraignments, sentencing and other non-testimonial proceedings. Coverage of divorce, annulment, support, domestic abuse and violence, child custody and protection, adoption, paternity, parental rights, sexual assault, trade secrets, and juvenile proceedings is prohibited. Coverage of the jury and any proceeding in which a living child is a principal subject is also prohibited. Requests for coverage should be made to the clerk of the court at which coverage is desired. Only one television camera, operated by one person and two still photographers, each with only one camera may be in the courtroom at any one time. The cameras may not have any "insignia or other indication of organizational affiliation". Pooling arrangements are the sole responsibility of the media.

Authority: Administrative Order--Cameras in the Courtroom (July 11, 1994) (West, 2000).

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## Maryland

In the absence of a statutory provision requiring close proceedings or permitting closed proceedings, coverage is permitted at civil trials, upon written consent of all the parties. Consent is not required, however, from a party that represents the government, or from an individual being sued in his or her governmental capacity. At the appellate level, consent is not required, but a party may move to limit or terminate coverage at any time. Requests for coverage must be submitted to the clerk of the court where the proceedings will be held at least five days before the trial begins. Coverage of jury selection, jurors or courtroom spectators, private conferences between an attorney and a client or conferences at the bench is prohibited. Not more than one television camera is permitted in any trial court proceeding, and not more than two are allowed in appellate proceedings. Only one still photographer, with not more than two cameras with not more than two lenses each, is allowed in both trial and appellate proceedings. Pooling arrangements are the sole responsibility of the media.

Coverage is prohibited in criminal trials.

Authority: [Rule 16-109, Maryland Rules Annotated](#), (2007); [MD Code, Criminal Proc. § 1-201 \(2007\)](#).

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## Massachusetts

Rule 1:19 of the Supreme Judicial Court of Massachusetts permits extended coverage of all proceedings open to the public except hearings on motions to suppress or to dismiss, or of probable cause or jury selection hearings. Close-up short of bench conferences, conferences between attorneys, or attorney-client conferences is prohibited. Frontal and close-up photography of the jury "should not usually be permitted." The media must submit requests for coverage to the presiding judge "reasonably" in advance of the proceeding to be covered, or risk denial. Before a party or a witness may move to limit media coverage, it must first notify the Bureau Chief, Newspaper Editor, or Broadcast Editor of the Associated Press. Oral arguments before the Supreme Judicial Court are available by webcast.

Authority: Rule 1:19, Rules of Massachusetts Supreme Judicial Court, (2004).

[Guidelines on the Public's Right of Access to Judicial Proceedings and Records](#) (2000).

Webcast: [Supreme Judicial Court](#)

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## Michigan

Extended coverage of judicial proceedings is permitted, but requests for coverage must be made in writing not less than three business days before the proceeding is scheduled to begin. A judge may terminate, suspend or exclude coverage at any time upon a finding, made and articulated on the record that the rules for coverage have been violated or that the fair administration of justice requires such action. Such decisions are not appealable. Coverage of jurors or the jury selection process is not permitted. The judge has sole discretion to exclude coverage of certain witnesses, including but not limited to, the victims of sex crimes and their families, police informants, undercover agents and relocated witnesses.

Authority: Canon 3A(7), Michigan Code of Judicial Conduct, Michigan Rules of Court 1986; [Administrative Order No.1989-1, Film or Electronic Media Coverage of Court Proceedings](#)

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## Minnesota

Expanded coverage is permitted at both the trial and appellate level, but at the trial level, the judge and all parties must consent to coverage prior to commencement of the trial. All courtroom coverage must occur in the presence of the presiding judge. Coverage of witnesses who object prior to testifying and coverage of jurors is prohibited, as is coverage of hearings that take place outside of the presence of the jury. Coverage is prohibited in cases involving child custody, divorce, juvenile proceedings, hearings on suppression of evidence, police informants, relocated witnesses, sex crimes, trade secrets, and undercover agents. Judges and media representatives must inform the Supreme Court of denials of coverage requests and the reason for such denials.

At the appellate level, consents of the parties and witnesses are not required, but the Clerk of the Appellate Courts must be notified of an intent to cover the proceedings at least 24 hours in advance of the coverage. Only one television camera and one still photographer, using not more

than two cameras with two lenses each are permitted in the courtroom during proceedings. The media are responsible for arranging pooling agreements.

Authority: Canon 3A(10), Minnesota Code of Judicial Conduct, Minn. Stat. Ann. vol. 52 (West); Rule 4, General Rules of Practice for the District Courts, Minn. Stat. Ann. vol. 51 (1999).

### [Policy Guidelines](#)

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## Mississippi

Electronic media coverage of judicial proceedings (trial, pre-trial hearings, post-trial hearings and appellate arguments) is permitted in Mississippi's Supreme Court, Court of Appeals, chancery courts, circuit courts and county courts. Mississippi's Rules for Electronic and Photographic Coverage of Judicial Proceedings ("MREPC"), effective July 1, 2003, prohibit electronic media coverage in justice and municipal courts.

Electronic coverage is subject to the authority of the presiding judge who may limit or terminate coverage at any time if there is a need to protect (1) the rights of the parties or witnesses, (2) the dignity of the court or, (3) to assure orderly conduct of the proceedings. Any party may object by written motion, filed no later than 15 days prior to the proceeding, unless good cause allows for a shorter filing period. Under MREPC the media is required to notify the clerk and the court of any plans to cover a proceeding at least 48 hours prior to the proceeding.

The media must comply with certain coverage restrictions. Electronic coverage of police informants; minors; undercover agents; relocated witnesses; victims and families of victims of sex crimes; victims of domestic abuse, and members or potential members of the jury (before their final dismissal) is expressly prohibited. In addition, audio recordings of off-the-record conferences and coverage of closed proceedings are also prohibited. Similarly, coverage of divorce; child custody; support; guardianship; conservatorship; commitment; waiver of parental consent to abortion; adoption; delinquency and neglect of minors; paternity proceedings; termination of parental rights; domestic abuse; motions to suppress evidence; proceedings involving trade secrets; and in camera proceedings are prohibited unless authorized by the presiding judge.

Only one television camera, one video recorder, one audio system, and one still camera are allowed in the courtroom at one time and the media are responsible for pooling arrangements. If the media cannot agree to a pooling arrangement, all contesting media personnel shall be excluded from the proceeding. Electronic media coverage may not distract from the courtroom proceedings, and in accordance with this principle, no artificial, flash or strobe lighting is allowed in the courtroom without the notification and approval of the presiding judge. All wires must be taped to the floor and equipment may only be moved before or after a proceeding or during a recess. The presiding judge may "relax" the technical restrictions so long as no distractions are created.

Authority: [Rules for Electronic and Photographic Coverage of Judicial Proceedings](#) ("MREPC"); [Cannon 3B\(12\)](#), Code of Judicial Conduct of Mississippi Judges; [Rule 1.04](#), Uniform Rules of Circuit and County Courts, Mississippi Rules of Court.

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## Missouri

Media coverage at both the trial and appellate levels are permitted, but coverage of jury selection, juvenile, adoption, domestic relations, and child custody cases is not permitted. Requests for coverage must be made to the media coordinator, in writing, at least five days in advance of the scheduled proceeding, and the media coordinator must then give written notice of the request to counsel for all parties, parties appearing without counsel and the judge at least four days in advance of the proceeding. Coverage of objecting participants who are victims of crimes, police informants, undercover agents, relocated witnesses, or juveniles is prohibited. Further, the judge may prohibit coverage of any or all of a participant's testimony, either upon the objection of the participant, party, or the court's own motion. Only one television camera and one still photographer, using not more than two cameras with two lenses each, are allowed in the courtroom at any one time. The media are responsible for all pooling arrangements.

Authority: [Administrative Rule 16](#), Missouri Supreme Court Rules, (2005).

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## Montana

Coverage of trial and appellate courts is permitted, though judges may restrict coverage of proceedings upon a finding that media coverage will "substantially and materially interfere with the primary function of the court to resolve disputes fairly under the law."

Authority: [Canon 35](#), Montana Canons of Judicial Ethics, 176 Mont. xxiii, 6 Media L. Rep. (BNA) 1543 (1980).

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## Nebraska

Media coverage in the Supreme Court and Court of Appeals is explicitly permitted, but this right is only afforded to "persons or organizations which are part of the news media." Party consent is not required, although a party may file an objection to media coverage before commencement of the proceeding in question.

Authority: Rules [17](#), [18](#); Rules of the Supreme Court/Court of Appeals; Nebraska Court Rules and Procedure (West).

[Reporters' Guide to Media Law and Nebraska Courts](#)

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## Nevada

Extended media coverage is permitted, at the judge's discretion except for certain proceedings which are made confidential by law. Obtaining the consent of the participants is not required, but the judge may prohibit coverage of any participant who does not consent to being filmed or photographed. Requests for coverage must be made in writing at least 72 hours in advance of the proceeding, but the judge may grant a request on shorter notice for "good cause." Deliberate coverage of jurors or of conferences of counsel is not allowed. No more than one television camera and one still photographer are allowed in a proceeding at any one time, and the media are responsible for any pooling arrangements.

Authority: [Nevada Supreme Court Rules, Part IV, Rules on Cameras and Electronic Media Coverage in the Courts](#), (2006).

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## New Hampshire

Rule 19 of the Rules of the Supreme Court of New Hampshire permits coverage of that court's proceedings subject to the Court's consent.

Rule 78 of the Rules of the New Hampshire Superior Court exhorts judges to permit the media coverage of all proceedings open to the general public, unless the coverage creates a substantial likelihood of harm to a person or party. While those wishing to cover a proceeding must obtain the court's permission, in [Petition of WMUR Channel 9](#), 148 N.H. 644 (2002), the New Hampshire Supreme Court stated that permission *should* be granted unless four requirements are met: "(1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure ordered is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives to closing the proceedings; and (4) the judge makes particularized findings to support the closure on the record." *Id.* Photography of jurors is prohibited.

The media rule of the New Hampshire District Courts is substantially similar to that of the Superior Court. The differences between the two courts' media rule arise provide that upon the petition of any party the court may, in its discretion, permit coverage of its judicial proceedings.

Authority: [Rule 19](#), New Hampshire Supreme Court Rules; [Rule 78](#), New Hampshire Superior Court Rules and Directory; [Rule 1.4](#), New Hampshire District and Municipal Court Rules, (2000).

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## New Jersey

Canon 3A(9) of the New Jersey Code of Judicial Conduct exhorts judges to allow "bona fide media" to cover proceedings. To this end, the Supreme Court has issued a set of guidelines for media coverage, which grants judges some latitude in limiting coverage, especially where the coverage may result in a substantial likelihood of harm to a witness or party. Unlike other jurisdictions, the media are granted the right to appeal any order excluding or varying coverage. Photography of the jury is prohibited, and photography and audio recording is prohibited in certain types of proceedings, such as juvenile proceedings, proceedings to terminate parental rights, child abuse/neglect proceedings, custody proceedings, and "proceedings involving charges of sexual contact or charges of sexual penetration or attempts thereof when the victim is alive." Photography and audio recordings of crime victims under the age of 18 or witnesses under the age of 14 may be permitted at the trial judge's discretion. Additionally, while coverage of juvenile proceedings is usually forbidden, courts, in their discretion, may allow coverage of 17-year old defendants in proceedings involving motor vehicle violations. The media are responsible for pooling arrangements.

Authority: [Canon 3A\(9\), Code of Judicial Conduct](#); [Supreme Court Guidelines for Still and Television Camera and Audio Coverage of Proceedings in the Courts of New Jersey](#) (2003).

Webcast: [Archive of Supreme Court Oral Arguments \(Webcasts\)](#)

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## New Mexico

Electronic coverage of proceedings in the state's appellate and trial courts is permitted, although the judge may limit or deny coverage for good cause. The judge also has wide discretion to exclude coverage of certain types of witnesses, including, but not limited to, the victims of sex crimes and their families, police informants, undercover agents, relocated witnesses and juveniles. Filming of the jury or any juror is prohibited, as is filming of jury selection. Coverage of any attorney-client or attorney-court conferences is prohibited. Those wishing to cover a proceeding must notify the clerk of the particular court at least 24 hours in advance of the proceeding. Only one television camera and two still photographers, each with one camera are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

Authority: [Rule 23-107](#), New Mexico Supreme Court General Rules, (2000).

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## New York

### Appellate Courts

Electronic photographic recording of proceedings in appellate courts is permitted, subject to the approval of the respective appellate court. Consent to coverage by parties or the attorneys is not required and any objections by attorneys or parties are limited to those showing good cause. Only two television cameras and two still photographers are allowed in the courtroom at any one time, and coverage is subject to various other technical conditions concerning media equipment.

### Trial Courts

Section 52 of the Civil Rights Law ("Section 52") imposes a per se ban on all televising of trial court proceedings, no matter what the circumstances of the case or the assessment of the presiding judge. The statute became effective on July 1, 1997, when Section 218 of the Judiciary Law ("Section 218") expired by operation of law. For all but one of the prior ten years, Section 218 had allowed, subject to specific limits in certain types of cases and with respect to certain trial participants, the televising of trials in New York State. In 1997, the Legislature failed to renew Section 218, resulting in the reimposition of Section 52, and thus barring extended coverage of trial proceedings. In response to the per se ban, a number of trial judges ruled Section 52 unconstitutional and permitted camera coverage. On June 16, 2005, however, the New York Court of Appeals effectively ended the debate by affirming a lower court's holding that Section 52 is constitutional. Unless the Legislature enacts a statute overruling the Court of Appeals, cameras will not be allowed in trial court proceedings for the foreseeable future.

Authority: [Courtroom Tel. Network, LLC v. New York](#); New York Civil Rights Law § 52 (trial court); 22 NYCRR §§ [29.1-29.2](#) (appellate court); NY CLS Standards & Administrative Policies [§ 131](#) (2000).

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## North Carolina

The rules for coverage require that the equipment and personnel used in coverage be neither seen nor heard by anyone inside the courtroom and that all personnel and equipment be located in an area set apart by a booth or partition with appropriate openings to allow photographic coverage. The presiding trial judge may permit coverage without booths, however, if coverage would not disrupt the proceedings or distract the jurors. The Chief Justice of the Supreme Court and the Chief Judge of the Court of Appeals may waive the booth requirements in proceedings in these courts. Hand-held audio tape recorders may be used upon prior notification to, and with the approval of, the presiding judge.

The rules do not require the consents of participants, but prohibit coverage of jurors. In addition, coverage of certain types of proceedings, such as adoption, divorce, juvenile proceedings, and trade secrets cases, is prohibited. Coverage of certain types of witnesses, such as police informants, undercover agents, victims of sex crimes and their families, and minor witnesses is also not permitted. Only two television cameras and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: [Rule 15](#), General Rules of Practice for the Superior and District Courts of North Carolina, North Carolina Rules of Court (2000).

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## North Dakota

Extended media coverage is authorized in all courts. The judge may deny media coverage of any proceeding or portion of a proceeding in which the judge determines that media coverage would materially interfere with a party's right to a fair trial or when a witness or party objects and shows good cause why expanded coverage should not be permitted. The judge may also deny coverage if: the coverage would include testimony of an adult victim or witness in sex offense prosecutions; or would include a juvenile victim or witness in proceedings in which illegal sexual activity is an element of the evidence; or coverage would include undercover or relocated witnesses.

Coverage of proceedings held in chambers, proceedings closed to the public, and jury selection is prohibited. Conferences between an attorney and client, witness or aide, between attorneys, or between counsel and the bench may not be recorded or received by sound equipment. Further, close up photography of jurors is also prohibited.

Requests for expanded media coverage of the Supreme Court must be made at least seventy-two hours before the proceeding and must be made by regular mail and, if possible, by facsimile with copies to counsel of record.

Requests for expanded media coverage of trial court proceedings must be made to the presiding judge at least seven days before the proceeding. Notice of the request must be given to all counsel of record and any pro se parties. The notice must be in writing and filed with proof of service with the clerk of the appropriate court.

Authority: [Administrative Rule 21](#); (North Dakota Court Rules).

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## Ohio

Rule 12 of the Rules of Superintendence for the Courts of Ohio requires judges to permit coverage of proceedings that are open to the public, subject to certain exceptions.

At the trial level, coverage of objecting witnesses and victims is prohibited. The judge is also required to inform victims and witnesses of their right to object to coverage. Requests for coverage must be submitted to the presiding judge, as the consent of the judge is required for coverage to take place. Only one still photographer and one television camera are permitted in the courtroom, unless the judge grants permission to use additional cameras. Coverage of attorney-client conferences and any bench conferences is prohibited. In addition to these rules, local courts may impose additional obligations and requirement for extended coverage.

Rule 12 may be modified by local rules. For example, the Hamilton County Court of Common Pleas requires broadcasters to use the court's audio system and permits coverage requests to be made up to thirty (30) minutes before the start of the proceeding.

Authority: [Rule 12](#), Rules of Superintendence for the Courts of Ohio (2005); [Hamilton County Common Pleas Rule 30](#).

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## Oklahoma

Trial and appellate coverage is permitted, but express permission of the judge is required. Coverage of objecting witnesses, jurors, or parties is not permitted in either criminal or civil proceedings. Moreover, no coverage is allowed in criminal trials without the express consent of all accused persons.

Authority: Title 5, Oklahoma Statutes, Chapter 1, Appendix 4, [Canon 3B\(9\)](#).

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## Oregon

In the appellate courts, broad discretion to permit or deny coverage is vested in the judge, who may deny coverage to "control the conduct of the proceedings before the court, insure decorum and prevent distractions, and insure the fair administration of justice in proceedings before the court." Only one television camera and one still photographer are allowed in the courtroom at any one time, and any pooling arrangements are the responsibility of the media.

At the trial court level, coverage is allowed, but a judge may deny coverage if there is a "reasonable likelihood" that the coverage would interfere with the rights of the parties to a fair trial, would affect the presentation of evidence or the outcome of the trial, or if "any cost or increased burden resulting" from the coverage would interfere with the "efficient administration of justice." Coverage of dissolution, juvenile, paternity, adoption, custody, visitation, support, mental commitment, trade secrets, and abuse, restraining and stalking order proceedings is prohibited. Also, coverage of sex offense proceedings will be prohibited at the victim's request. Upon request, those covering a proceeding must provide a copy of the coverage to the court and "any other person, if the requestor pays actual copying expense."

Courts may adopt local rules to establish procedural requirements governing media access.

Authority: [Rule 8.35](#), Rules of Appellate Procedure; [Rule 3.180](#) Uniform Trial Court Rules, Oregon Rules of Court-State (2006).

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## Pennsylvania

Photography or broadcasting of judicial proceedings is generally prohibited in both civil and criminal trials. Canon 3A(7) does, however, permit judges to authorize media coverage of non-jury civil proceedings. Coverage of support, custody, and divorce proceedings is prohibited. A judge may only authorize coverage with the consent of the parties. Additionally, coverage of objecting witnesses is prohibited. Media wishing to seek permission to cover a proceeding should speak in advance with the courtroom tipstaff, as the presiding judge must expressly authorize coverage.

Coverage is prohibited in proceedings before District Justices.

Local rules may vary.

Authority: [Canon 3A\(7\)](#), Code of Judicial Conduct; [Rule 112](#), Pennsylvania Rules of Criminal Procedure; [Rule 223](#), Pennsylvania Rules of Civil Procedure (Official Note); [Rule 7](#), Rules of Conduct, Offices Standards and Civil Procedure for District Justices (2005).

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## Rhode Island

Extended coverage is prohibited in all trial-level criminal proceedings. At the appellate level and in civil proceedings, the judges have “sole discretion” to “entirely exclude media coverage of any proceeding or trial over which he or she presides.” Exclusion by the trial court may also be based on a party’s request for non-coverage. Coverage of juvenile, adoption or any other matters in the Family Court “in which juveniles are significant participants” is prohibited. Coverage of hearings which take place outside of the jury’s presence (e.g., hearings regarding motion to suppress evidence) is not permitted. After the jury has been impaneled, individual jurors may be photographed, with their consent. Where photographing of the jury is unavoidable, close-ups that clearly identify individual jurors are not permitted.

Only one television camera and one still photographer, using not more than two cameras, are allowed in the courtroom, and the media must arrange for any pooling arrangements.

Authority: Article VII, Rhode Island Supreme Court Rules, Rhode Island Court Rules Annotated; Rule 53, Rhode Island Superior Court Rules of Criminal Procedure (2005).

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## South Carolina

Extended media coverage is permitted, but presiding judges are given significant discretion to limit coverage. Those wishing to cover a proceeding must give the presiding judge “reasonable notice” of the request for coverage, and the judge may request a written notice. The judge may also refuse, limit or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses. Coverage of prospective jurors is prohibited and members of the jury may not be photographed except when they happen to be in the background of other subjects being

photographed. Two television cameras and two still-photographers are allowed in the courtroom at one time, and the media are responsible for any pooling arrangements. Media personnel's equipment and clothing must not "bear the insignia or marking of any media agency," and the cameraperson must wear "appropriate business attire."

Authority: [Rule 605](#) and [Part 6, Appendix B, Form 1](#), South Carolina Appellate Court Rules, South Carolina Rules of Court (2007).

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## South Dakota

Extended coverage of trial and intermediate appellate court proceedings is prohibited. Expanded media coverage of Supreme Court proceedings is permitted. Under Rule 15-24-6, public appellate proceedings are presumed open, but parties may file an objection to such coverage 10 days prior. The rule provides that media coverage may not be limited unless it is shown that such coverage would materially interfere with the rights of the parties or the administration of justice.

Authority: Canon 3B(12), South Dakota Code of Judicial Conduct, S.D. Codified Laws, [§ 15-24-6](#).

Webcasts: [South Dakota Supreme Court Oral Arguments](#)

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## Tennessee

Extended coverage is permitted in all courts. Requests for coverage must be made in writing to the presiding judge not less than two business days before the proceeding. Coverage of a witness, party or victim who is a minor is prohibited except when a minor is being tried for a criminal offense as an adult. Coverage of the jury selection and the jurors during the proceeding is also prohibited.

In juvenile court proceedings, the court will notify parties and their counsel that a request for coverage has been made and prior to the beginning of the proceedings, the court will advise the accused, the parties and the witnesses of their right to object. Objections by a witness in a juvenile case will limit coverage of that witness. Objections to coverage by the accused in a juvenile criminal case or any party in a juvenile civil action will prohibit coverage of the entire proceeding.

Only two television cameras and two still photographers, using not more than two cameras each, are allowed in the courtroom at one time. The media are responsible for any pooling arrangements.

Appellate review of a presiding judge's decision to terminate, suspend, limit, or exclude media coverage shall be in accordance with Rule 10 of the Tennessee Rules of Appellate Procedure.

Authority: [Rule 30](#), Rules of the Tennessee Supreme Court, Tenn. Code Ann., Vol. 5A (2007).

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## Texas

Rule 18c, Texas Rules of Civil Procedure, and Rule 14, Texas Rules of Appellate Procedure, provide for the recording and broadcasting of civil court proceedings.

Rule 18c allows television, radio and photographic coverage with the consent of the trial judge, the parties and each witness to be covered. Coverage also may not “unduly distract participants or impair the dignity of the proceedings.”

Rule 14 technically permits coverage of civil and criminal appellate proceedings. Requests for coverage at the appellate level must be filed five days prior to the proceeding, and coverage may be subject to other limitations imposed by the presiding judge(s). Those seeking coverage at the trial level should check with the local court, as the Supreme Court has approved local rules submitted by counties and cities in the state to allow coverage of trial proceedings and will continue to do so.

Authority: Rule 18c, [Rules of Civil Procedure](#); [Rule 14](#), Rules of Appellate Procedure (2007).

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## Utah

Under Rule 4-401, filming, video recording and audio recording of appellate proceedings is permitted to preserve the record and as permitted by procedures of those courts, but is prohibited in trial proceedings except to preserve the record. Still photography of trial and appellate proceedings is permitted at the discretion of the presiding judge. Requests for still photography coverage should be made at least 24 hours prior to the proceeding but will be considered less than 24 hours ahead for good cause.

Authority: [Rule 4-401](#), Utah Code of Judicial Administration (2000).

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## Vermont

Extended media coverage of Supreme Court proceedings is permitted without the consent of the full court, but the Chief Justice has discretion to prohibit coverage. Audio recording of conferences between members of the Court, between co-counsel or between counsel and client is prohibited. Only two television cameras, each operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the Supreme Court at any one time.

At the trial level, coverage is permitted in the courtroom and in immediately adjacent areas that are generally open to the public. Consent of parties and witnesses is not required, but the trial judge has discretion to prohibit, terminate, limit or postpone coverage on the judge’s own motion or on a motion of a party or request of a witness.

Coverage of jurors is prohibited, except in the background when courtroom coverage would be otherwise impossible. While the rules do not ban coverage of specific types of cases, the reporter’s note accompanying the rule suggests that coverage of sex offense, domestic relations, trade secret cases or offenses in which the victim is a minor may be inappropriate. This issue is left to the discretion of the trial judge to evaluate on a case-by-case basis. No proceeding that is closed to the public, by statute, may be covered. Only one television camera, operated by one cameraperson, and one still photographer, using not more than two cameras, are permitted in the

courtroom at any one time. The media are responsible for any pooling arrangements. There is no right to an interlocutory appeal of a decision to prohibit or limit coverage.

Authority: Rule 35, Vermont Rules of Appellate Procedure; Rule 53, Vermont Rules of Criminal Procedure; Rules 79.2 & 79.3, Vermont Rules of Civil Procedure; 79.2, Rules of Probate Procedure (2000).

[Vermont Rules](#)

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## Virginia

Extended media coverage of both trial and appellate proceedings is permitted in the sole discretion of the trial judge. Coverage of jurors as well as certain kinds of witnesses (police informants, minors, undercover agents and victims and families of victims of sexual offenses) is prohibited. Media coverage of adoption, juvenile, child custody, divorce, spousal support, sexual offense, trade secret and in camera proceedings and hearings on motions to suppress evidence is prohibited as well. Not more than two television cameras and one still photographer (using no more than two cameras) are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: [Va. Code Ann. § 19.2-266](#) (1992).

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## Washington

The Courts of Washington permit extended media coverage of trial and appellate courtroom proceedings. The presiding judge may place conditions on the coverage, and the judge must expressly grant permission and ensure that the media personnel will not distract participants or impair the dignity of the proceedings. If a judge finds that media coverage should be limited, he or she must make, on the record, particularized findings that relate to specific circumstances of the proceeding. Judges may not rely on “generalized views” to limit media coverage.

The Bench-Bar-Press Committee, established in 1963, seeks to “foster better understanding and working relationships between judges, lawyers and journalists who cover legal issues and courtroom stories.” In addition to moderating disputes between the bench and the press, the Committee promulgates a nonbinding Statement of Principles as well as an annual report of its “Fire Brigade” (also known as its Liaison Committee).

Authority: [Rule 16](#), General Rules, Washington Court Rules - State (West).

[Bench-Bar-Press Committee  
Fire Brigade's 2006 Report on Activities.](#)

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## West Virginia

West Virginia's rules permit coverage of both trial and appellate proceedings but also permits a presiding judge to terminate coverage if he or she “determines that coverage will impede justice

or create unfairness for any party.” Requests for media coverage must be made at least one day in advance of the proceeding. The presiding judge may sustain or deny objections made by parties, witnesses and counsel to the coverage of any portion of a proceeding. Audio coverage of attorney-client meeting or any other conferences conducted between and among attorneys, clients, or the presiding judge is prohibited. Coverage that shows the face of any juror or makes the identity of any juror discernible is prohibited without juror approval. Only one television camera and one still photographer are allowed in the courtroom at any one time, and the media are responsible for any pooling arrangements.

Authority: [Canon 3B\(12\)](#), West Virginia Code of Judicial Conduct; Rules Governing Camera Coverage of Courtroom Proceedings, West Virginia Code Annotated; [Rule 8](#), West Virginia Trial Court Rules (2007); Media Coverage of Courtroom Proceedings in the Supreme Court of Appeals, [Rule 1](#) (2007)

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## Wisconsin

Extended coverage is permitted, but the presiding judge retains the authority to determine whether coverage should occur and, upon a finding of cause, to prohibit coverage. The trial judge retains the power, authority and responsibility to control the conduct of proceedings, including the authority over the inclusion or exclusion of the media and the public at particular proceedings or during the testimony of particular witnesses under the experimental and permanent guidelines. A presumption of validity attends objections to coverage of participants in cases involving the victims of crimes (including sex crimes), police informants, undercover agents, juveniles, relocated witnesses, divorce, trade secrets, and motions to suppress evidence. An individual juror may be photographed only after his or her consent has been obtained. Photographs of the jury are permitted in courtrooms where the jury is part of the unavoidable background, but close-ups, which enable jurors to be clearly identified, are prohibited. Audio coverage of conferences between an attorney and a client, co-counsel, or attorneys and the trial judge is also prohibited. Three television cameras and three still photographers, using not more than 2 cameras each, are allowed in the courtroom to cover a proceeding. Disputes regarding a court’s application of Chapter 61 are treated as administrative matters, which may not be appealed.

Authority: [Chapter 61](#), Wisconsin Supreme Court Rules (1999).

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## Wyoming

Extended media coverage is allowed in at both the appellate and trial court levels. A request for media coverage must be submitted 24 hours or more prior to the proceedings. The media may not make any close-up photography or visual recording of the members of the jury, nor may it make an audio recording of conferences between attorney and client or between counsel and the presiding judge. Additionally, equipment may not be moved during a proceeding. The trial judge has broad discretion in deciding whether there is cause for prohibition of coverage. Requests to limit media coverage enjoy a presumption of validity in cases involving the victims of crimes, confidential informants, and undercover agents, as well as in evidentiary suppression hearings.

Authority: [Rule 804](#), Uniform Rules of the District Courts of the State of Wyoming; [Rule 53](#), Wyoming Rules of Criminal Procedure, (2007).

Last Updated May 25, 2007, courtesy of Matthew Gibson for Kathleen Kirby.

# Tab 2

# TELEVISIONING THE JUDICIAL BRANCH: IN FURTHERANCE OF THE PUBLIC'S FIRST AMENDMENT RIGHTS

KELLI L. SAGER and  
KAREN N. FREDERIKSEN\*

## I. INTRODUCTION

The recent double murder trial of sports celebrity O.J. Simpson<sup>1</sup> resulted in a cacophony of voices raised in criticism of virtually everyone and everything associated with the proceedings, including the trial judge, the lawyers for the respective parties, various witnesses, and the jurors. The harshest criticism, however, has been reserved for the media's coverage of those proceedings, and in particular, for the courtroom camera, which has been singled out as the purported cause of every imaginable evil associated with the trial. Opportunistic politicians were quick to jump on the media-bashing bandwagon, calling for a reevaluation of the wisdom of allowing television cameras to record and broadcast court proceedings.<sup>2</sup>

When this movement is viewed in light of the history of the American court system and the entirety of empirical experience with

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1. *People v. Simpson*, No. BA097211 (L.A. Super. Ct. Oct. 3, 1995). The jury returned a "not guilty" verdict on October 3, 1995. Mr. Simpson is still defending civil suits brought against him by the families of Nicole Brown Simpson and Ronald Goldman, and by Nicole Brown Simpson's estate.

2. For example, California Governor Pete Wilson requested that the California Judicial Council revise California Rule of Court 980, which presently provides a mechanism through which judges can permit electronic coverage of judicial proceedings. Under Governor Wilson's proposal, the Rule would have been amended to forbid any electronic coverage of criminal court proceedings. Maura Oslan, *Key State Panel to Consider Major Changes for Trials*, L.A. TIMES, Oct. 31, 1995, at A1. This proposal was ultimately rejected by the Judicial Council. Mike Lewis, *Camera Ban Rejected by Council*, 13-6, L.A. DAILY J., May 20, 1996, at 3.

electronic coverage of the courts, it is apparent that while a reevaluation of such coverage is appropriate, it should proceed from a different perspective than that suggested by the chorus of *Simpson* critics. In this modern age, when most Americans rely on the broadcast media as their primary source of information,<sup>3</sup> and where advances in technology have eliminated any unique problems associated with electronic coverage, the real issue to be addressed is whether there remains any principled basis upon which broadcasters can be barred from covering the nation's courts. Moreover, when one considers this country's historical commitment to public access to judicial proceedings, the United States Supreme Court's substantial expansion of the constitutional right of access over the last two decades, and constitutional restrictions on government's ability to arbitrarily discriminate between different members of the media, a serious question arises as to whether excluding broadcasters from court proceedings is consistent with the First Amendment.<sup>4</sup>

As discussed in the following sections, the expansive constitutional right of public access to court proceedings, coupled with more than two decades of experimentation and experience with electronic coverage of judicial proceedings, mandates a presumption in favor of allowing such coverage. Furthermore, in an era where the Supreme Court has recognized that disparate treatment of different media is highly suspect, restricting the rights of the electronic media to report on judicial proceedings cannot be justified absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. Not surprisingly, the overwhelming weight of experience and evidence is to the contrary. Thus, the time has come

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3. As of 1985, television was the principal source of news for 64 percent of the American public and the sole source of news for nearly half of this country's population. See Note, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1083 & nn.169-70 (1993) [hereinafter, *Demystifying the Court*] (citing a 1985 Roper study related to public attitudes toward television).

4. The First Amendment to the United States Constitution provides, in pertinent part, that "Congress shall make no law . . . abridging the freedom of speech or of the press. . . ." U.S. CONST. amend. I. In addition to the right to speak, the First Amendment includes the right to "receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citations omitted); *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972) (citations omitted). Thus, as the Supreme Court has stated:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged. . . .

*Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

for the courts to recognize a presumptive right of the electronic media to have access to judicial proceedings.

## II. HISTORICAL OVERVIEW OF ELECTRONIC COVERAGE OF THE COURTS

As the law exists today in most states, electronic coverage of court proceedings is permitted. The United States Supreme Court made clear in 1981 that the Federal Constitution does not inherently prohibit such coverage,<sup>5</sup> and forty-seven states currently permit television coverage of at least some court proceedings.<sup>6</sup> For many years, however, courts were highly skeptical about—or even hostile to—the notion of televised judicial proceedings, in large part for reasons that are either irrelevant today or have nothing to do with the intrinsic nature of the broadcast medium. Indeed, over the years, many on the bench, including several Supreme Court justices, have anticipated that their aversion to television cameras in courtrooms will change as technological advances are made and the public's reliance on that medium becomes more commonplace.

The first suggested prohibition on the use of cameras in the courtroom came about before television was even invented, as a reaction to the frenzied media coverage of the 1935 trial of Bruno Richard Hauptmann. Hauptmann was charged with kidnapping national hero Charles Lindbergh's child. As a consequence of the media circus that ensued at his trial,<sup>7</sup> the American Bar Association began evaluating the propriety of allowing cameras in the courtroom, eventually adopting a rule that recommended prohibiting their use.<sup>8</sup>

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5. *Chandler v. Florida*, 449 U.S. 560 (1981).

6. See RADIO-TELEVISION NEWS DIRECTORS ASS'N, *NEWS MEDIA COVERAGE OF JUDICIAL PROCEEDINGS WITH CAMERAS AND MICROPHONES: A SURVEY OF THE STATES i-iii* (1994) [hereinafter *STATE SURVEY*].

7. See *State v. Hauptmann*, 180 A. 809 (N.J.), cert. denied, 296 U.S. 649 (1935). The Hauptmann trial was covered by approximately 700 news reporters, including 120 camera persons. Among other disruptions, the unruly photographers resorted to climbing over counsel tables and using blinding flash bulbs. See R.A. Strickland, *Cameras in State Courts: A Historical Perspective*, 78 *JUDICATURE* 128, 129 (1994). Notwithstanding this atmosphere, however, the appellate court rejected Hauptmann's claim that he was denied a fair trial because of the chaos in the courtroom and the massive publicity the murder trial received. *Hauptmann*, 180 A. at 827-29.

8. Adopted in 1937, Canon 35 of the A.B.A. Canons of Judicial Ethics recommended a prohibition on the use of cameras in the courtroom. 62 A.B.A. REP. 1123, 1134-35 (1937). In 1952, this Canon was amended to forbid television coverage of federal courts, as well as to bar photographic and broadcast coverage of state court trials. 77 A.B.A. REP. 610, 611 (1952). In 1972, the Canons of Judicial Ethics were replaced with the Model Code of Judicial Conduct, and

Thirty years later, when the United States Supreme Court was first called upon to evaluate the effect of televised proceedings on a criminal defendant's right to a fair trial, the presence of television cameras in the courtroom was still considered a novel concept that many viewed as inconsistent with the parties' fundamental rights to effective and impartial justice, and dignified and solemn proceedings. All but two states prohibited electronic media coverage of their trials, and the American Bar Association still maintained its position that no cameras should be permitted in courts. Many simply assumed—albeit without any empirical data or other evidence—that the presence of television cameras in the courts was intrinsically harmful. This negative assumption was undoubtedly furthered by the fact that, at that point in time, television coverage of important national events was still in a stage of relative infancy, and its significant influence upon the public was becoming the subject of extensive discussion and concern.<sup>9</sup>

It was against this backdrop that the United States Supreme Court considered the claim of criminal defendant Billie Sol Estes, an associate of President Lyndon Johnson, that the televising of pretrial and trial proceedings in 1962 had interfered with his ability to get a fair trial on swindling charges.<sup>10</sup> The majority of the Justices in *Estes* refused to adopt a per se rule that camera coverage is inherently unconstitutional as an interference with a defendant's Sixth Amendment rights.<sup>11</sup> However, based upon the particularly chaotic circumstances of this case, the Court held in a 5-4 decision that Estes' fair trial rights had been violated, and his conviction was reversed.

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Canon 35 became Canon 3A(7). This new provision included a limited exception that permitted photographic or electronic recording and reproduction of court proceedings under certain circumstances, but only for instruction in educational facilities. The ABA's recommended ban on courtroom cameras was finally eased in 1978.

9. For example, the televised presidential debates between John F. Kennedy and Richard M. Nixon were believed by many to have meant the difference between victory and defeat for Kennedy. The unforgettable visual images of Kennedy's subsequent assassination, and the early coverage of the Vietnam War, combined to make television the topic of many commentators' analyses.

10. *Estes v. Texas*, 381 U.S. 532 (1965). Over Estes' objection, the trial judge had exercised his discretion to allow coverage under a Texas rule that permitted television coverage of pretrial and trial proceedings.

11. There were six separate opinions written by the Justices in *Estes*. Justice Clark, writing for the Court, and Chief Justice Warren, Justice Douglas and Justice Goldberg, who joined the majority opinion, believed that televising the *Estes* criminal trial was a per se violation of the defendant's due process rights. Justice Harlan, however, who provided the fifth vote in support of the judgment, did not join in the finding of per se unconstitutionality. See *Chandler v. Florida*, 449 U.S. 560, 570-71 (1981) (analyzing the separate opinions in *Estes*).

Of primary importance to the majority of the Justices was the highly disruptive atmosphere during pretrial hearings. Justice Clark, writing for the Court, described the courtroom during those hearings as follows:

[A]t least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's desk and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.<sup>12</sup>

Although the presence of cameras at the actual *Estes* trial was more confined in compliance with new orders by the trial judge,<sup>13</sup> the Supreme Court concluded that the highly disruptive atmosphere at the important and widely followed pretrial hearings (some of which were conducted in the jury's presence) was amply sufficient to interfere with the defendant's due process rights.<sup>14</sup>

The Court clearly felt misgivings regarding the use of this relatively new medium in the novel setting of a courtroom. Justice Clark's opinion for the Court repeatedly emphasized his concern that the mere presence of television cameras would signal to a jury that a case is "notorious."<sup>15</sup> In today's society, however, where security cameras are noticeable in every public building, most courtrooms and even convenience stores, the "presence" of a camera is hardly meaningful at all. Justice Harlan—who cast the swing vote in favor of defendant *Estes*—presciently cautioned that the decision was not the definitive answer on electronic coverage, explaining that

the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. *If and when that day arrives the constitutional*

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12. *Estes*, 381 U.S. at 536 (citations omitted). Chief Justice Warren's concurring opinion provided further description, noting that two of the cameras were set up inside the bar, that "photographers [were] roaming at will throughout the courtroom," and at one point a "cameraman wandered behind the judge's bench and snapped his picture." *Id.* at 553 (Warren, C.J., concurring).

13. For example, for the trial, a booth painted the color of the interior of the courtroom was installed in the back of the room to house the photographers and their equipment. *Id.* at 537; see also *id.* at 606-09 (Stewart, J., dissenting). Even then, as Chief Justice Warren noted, there were four television cameras and several still photographers present, all of whom were "clearly visible to all in the courtroom." *Id.* at 556 (Warren, C.J., concurring).

14. *Id.* at 551.

15. *Id.* at 545.

*judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.* At the present juncture . . . televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned.<sup>16</sup>

Even Justice Clark recognized the temporal nature of the majority's ruling, noting that "*at this time* those safeguards [necessary to ensure solemn court proceedings] do not permit the televising and photographing of a criminal trial."<sup>17</sup> However, "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."<sup>18</sup> Yet, based upon the disruptive scene in the courtroom, and the fact that television was a relatively new medium, a majority of justices in *Estes* were willing to assume that cameras were inherently harmful to the pursuit of justice.<sup>19</sup> Having made this assumption, the *Estes* majority also stated, in *dicta*, that there was no First Amendment right of electronic media access to court proceedings because such a right would interfere with "the maintenance of absolute fairness in the judicial process."<sup>20</sup>

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16. *Id.* at 595-96 (Harlan, J., concurring) (emphasis added). Justice Harlan further limited his concurrence in *Estes*, stating that his holding was based in large part on the unusual facts presented by that case, including the fact that it was a "criminal trial of great notoriety." *Id.* at 587. Subsequent decisions by the Supreme Court have recognized the extremely limited nature of Justice Harlan's opinion. See, e.g., *Chandler v. Florida*, 449 U.S. 560, 573 (1981); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 552 (1976).

17. *Estes*, 381 U.S. at 540 (emphasis added).

18. *Id.* (emphasis added). Similarly, a dissenting Justice Stewart—writing for four members of the Court—had the foresight to state that he was "wary" of imposing a "*per se* rule" against televising court proceedings that may "serve to stifle or abridge true First Amendment rights . . . in the light of future technology." *Id.* at 604 (Stewart, J., dissenting); cf. *id.* at 615-16 (White, J., dissenting) (commenting that because of the "very limited amount of experience in this country with television coverage of trials," the materials available to evaluate this coverage are too sparse to make a pronouncement about a constitutional rule).

19. Indeed, many of the concerns expressed by members of the Court in *Estes*—including worries about the possible impact upon witness testimony, the burden placed on the trial judge and the possible harassment of the defendant—were not supported by any empirical evidence, and have since been debunked by the states' extensive experience with courtroom cameras and the numerous empirical studies of those experiences. See *infra* notes 78-88.

20. *Estes*, 381 U.S. at 539; *id.* at 585 (Warren, C.J., concurring); *id.* at 587-88 (Harlan, J., concurring). Justice Stewart, writing for four dissenting justices in *Estes*, not only pointed out that this conclusion is purely *dicta*, but also took strong exception to it:

While no First Amendment claim is made in this case, there are intimations in this opinion filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are

In 1966, one year after deciding *Estes*, the Court reversed another murder conviction on grounds of prejudicial media coverage, holding that adverse pretrial publicity and media dominance during the trial had denied Sam Sheppard his right to a fair trial.<sup>21</sup> As in the *Estes* case, the problems in *Sheppard* clearly were not the result of a single, unobtrusive courtroom camera—indeed, the actual proceedings were not broadcast at all—but rather with the overwhelming amount of media coverage and the complete paucity of any measures that could have safeguarded Sheppard's rights.<sup>22</sup>

For more than a decade, these two cases were the foundation of many opponents' arguments against electronic coverage of judicial proceedings, even though both cases involved unique circumstances unrelated to the presence of a single video camera—or even a video camera at all, in the *Sheppard* case—recording the proceedings in the courtroom. By the time the United States Supreme Court again considered the impact of televised coverage of judicial proceedings,<sup>23</sup> fifteen years after *Estes* and *Sheppard*, the circumstances both inside and outside the courtroom had changed dramatically.

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limits upon the public's right to know what goes on in the court causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. And the proposition that non participants in the trial might get the "wrong impression" from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the "essential requirement of the fair and orderly administration of justice," "[f]reedom of discussion should be given the widest range."

*Id.* at 614-15 (Stewart, J., concurring) (citations omitted). Five years after *Estes* one circuit court took a somewhat more liberal view of cameras in the courtroom than the majority of Justices in *Estes*, but still held that such access is within the trial judge's discretion. *Dorfman v. Meiszner*, 430 F.2d 558, 562 (7th Cir. 1970) (holding that a trial court properly acted within its discretion in prohibiting photographs and broadcasting inside, and adjacent to, the courtrooms).

21. *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

22. In addition to the prejudicial manner in which the Coroner's inquest was conducted, the Supreme Court pointed to the prejudicial and disruptive atmosphere at the trial itself, including the crowds of reporters and photographers in the courtroom whose movements in and out of the courtroom made it "difficult for witnesses and counsel to be heard"; the inability of counsel to confer privately with the defendant or the judge; the identification and photographing of jurors (who were not sequestered) during the trial, "all" of whom received calls about the case; and the refusal of the trial judge to take any ameliorative steps, such as moving or continuing the trial, sequestering the jury, or subjecting them to voir dire about their exposure to publicity and other outside influences. *Id.* at 340-45.

23. The access rights of the electronic media were raised in a different context in *Nixon v. Warner Communications*, 435 U.S. 589 (1978). As discussed below, although this case has frequently been relied upon by lower courts in holding that there is no First Amendment right of access for broadcasters, the unique circumstances of that case make it questionable authority, at best.

In 1981, when the Court decided *Chandler v. Florida*,<sup>24</sup> twenty-eight states had adopted rules permitting televised coverage of at least some court proceedings, and twelve more states were experimenting with such coverage.<sup>25</sup> The ABA Committee on Fair Trial-Free Press had recommended relaxing its prohibition on electronic coverage, and the Conference of State Chief Justices had almost unanimously approved a resolution in 1978 to promulgate standards permitting electronic coverage in state courts.<sup>26</sup> Preliminary empirical data concerning the potential impact of televised coverage upon trial participants was positive, in contrast to the speculative fears expressed by several Justices in *Estes* when television "was in its relative infancy."<sup>27</sup> Furthermore, technological advances had substantially reduced or eliminated many of the negative factors that had contributed to the distracting atmosphere in *Estes*, such as cumbersome equipment, blinding lights and multiple camera technicians.<sup>28</sup>

The combination of all of these circumstances led a unanimous Court in *Chandler* to hold that televised criminal proceedings do not inherently interfere with a criminal defendant's constitutional right to a fair trial, and that there was no empirical evidence to support such a claim.<sup>29</sup> Thus, according to the Court, the Constitution does not prohibit electronic coverage of criminal trials, absent a showing of actual

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24. 449 U.S. 560 (1981).

25. *Id.* at 566 n.6.

26. *Id.* at 562-65 & n.6.

27. *Id.* at 574.

28. *Id.* at 576. A year before *Chandler* was decided, the Florida Supreme Court had extensively examined the impact of televised court proceedings and reached a conclusion contrary to *Estes* about the constitutionality of electronic coverage. That court was "persuaded that on balance there is more to be gained than lost" by permitting such coverage. *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979). Noting that Florida's new camera access rule was a reflection of the state's commitment to open government, the Florida Supreme Court stated:

The court system is no less an institution of democratic government in our society. Because of the court's dispute resolution and decision-making role, its judgments and decrees have an equally significant effect on the day-to-day lives of the citizenry as the other branches of government. It is essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance.

*Id.* (citations omitted).

29. *Chandler*, 449 U.S. at 570-74. Unlike the *Estes* trial, in *Chandler* the portions of the trial that were broadcast were captured by a single camera. The Court noted that the specific issue of whether there is a First Amendment right to televise court proceedings was not before the court in *Chandler*. *Id.* at 569-70.

prejudice.<sup>30</sup> In addition, the *Chandler* Court limited the *Estes* holding to its facts, and to those cases “utterly corrupted by press coverage.”<sup>31</sup>

Following the green light provided by the Court in *Chandler*, today forty-seven states permit electronic coverage of at least some portion of judicial proceedings,<sup>32</sup> and courts across the country have found that permitting such coverage does not violate a criminal defendant’s Sixth Amendment rights.<sup>33</sup> Nonetheless, in the absence of any express directive from the United States Supreme Court, a number of lower courts have held that there is no First Amendment right to electronically broadcast court proceedings.<sup>34</sup> These decisions improperly rely on the Supreme Court’s decision in *Estes*—which, as explained above, should no longer be considered authoritative law in light of *Chandler*—and on the Court’s decision in *Nixon v. Warner Communications*,<sup>35</sup> which involved entirely different circumstances.

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30. *Id.* at 578-79, 582; *id.* at 588 (White, J., concurring). In *Chandler*, the defendants failed to offer any evidence that they were injured by the electronic coverage.

31. *Id.* at 573 n.8. The majority decision appeared to go to great pains to avoid the need to overrule *Estes*, finding that *Estes* did not establish a per se constitutional violation for electronic coverage. Justices Stewart and White, however, wrote concurring opinions in which they set forth their respective beliefs that *Estes* should be expressly overruled. *Id.* at 583-86 (Stewart, J., concurring); *id.* at 586-89 (White, J. concurring). Even without expressly overruling *Estes*, however, the Court’s decision in *Chandler* makes clear that *Estes* provides no support for a broad ban on electronic coverage of judicial proceedings.

32. See STATE SURVEY, *supra* note 6.

33. See *infra* part IV.

34. See, e.g., *Westmoreland v. Columbia Broadcasting Sys., Inc.*, 752 F.2d 16, 21-24 (2d Cir. 1984) (rejecting Cable News Network’s (“CNN”) First Amendment arguments, the Second Circuit affirmed a New York district court order prohibiting live television coverage of the trial of General William Westmoreland’s libel suit against CBS, and upheld the local rule prohibiting such coverage of trials), *cert. denied*, 472 U.S. 1017 (1985); *United States v. Hastings*, 695 F.2d 1278 (11th Cir.) (holding in the context of the trial of federal district court judge Alcee Hastings, who was charged with conspiracy and obstruction of justice, that there was no First Amendment right to televise the trial), *cert. denied*, 461 U.S. 931 (1983); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986) (holding that there was no right to televise the trial of Louisiana governor Edwin Edwards, who was charged with fraud and racketeering); *Conway v. United States*, 852 F.2d 187 (6th Cir.), *cert. denied*, 488 U.S. 943 (1988) (no First Amendment right to televise judicial proceedings); *United States v. Kerley*, 753 F.2d 617, 620-22 (7th Cir. 1985) (criminal defendant had no constitutional right to insist that his trial be videotaped); see also *United States v. Yonkers Bd. of Educ.*, 747 F.2d 111, 113-14 (2d Cir. 1984); *Combined Communications Corp. v. Finesilver*, 672 F.2d 818, 821 (10th Cir. 1982) (addressing district court ruling prohibiting televising settlement negotiations in a federal courthouse, the Tenth Circuit stated that “[t]he First Amendment does not guarantee the media a constitutional right to televise inside a courthouse”); *Associated Press v. Bost*, 656 So. 2d 113, 117 (Miss. 1995).

Several commentators have written that the First Amendment analysis in these opinions is flawed in light of recent Supreme Court precedent in the area of access to court proceedings, and advances in broadcasting technology. See, e.g., R.H. Frank, *Cameras in the Courtroom: A First Amendment Right of Access*, 9 HASTINGS COMM. & ENT. L.J. 748, 765-72 (1987).

35. 435 U.S. 589 (1978).

In *Nixon*, the Supreme Court was faced with a request by several news organizations for permission to copy and sell audiotapes made by former President Richard Nixon. The audiotapes had been introduced into evidence in a criminal trial involving the Watergate conspirators. The Court did not squarely address the question of whether electronic coverage of court proceedings is permitted or required by the First Amendment; the sole issue was whether third party news organizations had the right to *copy* items that had been subpoenaed from the former President and introduced into evidence. As Justice Powell wrote for the majority:

[T]he issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying.<sup>36</sup>

In a split decision, the Court held that under these circumstances, there is no constitutional right to have physical access to the tapes for broadcast.

The application of *Nixon* to the current electronic coverage debate is questionable, at best. First, the majority's reference to the right to record and broadcast court proceedings relied on *Estes*,<sup>37</sup> which is hardly authoritative in light of the Court's later decision in *Chandler*. Second, and more importantly, the Court made clear that its decision was strongly influenced by the "additional, unique element" of the *Nixon* case; namely, that the records in question fell within the recently enacted Presidential Recordings Act, which sets forth specific limitations and procedures for public access to presidential documents.<sup>38</sup> Finally, none of the arguments advanced in support of a constitutional right of access for electronic media were considered by the Court in *Nixon*. Consequently, the reliance by some lower courts on *Nixon* as somehow resolving the First Amendment issues surrounding a right to televise judicial proceedings is misplaced.

As the following section of this Article demonstrates, there are two separate strands of cases which strongly support a constitutional right for electronic coverage under the First Amendment. The first strand of cases involves the well-established rights of the public and

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36. *Id.* at 609. The audiotapes had been played in open court, and copies of transcripts were made available to the public and press. *Id.*

37. *Id.* at 610.

38. *Id.* at 603.

press to have access to judicial proceedings, and the need for electronic coverage if those rights are to be meaningful in today's society. The second strand of cases involves the constitutional limitations on the government's ability to arbitrarily discriminate between different mediums of communication, particularly where, as here, there is no compelling justification for such differential treatment. Arguably, either or both of these lines of precedent establish a constitutional right of access to the courts for electronic media. At a minimum, it is clear from these cases that electronic coverage substantially furthers the public's interests under the First Amendment, and for this reason alone is entitled to a presumption favoring such access absent a compelling justification to the contrary.

### III. ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS FURTHERS, AND IS ARGUABLY REQUIRED BY, THE PUBLIC'S RIGHTS UNDER THE FIRST AMENDMENT.

A presumption in favor of allowing electronic coverage of judicial proceedings is not only consistent with, but is arguably required by, two important constitutional doctrines: the public's well-established constitutional right of access to the courts and the prohibition against discriminatory treatment of different members of the media.

#### A. THE HISTORY OF OPEN JUDICIAL PROCEEDINGS IN THIS COUNTRY FAVORS PERMITTING ELECTRONIC COVERAGE OF THE COURTS

The origins of proceedings that evolved into the modern criminal and civil trials date back to the days before the Norman Conquest, when disputes were brought before local courts called "moots."<sup>39</sup> Attendance at the "moots" was required of all freemen, who were "called upon to render judgment."<sup>40</sup> Although the requirement of attendance was relaxed as the jury system evolved, the concept that all members of a community should observe the proceedings was not lost. As explained by one general court decision in 1313 and recited more than 600 years later by the United States Supreme Court:

[T]he King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to

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39. This historical evolution is traced in detail in the United States Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-65 (1980).

40. *Id.* at 565.

rich as to poor, *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare.<sup>41</sup>

This tradition of attendance did not change over the course of time, as the Supreme Court recognized in its historical analysis. Quoting from a treatise by Sir Thomas Smith published in 1565, the Court noted the “constant” public nature of criminal proceedings:

All the rest [after the written indictment] is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositories and witnesses what is saide*.<sup>42</sup>

This tradition was carried over into the American colonies, where trials were held “in open Court, *before as many of the people as chuse to attend*.”<sup>43</sup>

The Supreme Court relied on this clear tradition in reaching its decision in *Richmond Newspapers* that the right of a “public” trial belongs not only to the accused, but to the public and press as well. After reviewing the historical analogs to the modern open trial, the Court concluded:

[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.<sup>44</sup>

Recognizing that modern society prevents most people from physically attending trials, the Court went on to specifically address the need for access by members of the media:

Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now

41. *Id.* at 566 (quoting 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 268 (1927)).

42. *Id.* (quoting THOMAS SMITH, DE REPUBLICA ANGLORUM 101 (Alston ed., 1972)).

43. *Id.* at 568-69 (quoting 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 107 (1904)).

44. *Id.* at 569 (citations omitted).

acquire it chiefly through the print *and electronic media*. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This "contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ."45

The Court also recognized the intrinsic value of having court proceedings be as open as possible to public scrutiny:

When a shocking crime occurs, a community reaction of outrage and public protest often follows. . . . Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers. . . . It is not enough to say that results alone will satiate the natural community desire for "satisfaction." A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," and *the appearance of justice can best be provided by allowing people to observe it.*46

In keeping with the recognition of the importance of public access to and observation of court proceedings, the United States Supreme Court has repeatedly emphasized and expanded this constitutional right since *Richmond Newspapers*. Two years after *Richmond Newspapers*, in *Globe Newspaper Co. v. Superior Court*,47 the Court struck down a state law closing courtrooms during the testimony of minors who were victims of sex crimes. Furthermore, the Court strengthened its holding in *Richmond Newspapers* by requiring that a trial judge make specific findings on the record to justify the closure of

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45. *Id.* at 572-73 (emphasis added) (quoting *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976)). Courts have frequently found that the media is entitled to greater First Amendment protection than individuals when the media fulfills its role as a surrogate for the public. *See, e.g., Houchins v. KQED, Inc.*, 438 U.S. 1, 16-17 (1978) (Stewart, J., concurring).

46. *Richmond Newspapers*, 448 U.S. at 571-72 (emphasis added) (citations omitted).

47. 457 U.S. 596 (1982).

a criminal trial. The Court also held that closure of judicial proceedings is subject to strict scrutiny: Closure is permissible only in the limited circumstances where denial of such access is justified by a "compelling governmental interest" and such closure order is "narrowly tailored to serve that interest."<sup>48</sup>

The Supreme Court subsequently extended this constitutional right of access to judicial proceedings to several contexts beyond actual trial. For example, in *Press-Enterprise Co. v. Superior Court*<sup>49</sup> ("Press-Enterprise I") the Court upheld the First Amendment right of access to jury voir dire. Shortly thereafter, the Court held in *Press-Enterprise Co. v. Superior Court*<sup>50</sup> ("Press-Enterprise II") that the First Amendment right of access applies to preliminary hearings. In these cases, as in the earlier decisions, the Supreme Court emphasized the importance of indirect public scrutiny of the judicial process based upon the direct observations of interested individuals and organizations:

The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.<sup>51</sup>

The Court further noted that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>52</sup>

In recognizing the importance of public scrutiny, the Court rejected the notion that a post-trial review of transcripts is sufficient to satisfy this important interest. As Justices Marshall and Brennan observed in *Richmond Newspapers*:

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48. *Id.* at 606-07.

49. 464 U.S. 501 (1984). Echoing the Court's earlier holding in *Richmond Newspapers* and *Globe*, the *Press-Enterprise I* Court stated:

[T]he presumption . . . [of access] may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Id.* at 510.

50. 478 U.S. 1 (1986).

51. *Id.* at 13 (quoting *Press-Enterprise I*, 464 U.S. at 508).

52. *Id.* (quoting *Richmond Newspapers*, 448 U.S. at 572).

In advancing these purposes [of open judicial proceedings], the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the “cold” record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, “[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as cliec[k] only in appearance.”<sup>53</sup>

The reason is clear: Critical components of any trial include the demeanor, tone, credibility and contentiousness—and perhaps even the competency and veracity—of trial participants. Even a complete transcript, which is rarely available to the public, cannot provide such critical, nonverbal information.

Thus, the history of this country’s jurisprudence demonstrates that maximum public access is the accepted ideal, and the United States Supreme Court has repeatedly reaffirmed this principle in the past fifteen years. Moreover, although the Court has not directly addressed this need for maximum public access in terms of allowing electronic coverage, it cannot be seriously disputed that, in today’s society, only electronic coverage can provide realistic access for most segments of the public to most judicial proceedings.

In part, this is a function of the importance television now plays in individuals’ daily lives. Television has become a primary source of information for the public worldwide. In the United States, for example, “[t]elevision is our . . . most common and constant learning environment, the mainstream of our culture. In a typical American home, the set is on for more than 7 hours each day, engaging its audience in a

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53. *Richmond Newspapers*, 448 U.S. at 597 n.22 (Brennan, J., and Marshall, J., concurring) (alteration in original) (quoting *In re Oliver*, 333 U.S. 257, 271 (1978)). In *Kleindienst v. Mandel*, 408 U.S. 753 (1972), the Court rejected the government’s proposition that access to a lecturer’s ideas through books and speeches—and through “‘technological developments,’ such as tapes or telephone hook-ups”—satisfied the First Amendment rights of professors who wished to hear the lecturer in person. “This argument [by the government] overlooks what may be particular qualities inherent in sustained, face-to-face debate, discussion and questioning.” *Id.* at 765. In *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981), while discussing the differences between television and other forms of media, the district court commented that “visual impressions can and sometimes do add a material dimension to one’s impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.” *Id.* at 1245.

ritual most people perform with great regularity.’”<sup>54</sup> In large part because of the pervasiveness of television, electronic coverage of the government—the legislative branch, as well as the courts—has become commonplace.

Furthermore, as the Supreme Court has long recognized, the physical space limitations of a particular courtroom and geographic and other limitations on the public’s ability to personally attend judicial proceedings validate the media’s claim that it acts as a “surrogate” for the public in providing access to those proceedings.<sup>55</sup> While Chief Justice Burger has specifically referred to both the print and electronic media as fulfilling that important surrogate role, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing a trial without physical attendance. Thus, in today’s society, a ban on television coverage of a given court proceeding means that only a handful of individuals can have meaningful access to that proceeding. As Chief Justice Burger noted in *Richmond Newspapers*, such a limited view of the First Amendment’s right to attend court proceedings is unacceptable:

[I]n the context of trials . . . the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors. . . . “For the First Amendment does not speak equivocally. . . . It must be taken as a command of the

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54. See *Demystifying the Court*, *supra* note 3, at 1083 & n.172 (citation omitted); see also *Cable News Network*, 518 F. Supp. at 1245 (“[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news.”) Frank, *supra* note 34, at 774-75; Thomas R. Julin, *The Inevitability of Electronic Media Access to Federal Courts*, 1983 DET. C. L. REV. 1303, 1310 (1983) (“Television provides the most accurate and effective tool to report that has ever been devised and the public today relies on the medium more than any other for complete, honest, and objective information about virtually all news events.”); E.E. Stolnick, *Television News and the Supreme Court: A Case Study*, 77 JUDICATURE 21, 22 (1993) (stating that most of the public reports that its main or only source of news is television); Diane L. Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641, 659 (1980) (“When the first amendment was adopted, the mass communicators were the publishers of eighteenth century broadsheets and pamphlets; now they are the national television and radio networks. The Supreme Court firmly recognizes that speech can occur in a variety of forms, many of which were unknown or arguably unpalatable to the framers.”) (footnotes omitted).

55. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). A good example of this is the O.J. Simpson criminal trial where there were only approximately 6 to 10 seats assigned to the “public,” and approximately 27 seats available for the dozens of national and international media representatives. See, e.g., *Life Imitates Art, But This is Los Angeles*, BOSTON HERALD, Jan. 25, 1995, at 20; Steven Brill, *Cameras in the Court and Original Intent*, CONN. L. TRIB., Jan. 29, 1996, at 43.

broadest scope that explicit language, read in the context of a liberty-loving society, will allow.”<sup>56</sup>

Thus, true public “access,” consistent with the Federal Constitution and this nation’s history, requires courts to permit televised coverage of their proceedings.

#### B. FORBIDDING ELECTRONIC COVERAGE ABSENT A COMPELLING JUSTIFICATION ALSO CONSTITUTES IMPERMISSIBLE DISCRIMINATION IN CONTRAVENTION OF IMPORTANT FIRST AMENDMENT PRINCIPLES.

Following *Chandler v. Florida*, a second line of cases developed in support of a presumption favoring electronic coverage. This second line of cases involves restrictions on the government’s ability to arbitrarily discriminate among different media. In recent years, the Supreme Court and lower courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment,<sup>57</sup> absent an overriding governmental interest.<sup>58</sup> For example, the Court has invalidated discriminatory tax schemes only imposed upon certain types of media.<sup>59</sup> As the Court explained, “[t]his is [unconstitutional] because selective taxation of the press—either singling

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56. *Richmond Newspapers*, 448 U.S. at 576 (emphasis added) (quoting *Bridges v. California*, 314 U.S. 252, 263 (1941)).

57. It was established long ago that the First Amendment applies to all media. See, e.g., *Superior Films, Inc. v. Department of Educ.*, 346 U.S. 587, 589 (1954) (Douglas, J., concurring) (stating that although motion pictures are different than “public speech, the radio, the stage, the novel, or the magazine,” the First Amendment draws no distinction between the various methods of communicating ideas”); *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948) (“[M]oving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment.”).

58. The charge that the denial of television coverage of trials violates the equal protection clause of the Fourteenth Amendment was rejected by the fragmented Supreme Court in *Estes*; however, for the reasons set forth in Part II, *supra*, that decision should no longer be viewed as reliable precedent. See generally *Estes v. Texas*, 381 U.S. 532, 540 (1965) (“[C]ourts [cannot] be said to discriminate where they permit the newspaper reporter access to the courtroom. . . . The television and radio reporter has the same privilege. . . . The news reporter is not permitted to bring his typewriter or printing press.”); *id.* at 589-90 (Harlan, J., concurring). Indeed, *Estes*’ dated approach has been roundly criticized by commentators. See, e.g., Zimmerman, *supra* note 54, at 653 (recasting the equal protection argument by arguing that if print reporters are permitted to bring writing instruments and papers into a courtroom, the broadcast media should be permitted to bring the tools relevant to them: “If this kind of evenhanded treatment is denied, reporters are not treated in a functionally equal way: none but the traditional print journalists may exploit the full potential of their medium of communication.”); Charles E. Ares, *Chandler v. Florida: Television, Criminal Trials, And Due Process*, 1981 SUP. CT. REV. 157, 177 (arguing that electronic broadcasters cannot constitutionally be treated differently from print media, and thus the broadcast media should be given access to the courtroom).

59. See *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 590 (1983) (holding that a special use tax assessed against a publication for the use of ink and

out the press as a whole or targeting individual members of the press—poses a particular danger of abuse by the State.”<sup>60</sup>

In addition to limits imposed by the First Amendment against discrimination against particular members of the media, the Supreme Court has held that the Fifth Amendment’s Equal Protection and Due Process Clauses also bar such discrimination. As the Court noted in *Police Department v. Mosley*<sup>61</sup>:

[U]nder the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an “equality of status in the field of ideas,” and government must afford all points of view an equal opportunity to be heard.<sup>62</sup>

Thus, discrimination in the area of First Amendment rights cannot be content-based, and any differential treatment must be tailored to serve a substantial government interest. Since eliminating television coverage significantly impacts upon the *content* of the information conveyed about a particular trial, this scrutiny is required in any analysis of whether precluding the electronic media from court proceedings while permitting access to others violates the Equal Protection Clause and the First Amendment.

In cases that deal more directly with access-related issues, lower courts have held that the Federal Constitution does not permit government officials to discriminate between members of the media. For example, in *Cable News Network, Inc. v. American Broadcasting*

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paper violated the First Amendment both by singling out newspapers for the special tax, and by only targeting a small group of newspapers through the use of an exception for the first \$100,000 in costs for any calendar year; the effect was to eliminate all but a handful of newspapers from being subject to the tax); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 232-33 (1987) (holding that a tax imposed upon magazines and newspapers was discriminatory and violated the First Amendment, where some specialty magazines were exempt under the statutory scheme; because Arkansas’ selection application was discriminatory in that it treated different magazines differently, the Court expressly declined to address the argument that the tax was also unconstitutional to the extent newspapers and magazines were treated differently).

60. *Ragland*, 481 U.S. at 228.

61. 408 U.S. 92, 96 (1972).

62. *Id.* at 96 (citation omitted).

*Cos.*,<sup>63</sup> a Georgia court held that discriminatory treatment of television media in coverage of the White House is unconstitutional. Specifically, the court recognized the First Amendment right of the electronic media to be included in a White House media pool that was open to other types of media. In reaching this conclusion, the court noted that only television coverage “provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.”<sup>64</sup>

Reaching a similar conclusion, the First Circuit in *Anderson v. Cryovac, Inc.*<sup>65</sup> reviewed a protective order entered by the trial court that prohibited the parties from divulging information obtained during discovery, but exempted disclosures to one public media organization that was preparing a documentary film about the case. A newspaper challenged the order as discriminatory. Although the First Circuit acknowledged that an order barring all disclosure of discovery materials would have been within the trial court’s discretion, it held that the disparate treatment of different types of the media rendered the protective order unconstitutional:

A court may not selectively exclude news media from access to information otherwise made available for public dissemination. . . . The danger in granting favored treatment to certain members of the media is obvious: it allows the government to influence the type of substantive media coverage that public events will receive. Such a practice is unquestionably at odds with the first amendment. Neither the courts nor any other branch of the government can be allowed to affect the content or tenor of the news by choreographing which news organizations have access to relevant information.<sup>66</sup>

The Second Circuit engaged in a similar analysis in *American Broadcasting Cos. v. Cuomo*,<sup>67</sup> where the court held that there would be irreparable harm to the public and ABC television if the network was not given immediate access to the campaign headquarters of the two New York City mayoral candidates, Mario Cuomo and Edward

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63. 518 F. Supp. 1238 (N.D. Ga. 1981).

64. *Id.* at 1245 (“[T]he Court finds that the total exclusion of television representatives from White House pool coverage denies the public and the press their limited right of access, guaranteed by the First Amendment.”).

65. 805 F.2d 1 (1st Cir. 1986).

66. *Id.* at 9. The First Circuit also objected to granting only one “privileged” member of the media access to the discovery materials, reasoning that the chosen outlet would then “shape the form and content of the initial presentation of the material to the public.” *Id.*

67. 570 F.2d 1080 (2d Cir. 1977).

Koch.<sup>68</sup> The Second Circuit rejected the candidates' contentions that they could selectively exclude some members of the media through providing access by invitation only:

[O]nce the press is invited, including the media operating by means of instantaneous picture broadcast, there is a dedication of those premises to public communications use. . . . The issue is not whether the public is or is not generally excluded, but whether the members of the broadcast media are generally excluded.

. . . [O]nce there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.<sup>69</sup>

Thus, in the fifteen years since *Chandler* was decided, courts have consistently held that public officials cannot arbitrarily discriminate

68. ABC television crews were on strike and management personnel were operating the network's cameras. The candidates had threatened to have any nonunion ABC crews arrested for trespassing. No other television news organizations were similarly threatened because none of them had striking employees. *Id.* at 1082.

69. *Id.* at 1083; see also *Times-Picayune Publishing Corp. v. Lee*, 15 MEDIA L. REP. (BNA) 1713, 1719 (E.D. La. 1988) (holding that a sheriff violated the First Amendment by directing his staff not to respond to questions of reporters from plaintiff newspaper unless they were submitted in writing); *United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (holding that a court order barring one reporter's access to trial exhibits, while permitting other reporters to have access, is unconstitutional; "Arbitrary exclusion jeopardizes the first amendment's 'core purpose' of insuring informed debate of issues crucial to our democratic government"); *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238 (N.D. Ga. 1981) (temporary restraining order was granted to a television network which claimed its First and Fifth Amendment rights were violated by defendants, who unreasonably interfered with the rights of the press to cover the White House and who treated the television media in a different manner than other forms of news media); *Southwestern Newspapers Corp. v. Curtis*, 584 S.W.2d 362, 364-54 (Tex. Civ. App. 1979) (finding a First Amendment violation when the district attorney required reporters of a disfavored newspaper to obtain advance appointments not required of other reporters); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (holding that access to White House press conferences via press passes could not be denied to one reporter "arbitrarily or for less than compelling reasons"); *Borreca v. Fasi*, 369 F. Supp. 906, 909-10 (D. Haw. 1974) (holding that a mayor could not bar a newspaper reporter from access to his press conferences without violating the First Amendment and Equal Protection Clause, even though he believed the reporter was biased against him; the court rejected the mayor's argument that there was no constitutional violation because the newspaper could send another reporter to cover the conferences and the reporter in question could have access to news releases and other written material); *Quad-City Community News Serv., Inc. v. Jebens*, 334 F. Supp. 8, 15 (S.D. Iowa 1971) (finding a violation of the First Amendment and Equal Protection Clauses where city officials denied reporters for an underground newspaper access to police files available to other reporters: "Any classification which serves to penalize or restrain the exercise of a First Amendment right, unless shown to be necessary to promote a compelling governmental interest is unconstitutional."); *McCoy v. Providence Journal Co.*, 190 F.2d 760, 764-66 (1st Cir.), *cert. denied*, 342 U.S. 894 (1951) (finding that a city's refusal to permit a newspaper to inspect municipal tax resolutions, while providing competing newspaper access to that material, violated the Fifth Amendment).

regarding access to official proceedings and records without running afoul of the Fifth and Fourteenth Amendments. During the same period, the Supreme Court has broadly interpreted the public's right of access to the courts. Thus, although lower courts have so far refused to extend constitutional rights of access to cameras, it is impossible to reconcile these two lines of cases with the view that courts can arbitrarily restrict the public's access to judicial proceedings and discriminate against the electronic media absent a compelling justification for doing so.<sup>70</sup>

C. ELECTRONIC COVERAGE IS ALSO CONSISTENT WITH THE  
WELL-RECOGNIZED PURPOSES OF THE FIRST  
AMENDMENT, NAMELY, TO MAKE INFORMATION  
AVAILABLE TO THE PUBLIC.

As the Supreme Court has recognized, one of the primary purposes of the First Amendment is to "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged."<sup>71</sup> It is here that the value of allowing electronic coverage of court proceedings is most obvious: Such coverage not only provides the public with information that is vital to the public's role in a functioning democracy, but also helps

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70. See generally Zimmerman, *supra* note 54, at 647 (discussing the differing treatment of the various media and arguing that "all news-gathering techniques should enjoy a first amendment right of access to any governmental function otherwise open to the public"; thus, bans on the use of the different medias' technology—including television cameras—violate the Equal Protection Clause of the Fourteenth Amendment). See also *Associated Press v. Bost*, 656 So. 2d 113, 119 (Miss. 1995) (Hawkins, C.J., specially concurring) ("I cannot, however, [concur with] the argument that a television reporter denied the right to bring his camera in the courtroom is not being discriminated against because the newspaper reporter cannot bring his typewriter into the courtroom, either. That is about like saying to the newspaper reporter that he cannot bring a pad and pencil into the courtroom. Or, if the reporter could take shorthand or stenotype, he could not do that, either . . ."). But see *id.* at 115-18 (majority holding that state law providing trial judges with discretion as to whether to permit trials to be televised does not discriminate against photojournalists or broadcasters; court held that equal protection's strict scrutiny standard does not apply because there is no recognized First Amendment right to televise court proceedings; rational basis scrutiny is satisfied by the state's "interest in preserving order and decorum, preserving the truth-seeking function of a trial, and the protection of a defendant's rights"). See generally Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927, 944-47 (1992) ("[T]he courts have invalidated discriminatory bans on camera access as between different television news organizations, but have been less sympathetic to claims of discrimination between print press organizations and television news organizations.") (footnote omitted).

71. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969).

ensure that the information disseminated is more complete and accurate.

As to the first point, it is axiomatic that only an informed public can monitor and, when necessary, change the laws and procedures that provide the structure of democracy. Only an informed public can work to ensure that those laws and procedures are fairly and lawfully implemented by government officials, including judges, law enforcement officers, prosecutors, and others. Justice Frankfurter longed for the day when "the news media would cover the Supreme Court as thoroughly as it did the World Series," believing that "the public confidence in the judiciary hinges on the public's perception of it, and that perception necessarily hinges on the media's portrayal of the legal system."<sup>72</sup> Writing for the plurality in *Richmond Newspapers*, Chief Justice Burger endorsed a similar belief: "It is not unrealistic even in this day to believe that public inclusion affords citizens a form of legal education and hopefully promotes confidence in the fair administration of justice."<sup>73</sup> According to some studies, the public has a great need for such education. As one commentator has noted, television access to trials is essential to "educate a public largely ignorant about the conduct of state and federal trials," as "[t]here is no field of governmental activity about which the people are so poorly informed as the judicial branch."<sup>74</sup>

Television coverage may currently be the only mass medium that can make these visions of public confidence a reality and ensure that the maximum number of citizens are educated about the workings of one of the most essential aspects of government—the courts. Furthermore, students, educators and lawyers additionally benefit by being able to observe "firsthand," via the broadcast and videotape, a trial

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72. *Demystifying the Court*, *supra* note 3, at 1087 & nn.186-87 (citations omitted).

73. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572-73 (1980) (quoting *State v. Schmit*, 139 N.W.2d 800, 807 (Minn. 1966)). See generally *Demystifying the Court*; *supra* note 3, at 1085 & n.117 ("The reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges' decision makes the law, it is often the people's view of the decision which makes history.") (citation omitted); Nancy T. Gardner, *Cameras In the Courtroom: Guidelines for State Criminal Trials*, 84 MICH. L. REV. 475, 492-93 (1985) (noting that not only do televised court proceedings promote the public's education about the judicial process, they also advance the press' "fourth estate" function of serving as a watchdog over the other three branches and facilitate a "community therapeutic value" by providing an outlet for community hostility over a particular crime or trial) (citation omitted); David R. Fine, *Lex, Lies, and Audiotape*, 96 W. VA. L. REV. 449, 468 (1993) (arguing that court proceedings should be televised because "the justice system in this country—police, lawyers, judges—has become too far removed from the everyday lives of Americans").

74. Frank, *supra* note 34, at 796 & n.289 (1987).

and its participants. Indeed, as early as 1965, in his concurring opinion in *Estes*, Justice Harlan recognized that “television is capable of performing an educational function by acquainting the public with the judicial process in action.”<sup>75</sup> The plurality opinion in *Richmond Newspapers* later elaborated on this idea:

When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

“The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.”<sup>76</sup>

Because of the public scrutiny and media attention given to pre-trial and trial proceedings, televised coverage frequently provides a highly unique, and perhaps unprecedented, opportunity to educate a huge domestic and international audience about how our courts administer justice and the essential roles of the judge, jury, prosecutors and defense counsel. In addition, television coverage of court proceedings provides an essential source of information to the public about important social issues of the day. As the Georgia district court explained in *Cable News Network*:

[I]t cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one’s impression of particular news events. Television film coverage of the news provides a comprehensive visual element and an immediacy, or simultaneous aspect, not found in print media.<sup>77</sup>

In addition to directly benefiting the public, simultaneous television coverage of a trial also improves the media’s overall ability to accurately report on the proceedings. Limited space availability in most courtrooms has meant that only a few can be physically present in court. Television, however, expands this potential audience so that

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75. *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

76. *Richmond Newspapers*, 448 U.S. at 572 (quoting 6 J. WIGMORE, EVIDENCE § 1834, at 435 (J. Chadbourne rev. ed. 1976)).

77. *Cable News Network, Inc. v. American Broadcasting Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

all reporters can have instantaneous access to virtually all of the proceedings. Thus, for reporters who are not able to be present in court, electronic media coverage—at least to the extent that it is broadcast simultaneously with the proceedings—provides the most accurate possible information about the proceedings—an audio and video record of the proceedings themselves. Articles and analyses can be prepared as the proceedings unfold, and reporters need not face the inherent time pressure of waiting to receive information from the “pool” reporters. Furthermore, in-court events, including quotations, can be verified simply by playing back a videotape of the day’s proceedings. Visually oriented information that is critical to a complete and accurate portrayal of the proceedings, including the atmosphere of the courtroom and the demeanor, gestures, and emotions of the trial participants, is readily available to all.

Thus, because electronic coverage of judicial proceedings furthers not only the constitutional justifications set forth previously, but also the central purpose of the First Amendment (informing citizens), there should be a presumption in favor of allowing such coverage in the absence of a compelling justification for preventing it. As discussed below, no such justification exists as a general matter; consequently, absent unique, compelling circumstances, electronic coverage should be permitted.

#### IV. NO JUSTIFICATION, LET ALONE A COMPELLING ONE, EXISTS FOR BARRING ELECTRONIC COVERAGE OF JUDICIAL PROCEEDINGS.

The concerns raised most often about television coverage of courtroom proceedings regard the potential harm to the integrity of the court or the negative effects upon the trial participants. These concerns have been refuted by extensive studies and broad-based state experiences with courtroom cameras. As the Supreme Court noted in *Chandler*, the remarkable technological breakthroughs that have taken place in the last few decades—and, indeed, even in the last fifteen years—have eliminated many of the problems with electronic coverage that existed during the *Estes* era. Today, court proceedings are televised by the use of one small, noiseless, generally stationary camera located inconspicuously in a court-approved location. Indeed, these cameras are no more intrusive or distracting than the standard security camera with which we have all become highly familiar.

Furthermore, pooling arrangements, which are typically required, allow use of only one video operator and camera in the courtroom, and arrangements can be made to have a fixed camera, operated by remote control, mounted on the wall so that it is even less visible to trial participants. No special lighting is necessary, and existing microphone systems can typically be utilized so that the wires, cables and lights that filled the courtroom in *Estes* are completely absent in the modern courtroom. Indeed, some have observed that the use of a single, "pooled" television camera in a courtroom and the concomitant availability of a video feed to interested journalists can—and has—reduced congestion and disruption that otherwise might be caused by the physical presence of many reporters in the courtroom.

The speculative concerns raised in *Estes* about the potential impact on trial participants also have been repeatedly refuted by empirical studies and experiences across the nation. Researchers in various states including California, as well as the federal courts, have reached virtually identical conclusions concerning the impact—or lack of impact—on trial participants from the presence of cameras.

For example, several states—including Arizona, California, Florida, Hawaii, Kansas, Louisiana, Maine, Massachusetts, Minnesota, Nevada, New Jersey, New York, Ohio, Virginia and Washington—have studied the impact of electronic media coverage on courtroom proceedings, particularly focusing on the effect cameras have upon courtroom decorum and upon witnesses, jurors, attorneys, and judges.<sup>78</sup> In all of these states, electronic media coverage was permitted in both civil and criminal proceedings, although the majority of coverage was in criminal cases.

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78. These state studies are contained or summarized in the following materials: MATTHEW T. CROSSON, REPORT OF THE CHIEF ADMINISTRATOR TO THE NEW YORK STATE LEGISLATURE THE GOVERNOR AND THE CHIEF JUDGE ON THE EFFECT OF AUDIO-VISUAL COVERAGE ON THE CONDUCT OF JUDICIAL PROCEEDINGS (1991) (New York); ERNEST H. SHORT & ASSOC., INC., EVALUATION OF CALIFORNIA'S EXPERIMENT WITH EXTENDED MEDIA COVERAGE OF COURTS (1981) [hereinafter CALIFORNIA STUDY]; INFORMATION SERVICE MEMORANDUM IS 88.002, TV CAMERAS IN THE COURTS, EVALUATION OF EXPERIMENTS 10 (Washington), 18 (Nevada), 39 (Arizona study), 62 (Florida), 79 (Minnesota), 101 (Louisiana); HON. BURTON B. ROBERTS, CHAIR, REPORT OF THE COMMITTEE ON AUDIO-VISUAL COVERAGE OF COURT PROCEEDINGS (1994) (New York). Most of these state studies, and studies from Hawaii, Kansas, Maine, Massachusetts, New Jersey, Ohio and Virginia, are described in FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF COURTROOM PROCEEDINGS: EFFECTS ON WITNESSES AND JURORS, SUPPLEMENT REPORT OF THE FEDERAL JUDICIAL CENTER TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT (1994) [hereinafter SUPPLEMENTAL REPORT].

The results from the state studies were unanimous: The impact of electronic media coverage of courtroom proceedings—whether civil or criminal—is virtually nil. For example, the state studies revealed that fears about witness distraction, nervousness, distortion, fear of harm and reluctance or unwillingness to testify were unfounded.<sup>79</sup>

A typical example of study findings relates to the states' inquiry into witness nervousness. The 1991 New York study, for example, revealed that when jurors were asked whether credibility of the witness was affected by their "relative insecurity or tension" due to camera coverage, most responded "not at all."<sup>80</sup> Similarly, more than ninety percent of the respondents in the Florida study on electronic media coverage of the courtroom said the presence of electronic media had "no effect" whatsoever on their ability to judge the truthfulness of witnesses.<sup>81</sup>

Similarly, when these states evaluated the impact of cameras in the courtroom upon jurors—including potential juror distraction, effect on deliberations or case outcome, making a case or witness importance and reluctance to serve with electronic media present—almost no such effects were noted.<sup>82</sup> Indeed, during the evaluation of the recent federal experiment regarding electronic media coverage of court proceedings, the Federal Judicial Center specifically found that

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79. See generally the state studies described in the previous footnote, and SUPPLEMENTAL REPORT, *supra* note 78, at 1-25, which provides a comprehensive overview of several states' evaluations of camera presence in civil and criminal trial proceedings.

80. FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 39 (1994) [hereinafter FEDERAL EVALUATION].

81. *Id.*

82. See, e.g., SUPPLEMENTAL REPORT, *supra* note 78, at 1-25. Indeed, the impact upon jurors is now minimized by rules in most states requiring exclusion of jurors from coverage. Jurors are frequently ordered to avoid all press coverage about the case with which they are involved, and in some cases courts have sequestered juries to prevent their exposure to extensive pretrial and trial publicity. At least to the extent that televised judicial proceedings reveal only what takes place while a jury is present, sequestration may be unnecessary; certainly there can be little prejudice to a defendant if a juror disobeys a judge's order and watches on the television court events that the juror already has seen personally. Moreover, the Supreme Court has long held that a juror need not be ignorant of the facts surrounding a case prior to trial; the relevant inquiry is whether the juror can put aside that information, and his or her own personal biases, and follow the court's instructions in rendering an impartial verdict. See, e.g., *Murphy v. Florida*, 421 U.S. 794, 799 (1975) (holding that a jury's exposure to information about the plaintiff or the defendant prior to trial does not necessarily deprive the plaintiff of due process); *Mu'Min v. Virginia*, 500 U.S. 415 (1991) (holding that defendant could obtain a fair trial because jurors were asked whether they could remain impartial, despite the pretrial publicity to which they were exposed).

“[r]esults from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses.”<sup>83</sup>

California also conducted its own study on the effect of electronic coverage, resulting in a report that is probably the most comprehensive of the state evaluations that have been completed. In addition to surveying the impact of cameras on jurors and witnesses, as many other states have done, the researchers involved in the California evaluation also observed the jurors' behavior. The California study also included observations and comparisons of proceedings that were covered by the electronic media versus proceedings that were not.<sup>84</sup>

Not only did California's survey results mirror those of other states and the federal courts—namely, finding that there was virtually no impact upon jurors, witnesses, judges, counsel or courtroom decorum when cameras were present during judicial proceedings—but the “observational” evaluations completed in California further buttressed these results.<sup>85</sup> For example, after systematically observing proceedings where cameras were and were not present, the consultants who conducted California's study concluded that witnesses were equally effective at communicating in both sets of circumstances.<sup>86</sup> Furthermore, the behavioral observations in California also reinforced survey results from California and other state and federal courts, which found that jurors in proceedings where electronic media were present were equally attentive to testimony as jurors in proceedings without such coverage.<sup>87</sup> Not surprisingly, the California study

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83. FEDERAL EVALUATION, *supra* note 80, at 7, 38-42; *see also* SUPPLEMENTAL REPORT, *supra* note 78, at 2 (noting that several state studies and the federal study found that “[m]ost participants believe electronic media presence has no or minimal detrimental effects on jurors or witnesses”). Although the federal study only examined judges and attorneys in its evaluations, the Federal Judicial Center also reviewed and considered the many state surveys in which witnesses and jurors were questioned along with judges and attorneys. The results were the same regardless of whom was being polled: The majority who experienced such coverage did not report any negative consequences or concerns. *See, e.g.*, SUPPLEMENTAL REPORT, *supra* note 78, at 4.

84. *See generally* CALIFORNIA STUDY, *supra* note 78, at 20, 55-67, 82-98.

85. *Id.* at 220-27, 243-45.

86. *Id.* at 103-04.

87. *Id.* at 86-87, 106-07, 111. In fact, several studies and commentators have noted that televising court proceedings is likely to enhance the performance of trial participants: judges may be more attentive, attorneys better-prepared, some witnesses able to remember more details and others alerted to the need to come forward and testify. *See generally* Frank, *supra* note 34.

also revealed that there was no, or only minimal, impact upon courtroom decorum from the presence of cameras.<sup>88</sup>

The overwhelmingly positive results from the California study cannot be distinguished on the ground that the case at hand is a "high-profile" case. To the contrary, as noted in the California study, it is precisely the "sensational heinous crime case type" that constitutes a large portion of the proceedings that are covered by electronic media, and such cases were included in the State's study.<sup>89</sup>

Finally, in September 1990, the Judicial Conference of the United States implemented a three-year pilot program that permitted electronic media coverage in civil proceedings in six federal district courts and two circuit courts.<sup>90</sup> Not surprisingly, in light of the uniformly positive results from similar state court evaluations of electronic media coverage of trials, the Federal evaluation revealed, among other things, that federal judges who experimented with allowing electronic coverage developed a favorable view of it:

- Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program;
- Judges and attorneys who had experience with electronic media coverage under the program reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice;
- Overall, judges and court staff report[ed] that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.<sup>91</sup>

Indeed, the Federal Judicial Center's "Summary of Findings" concluded that little or *no* negative impact resulted from having cameras in the courtroom.<sup>92</sup>

Notwithstanding these positive results, the U.S. Judicial Conference—made up almost entirely of judges who did *not* participate in the experiment—voted to ignore its own study's findings, and rejected a permanent program allowing electronic media coverage of federal court proceedings. This decision was reconsidered by the Judicial

88. CALIFORNIA STUDY, *supra* note 78, at 78-79.

89. *Id.* at 67-69.

90. The results of that pilot program from July 1, 1991 to June 30, 1993 were monitored and evaluated by the Federal Judicial Center via judge and attorney evaluations and are reported in FEDERAL EVALUATION, *supra*, note 80.

91. *Id.* at 7; *see also id.* at 12-18.

92. *Id.* at 7.

Conference earlier this year; the conference voted to allow each of the eleven circuit courts to set its own rules regarding cameras.<sup>93</sup>

In sum, the extensive empirical evidence that has been collected on the impact of electronic coverage has established that such coverage is not detrimental to the parties, jurors, counsel, or courtroom decorum. Consequently, it is not surprising that, despite the frequently raised objection that electronic coverage will somehow interfere with a criminal defendant's right to a fair trial, courts evaluating such claims—even in high profile cases—have repeatedly found that television coverage did not negatively impact upon the defendant's Sixth Amendment rights.<sup>94</sup>

Fears regarding possible undermining of fair trial rights in televised cases are, at best, misplaced, as is demonstrated by recent experiences in California with cameras in the courtroom. Even in instances where a defendant opposed such coverage, it has been proven over and over that television coverage of criminal trials does not negatively impact the defendant's fair trial rights,<sup>95</sup> or the jury's ability to render a verdict based upon the evidence, and participants are not hindered from successfully performing their trial responsibilities by the presence of a camera in the courtroom.<sup>96</sup> Moreover, problems of prejudicial publicity from all media can be effectively dealt with through careful voir dire, admonition and sequestration.

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93. See Philip Carrizosa, *9th Circuit to Allow Cameras Back into Courtroom for Oral Arguments*, L.A. DAILY J., Mar. 25, 1996, at 3. Responding to the Judicial Conference's new position, the Ninth Circuit Court of Appeals announced that it would allow camera coverage during oral argument. *Id.*

94. In addition, any purported Sixth Amendment concerns raised by cameras in trial courtrooms are irrelevant to the question of whether the public and press have a First Amendment right to have state and federal *appellate* proceedings televised live. See generally, J. Clark Kelso, *A Report on the California Appellate System*, 45 HASTINGS L.J. 433, 486-87 (1994) (advocating televised appellate proceedings, which often raise questions of interest to the entire community).

95. Indeed, many of the notable "high-profile" trials televised during the last fifteen years resulted in acquittals for the criminal defendant, including not only O.J. Simpson, but also District of Columbia Mayor Marion Barry and William Kennedy Smith.

96. Thus, in the high-profile case of *People v. Keating*, 19 Cal. Rptr. 2d. 899 (Ct. App. 1993), portions of the trial were televised with no apparent negative effect. In fact, the Court of Appeal denied Keating's claim that he was denied a fair trial because television coverage had been permitted. See also *People v. Spring*, 200 Cal. Rptr. 849 (Ct. App. 1984) (holding that the presence of a television camera during trial did not violate criminal defendant's Sixth Amendment right to a fair trial); *State v. Smart*, 622 A.2d 1197 (N.H. 1993) (holding that televised coverage of high-profile murder trial did not prejudice defendant); *Stewart v. Commonwealth*, 427 S.E.2d 394 (Va. 1993) (holding that the presence of video cameras during a criminal trial did not violate defendant's due process rights); *Florida v. Garcia*, 12 MEDIA L. REP. (BNA) 1750 (Fla. Cir. Ct. 1986) (holding that criminal defendants did not have right to bar broadcast coverage of criminal proceedings).

Indeed, television coverage of what actually took place in the courtroom should actually improve a defendant's opportunity to receive a fair trial, particularly in a high-profile situation. The best antidote to lawyers' "spin control," legal commentators' opinions or any type of biased, subjective publicity is to let the public view via their television sets what actually occurs in the courtroom.

In any event, the First Amendment right of access is not absolute in other instances, and would not be absolute in the case of electronic coverage. Where a compelling justification exists for restricting electronic coverage—and certainly scenarios can be hypothesized where there would be justification for shutting down some or all electronic coverage during a particular proceeding—courts may do so, just as they may close the courtroom or seal files where a "compelling" justification for doing so exists. However, the concern that electronic coverage of court proceedings might in some circumstances subject trial participants, possibly including the judge, to public scrutiny and even criticism does not justify keeping cameras out. To the contrary, the need for such scrutiny is one of the very reasons that such access must be established as a matter of First Amendment right.<sup>97</sup>

## V. CONCLUSION

It has been fifteen years since the United States Supreme Court held that electronic coverage of trials is not prohibited by the Federal Constitution.<sup>98</sup> During that time hundreds—if not thousands—of judicial proceedings across the country have been covered by the electronic media. Yet, it appears that there has not been a single case since 1981 where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have had any effect whatsoever on the ultimate result. This fact alone should

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Electronic media coverage of a trial was first challenged by a defendant in *People v. Stroble*, 226 P.2d 330 (Cal. 1951) (en banc), *aff'd*, 343 U.S. 181 (1952). The California Supreme Court found that although the broadcast and other coverage of the trial, which included televised photographs of the jurors, was sensationalistic, it did not constitute reversible error because there was no proof of jury prejudice. *Id.* The United States Supreme Court agreed that Stroble failed to prove that the extensive media coverage surrounding his trial resulted in jury prejudice. *Stroble*, 343 U.S. at 193-95.

97. See *Demystifying the Courts*, *supra* note 3, at 647; see also *Craig v. Harney*, 331 U.S. 367, 376 (1947) ("[A] judge may not hold in contempt one 'who ventures to publish anything that tends to make him unpopular or to belittle him'. . . . [T]he law of contempt is not made for the protection of judges who may be sensitive to the winds of public opinion. Judges are supposed to be men of fortitude, able to thrive in a hardy climate.") (citations omitted).

98. *Chandler v. Florida*, 449 U.S. 560, 582 (1981).

give pause to those who would “pull the plug” on electronic coverage of the courts. At the same time, those fortunate enough to live in—or receive broadcast footage from—states where electronic coverage is permitted have been able to “see for themselves” what transpires in their courts, in keeping with the historical requirement that trials be open to all who choose to attend.<sup>99</sup> As one commentator summarizes: “Advocates of electronic media coverage of judicial proceedings argue that courts belong to the people, that the people have a right to know exactly what goes on in their courts, and that the public should be able to get that information through whatever medium they wish.”<sup>100</sup>

Thus, absent a showing in a given case that televised coverage will demonstrably prejudice the parties or interfere with the conduct of justice, televised coverage should be permitted as a matter of constitutional right. Moreover, even when it is demonstrated that a compelling interest exists for restricting electronic coverage, any restriction should be narrowly tailored to address only that specific interest. Any other standard would severely and needlessly limit the public’s First Amendment right of court access to only a chosen few.

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99. See JOURNALS OF THE CONTINENTAL CONGRESS, *supra* note 43.

100. S. Shepard Tate, *Cameras In The Courtroom: Here To Stay*, 10 U. TOL. L. REV. 925, 926 (1979).



# Tab 3

# **Electronic Media Coverage of Federal Civil Proceedings**

**An Evaluation of the  
Pilot Program in Six  
District Courts and  
Two Courts of Appeals**

**Federal Judicial Center  
1994**

# **Electronic Media Coverage of Federal Civil Proceedings**

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Molly Treadway Johnson

Carol Krafka

**Federal Judicial Center**

**1994**

This Federal Judicial Center publication was undertaken in furtherance of the Center's statutory mission to conduct and stimulate research and development for the improvement of judicial administration. The views expressed are those of the authors. On matters of policy, the Center speaks only through its Board.



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# Introduction

In September 1990, the Judicial Conference of the United States adopted the report of its Ad Hoc Committee on Cameras in the Courtroom, which recommended a pilot program permitting electronic media coverage<sup>1</sup> of civil proceedings in six federal district courts and two federal courts of appeals. Under the pilot program, media representatives interested in using electronic media to cover all or part of a civil proceeding in one of the eight pilot courts submitted an application to the court, and the judge presiding over the proceeding determined whether to permit coverage. Guidelines promulgated by the Judicial Conference set forth the conditions under which coverage could take place (see Appendix).

In adopting the committee's recommendation, the Judicial Conference approved the Federal Judicial Center's proposal to evaluate the pilot program, and this report presents the results of the Center's evaluation. The evaluation covers the period from July 1, 1991, to June 30, 1993.

The research project staff used the following resources to evaluate the program: (1) information about application and coverage activity in each court; (2) questionnaire responses from participating and nonparticipating judges in the pilot courts; (3) questionnaire responses from attorneys who participated in proceedings in which there was electronic media coverage; (4) telephone interviews with (a) judges who had the most experience with electronic media coverage, (b) media representatives whose organizations participated in the program, and (c) court personnel responsible for day-to-day administration of the program in each pilot court; (5) a content analysis of evening news broadcasts incorporating courtroom footage obtained under the program; (6) information about coverage provided by extended-coverage networks; and (7) reviews of studies exploring effects of electronic media coverage on witnesses and jurors in state court proceedings.

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1. In this report the phrase "electronic media coverage" refers to the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media.



# History and Description of the Pilot Program

Electronic media coverage of criminal proceedings has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the Criminal Rules were adopted in 1946.<sup>2</sup> In 1972, the Judicial Conference of the United States adopted a prohibition against “broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto . . .” (Canon 3A(7) of the Code of Conduct for United States Judges). The broad prohibition applied to both civil and criminal cases. At that time the American Bar Association’s Model Code of Judicial Conduct contained a similar provision, and cameras were prohibited in most state courts.

In the mid-1970s, state courts began authorizing broadcast coverage of judicial proceedings, on either an experimental or permanent basis. In 1981, the Supreme Court ruled in *Chandler v. Florida*, 449 U.S. 560 (1981), that the presence of television cameras at a criminal trial was not a denial of due process. In 1983, a group of interested media and other organizations petitioned the Judicial Conference to adopt rules permitting electronic media coverage of federal judicial proceedings, and the Conference appointed an ad hoc committee to consider the issue. In its September 1984 report, that ad hoc committee recommended denial of the requested change; on September 20, 1984, the Conference adopted the committee’s report.

Shortly after the *Chandler* decision, the American Bar Association revised Canon 3A(7) of its Model Code of Conduct to permit judges to authorize broadcasting, televising, recording, or photographing civil and criminal proceedings subject to appropriate guidelines. The canon was ultimately removed from the ABA’s Code of Conduct based on a determination that the subject of electronic media coverage in courtrooms was not directly related to judicial ethics and was more appropriately addressed by administrative rules adopted within each jurisdiction.<sup>3</sup>

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2. In June 1994, the Judicial Conference’s Standing Committee on Rules of Practice and Procedure voted to publish for comment a revision of Rule 53 that would remove from that rule the prohibition on electronic media coverage.

3. See ABA Standing Committee on Ethics and Professional Responsibility, Final Draft of Recommended Revisions to ABA Code of Judicial Conduct (December 1989).

Throughout the 1980s, several cases challenged the federal courts' prohibition on electronic media coverage.<sup>4</sup> In 1988, the Judicial Conference appointed a second Ad Hoc Committee on Cameras in the Courtroom "to review recommendations from other Conference committees on the introduction of cameras in the courtroom, and to take into account the American Bar Association's ongoing review of Canon 3A(7) of its Code of Judicial Conduct, dealing with the subject."<sup>5</sup> In September 1990, after receiving input from news organizations and a letter from U.S. Representative Robert Kastenmeier, then Chair of the House Judiciary Committee's Subcommittee on Courts, Intellectual Property, and Administration of Justice, the ad hoc committee recommended that the Judicial Conference (1) strike Canon 3A(7) from the Code of Conduct for United States Judges, and include policy on cameras in the courtroom in the *Guide to Judiciary Policies and Procedures*; (2) adopt a policy statement expanding permissible uses of cameras in the courtroom; and (3) authorize a three-year experiment permitting camera coverage of certain proceedings in selected federal courts.<sup>6</sup>

In September 1990, the Judicial Conference adopted these recommendations<sup>7</sup> and authorized the three-year pilot program allowing electronic media coverage of civil proceedings in selected federal trial and appellate courts, subject to guidelines approved by the Judicial Conference. The Federal Judicial Center (FJC) agreed to monitor and evaluate the pilot program. In its final report to the Conference in March 1991, the ad hoc committee recommended pilot courts for the experiment: the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of Washington; and the U.S. Courts of Appeals for the Second and Ninth Circuits. The pilot courts were selected from courts that had volunteered to participate in the experiment. Selection criteria included size, civil caseload, proximity to major metropolitan markets, and regional and circuit representation. The use of size, civil caseload, and location in metropolitan areas as criteria reflected a concern

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4. For a summary of these mostly constitutionally based challenges, see Radio–Television News Directors Association, *News Media Coverage of Judicial Proceedings with Cameras and Microphones: A Survey of the States* (1993).

5. See Report of the Judicial Conference Ad Hoc Committee on Cameras in the Courtroom (September 1990).

6. See Report of the Proceedings of the Judicial Conference of the United States (September 1990).

7. *Id.*

that smaller and less metropolitan courts would not have enough cases with high media interest to support evaluation of the program.

After the ad hoc committee selected the pilot courts and approved the FJC's proposed evaluation methods, the Conference discharged the ad hoc committee and assigned oversight of the pilot program to the Judicial Conference Committee on Court Administration and Case Management.

## ***Pilot Program Guidelines***

The pilot program began on July 1, 1991, and runs through December 31, 1994.<sup>8</sup> The program authorizes coverage only of civil proceedings and only in the courts selected for participation in the pilot program. The guidelines adopted by the Judicial Conference require reasonable advance notice of a request to cover a proceeding; prohibit photographing of jurors in the courtroom, in the jury deliberation room, or during recesses; allow only one television camera and one still camera in trial courts (except for the Southern District of New York, which was permitted to allow two cameras in the courtroom for coverage of civil proceedings) and two television cameras and one still camera in appellate courts; and require the media to establish "pooling" arrangements when more than one media organization wants to cover a proceeding.<sup>9</sup> In addition, discretion rests with the presiding judicial officer to refuse, terminate, or limit media coverage.

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8. The program was originally scheduled to terminate on June 30, 1994. In March 1994, the Judicial Conference adopted a recommendation of the Committee on Court Administration and Case Management to continue the program in the pilot courts through the end of 1994 to avoid a lapse in the program while a final Judicial Conference decision is pending.

9. Pooling involves running an electronic feed from a television camera inside the courtroom to a monitor located outside the courtroom, from which other interested media organizations can obtain footage. This procedure enables a number of media organizations to cover proceedings while limiting the number of cameras in the courtroom.



# The Federal Judicial Center Evaluation

So that we could report research results to the Conference prior to the termination of the pilot program, our evaluation covered the period from July 1, 1991, through June 30, 1993.

## *Summary of Findings*

Our overall findings were the following:

- During the two-year period from July 1, 1991, through June 30, 1993, the media filed applications for coverage in 257 cases; 82% of the applications were approved.
- The most common type of coverage was television coverage of trials.
- Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.
- Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.
- Judges, media representatives, and court staff found the guidelines governing the program to be generally workable.
- Overall, judges and court staff report that members of the media were very cooperative and complied with the program guidelines and any other restrictions imposed.
- Most television evening news footage submitted for content analysis (1) employed courtroom footage to illustrate a reporter's narration rather than to tell the story through the words and actions of participants; (2) provided basic verbal information to the viewer about the nature and facts of the cases covered; and (3) provided little verbal information to viewers about the legal process.
- Results from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses.

## ***Limits of the Evaluation***

Several potentially relevant issues were not examined in the evaluation and therefore cannot be addressed in this report. First, the evaluation design as approved by the Ad Hoc Committee on Cameras in the Courtroom did not include a measure of the *actual* (as opposed to *perceived*) effects of electronic media on jurors, witnesses, counsel, and judges. The only way to measure objectively the actual effects of electronic media on jurors and witnesses would be to compare the behavior and perceptions of jurors and witnesses in two different groups of cases: those covered by electronic media and those not covered. The Federal Judicial Center suggested—and the Ad Hoc Committee on Cameras in the Courtroom concurred—that this approach was not feasible because, among other reasons, there would be too few cases in the pilot courts with high media interest to support such an evaluation.

Second, we did not directly measure the attitudes of jurors, witnesses, and parties because most have had little courtroom experience and could not, we believed, make judgments (as judges and attorneys could) about the effects of electronic media on themselves. (A witness who has never been in a courtroom might be nervous for many reasons but might attribute that state—inappropriately—to the presence of cameras.) We did obtain some information on these issues through other methods, such as judge and attorney questionnaires. Also, we reviewed results from state court studies exploring these questions.

Finally, because the pilot program limited coverage to civil proceedings, the impact of electronic media coverage on federal criminal proceedings was not addressable in this evaluation. Opinions on the issue of criminal coverage were obtained through questionnaires and interviews.

Another consideration relevant to interpreting the findings in this report is that the pilot courts were chosen from among courts that had volunteered to participate, and most of the analyses in our study focused on judges who actually had experience with electronic media coverage. Thus, it could be expected that judges whose responses we report would on average be more favorable toward electronic media coverage than would a randomly-selected sample of judges throughout the country.

## ***Research Approaches and Results***

### **Information About Media Activity**

From July 1, 1991, through June 30, 1993, media organizations applied to cover a total of 257 cases across all of the pilot courts. Of these, 186 applications were approved, 42 were disapproved, and 29 were not acted on

(usually because the case was settled or otherwise terminated, or the application was withdrawn before the judge ruled on the application). Table 1 shows the breakdown, by court, of the outcomes of applications for electronic media coverage.

**Table 1. Outcome of Applications, by Court**

	<b>Number of applications</b>	<b>Number approved</b>	<b>Number disapproved</b>	<b>No ruling</b>	<b>% approved in cases with a ruling</b>
Second Circuit	16	12	4	0	75
Ninth Circuit	18	13	4	1	76
S.D. Indiana	23	16	1	6	94
D. Massachusetts	19	17	2	0	89
E.D. Michigan	34	21	8	5	72
S.D. New York	40	26	7	7	79
E.D. Pennsylvania	78	54	15	9	78
W.D. Washington	29	27	1	1	96
<b>TOTAL</b>	<b>257</b>	<b>186</b>	<b>42</b>	<b>29</b>	<b>82</b>

As can be seen from this table, most application activity was in the district courts, but there was also variation among the district courts with respect to activity. These variations in application activity are generally—but not perfectly—related to the size of the court. In telephone interviews, other factors were suggested that may have influenced the extent of application activity: the number of non-participating judges in a court;<sup>10</sup> differences in local television and radio station resources across cities of various sizes; and, most importantly, the involvement of a media coordinator, an agent of media organizations in a particular market.<sup>11</sup> There was a very active media coordinator in the Eastern District of Pennsylvania, which had the greatest volume of application and coverage activity (it was the second-largest district court in the pilot).

10. Some judges in the pilot courts declined to participate in the pilot program.

11. Media coordinators kept media organizations in a market apprised of interesting cases, coordinated pooling arrangements, and in some instances served as a media liaison to the court.

Use of cases as the unit of analysis in reporting activity, as in the numbers reported above, provides a very conservative measure of the extent of coverage activity. For example, many cases were covered by more than one media organization; our data do not reflect the number of media organizations interested in covering each proceeding. In addition, several cases involved coverage of more than one proceeding (e.g., a pretrial hearing and the trial) or multiple days of coverage for one proceeding (e.g., a trial). The data we collected reflect a total of 324 coverage days over the two-year data collection period, for an average of 2.2 coverage days for each proceeding covered. The longest coverage of a proceeding was 15 days, for a jury trial in which the plaintiff alleged sexual harassment and discrimination by an employer.

### ***Reasons for Disapproval of Applications***

The guidelines do not require judges in the pilot courts to explain their reasons for denying coverage of a case; however, a number of them did indicate reasons in their written orders denying coverage. In the forty-two denials, thirteen did not state a reason and seven were because a judge was not participating in the pilot program.<sup>12</sup> Five of the stated reasons were general statements that coverage would not be in the interests of justice or would prejudice the parties, without explaining in detail why this was so. Specific reasons given for the remaining seventeen denials included the sensitive nature of a case, witness or party objection to coverage, and untimely media applications.

### ***Non-Coverage of Approved Cases***

Of the 186 cases approved for coverage, 147 were actually recorded or photographed. Nineteen of the 39 approved cases that were not covered had settled or otherwise terminated. Nine applications were withdrawn, and in 11 instances the media failed to appear to cover an approved case.<sup>13</sup>

### ***Proceedings Covered***

Not surprisingly, trials were the type of proceeding most frequently covered by electronic media; fifty-six trials were covered over the two-year period. Other proceedings covered included pretrial proceedings (twenty-

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12. Three of these cases involved appellate panels on which retired Supreme Court Justice Thurgood Marshall was sitting.

13. According to telephone interviews, media “no shows” usually happened when an event occurred to which a station chose to devote resources that were originally scheduled to cover the court proceeding.

seven); bankruptcy proceedings (four); appellate proceedings (twenty-four); and other proceedings (forty-three), including hearings for injunctive relief, show cause hearings, motions for stay, conferences, and proceedings not related to a particular case, such as a judge's swearing in ceremony or court activities filmed or photographed for a special television program or news article.

### ***Type of Coverage***

Television was by far the most common type of coverage under the program, with 124 proceedings covered. The majority of television coverage was done by local stations for use in evening news broadcasts, although 32 proceedings were filmed and broadcast by networks such as Court-TV and C-SPAN, which provide more extensive coverage of proceedings. Still photographers covered 56 proceedings, while radio covered 27. Approximately one-third of the covered proceedings were covered by more than one type of electronic media (e.g., television and still photographers).

### ***Types of Cases for Which Coverage Requests Were Made***

The types of civil cases in which coverage applications were most frequently made were civil rights cases and personal injury tort cases.<sup>14</sup>

## **Judge Questionnaires**

### ***Method***

Prior to the start of the pilot program, we sent a questionnaire to all judges (including district, appellate, senior, magistrate, and bankruptcy judges) in the pilot courts asking about their expectations and opinions of electronic media coverage of civil proceedings. Judges were asked to rate the likelihood of certain potential effects of electronic media coverage as compared to conventional coverage. These effects included potential positive and negative effects of electronic media on witnesses (e.g., "motivates witnesses to be truthful," "makes witnesses more nervous than they otherwise would be"); jurors (e.g., "increases juror attentiveness," "signals to jurors that a witness or argument is particularly important"); attorneys (e.g.,

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14. Applications were made to cover 107 civil rights cases and 27 personal injury tort cases. Other types of cases in which applications were frequently filed include the following: contracts (15); intellectual property (including patent, trademark, and copyright) (14); labor litigation (9); bankruptcy and bankruptcy appeals (9); environmental matters (8); habeas corpus (8); ERISA (4); and constitutionality of state statutes (4).

“causes attorneys to be more theatrical in their presentation,” “prompts attorneys to be more courteous”); judges (e.g., “increases judge attentiveness,” “causes judges to avoid unpopular decisions or positions”); and overall effects of electronic media presence (e.g., “disrupts courtroom proceedings,” “educates the public about courtroom proceedings”). The response categories ranged from 1 (effect expected “to little or no extent”) to 5 (effect expected “to a very great extent”).<sup>15</sup> As a baseline, judges were asked to rate their views of the same effects for conventional media coverage as compared to the absence of coverage. Finally, judges were asked about their overall attitudes toward electronic media coverage of civil and criminal proceedings;<sup>16</sup> their previous experience with electronic media coverage (e.g., as a litigator or state court judge); and their expectations as to whether they would participate in the pilot program.

After the program had been in operation for one year, we sent follow-up questionnaires asking pilot court judges about the following: their beliefs about the same specific potential effects of electronic media coverage as had appeared in the initial questionnaire; the same specific effects of conventional coverage; whether they had experienced electronic media coverage under the pilot program; and their overall attitudes toward electronic media coverage of civil and criminal proceedings. Judges who did not respond to the one-year follow-up received the same follow-up questionnaire after the program had been in operation for two years.<sup>17</sup> Overall, 114 out of 163 district judges (70%) and 34 out of 51 appellate judges (67%) responded to both the initial and follow-up questionnaires.

## **Results**

### *District judges*

Our analysis of responses about the effects of electronic media coverage focused on judges who had experienced electronic media coverage under the program. In general, district judges who had experience with electronic media coverage under the pilot program believed electronic coverage had only minor effects on the participants or proceedings; in the follow-up question-

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15. Judges were also given the option of indicating they had no opinion.

16. Though criminal case coverage was not allowed in the pilot program, media representatives are urging the federal courts to allow criminal coverage, and therefore we thought opinions of pilot court judges on this issue might be of interest to policy makers.

17. Copies of the initial and follow-up questionnaires are on file with the Research Division of the Federal Judicial Center.

naire, their median ratings indicated that all but one potential effect occurred “to little or no extent” or “to some extent.”<sup>18</sup> Table 2 shows these judges’ responses to the follow-up survey about specific effects of coverage.

When we compared the results in Table 2 to results from the initial questionnaire (not displayed here), our analysis showed that district judges who had experience with electronic media coverage rated nine of seventeen potential effects significantly lower (i.e., as occurring to a lesser extent) on the follow-up questionnaire than on the initial questionnaire.<sup>19</sup> These effects included the following items relating to electronic media coverage: “violates witnesses’ privacy”; “distracts witnesses”; “makes witnesses more nervous than they otherwise would be”; “signals to jurors that a witness or argument is particularly important”; “causes attorneys to be more theatrical in their presentation”; “disrupts courtroom proceedings”; “motivates attorneys to come to court better-prepared”; “increases judge attentiveness”; and “prompts judges to be more courteous.” Thus, judges apparently experienced these potential effects to a lesser extent than they had expected.

In contrast, when we compared ratings of conventional coverage effects between the initial and follow-up surveys we found no significant differences. This suggests that the differences in ratings of effects of electronic media coverage between the initial and follow-up questionnaires were attributable to experience with electronic media coverage and not to some more general shift in judges’ attitudes toward the media.

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18. The median represents the midpoint of all responses. The median rating on the item “educates the public about courtroom procedures” indicated this effect occurred “to a great extent.”

19. Ratings of each potential effect by judges who completed both questionnaires were compared using a Wilcoxon Signed Rank test. This analysis examined the number of judges who changed their response in each direction and enabled a determination of whether the direction and magnitude of changes in ratings between the initial and follow-up questionnaires were statistically significant.

**Table 2. Ratings of Effects by District Judges Who Experienced Electronic Media Coverage Under the Program, by Percentage\***

<b>Effect</b>	<b>To little or no extent</b>	<b>To some extent</b>	<b>To a moderate extent</b>	<b>To a great extent</b>	<b>To a very great extent</b>	<b>No opinion</b>
Motivates witnesses to be truthful	61	7	7	2	0	22
Violates witnesses' privacy	37	34	10	7	5	7
Makes witnesses less willing to appear in court	32	27	15	2	2	22
Distracts witnesses	51	22	15	2	2	7
Makes witnesses more nervous than they otherwise would be	24	37	22	5	0	12
Increases juror attentiveness	46	22	7	7	2	15
Signals to jurors that a witness or argument is particularly important	51	15	10	5	7	12
Increases jurors' sense of responsibility for their verdict	49	15	15	10	0	12
Prompts people who see the coverage to try to influence juror-friends	54	10	7	0	0	27

(continued)

**Table 2 (continued)**

<b>Effect</b>	<b>To little or no extent</b>	<b>To some extent</b>	<b>To a mod- erate extent</b>	<b>To a great extent</b>	<b>To a very great extent</b>	<b>No opinion</b>
Motivates attorneys to come to court better prepared	32	32	15	10	7	5
Causes attorneys to be more theatrical in their presentation	29	37	20	2	5	7
Prompts attorneys to be more courteous	44	20	15	17	2	2
Increases judge attentiveness	63	10	15	10	2	0
Causes judges to avoid unpopular decisions or positions	88	2	5	2	0	2
Prompts judges to be more courteous	56	22	15	7	0	0
Disrupts courtroom proceedings	83	15	0	2	0	0
Educates the public about courtroom procedure	12	20	12	24	30	2

\*Note: The figure in each cell represents the percentage of responding judges (N = 41) who selected that answer.

With respect to overall attitudes toward electronic media coverage of civil and criminal proceedings, district judges (including those who personally experienced coverage and those who did not experience coverage but presumably observed the effects of coverage on their colleagues and on the court as a whole) exhibited significantly more favorable attitudes toward electronic media coverage of civil proceedings in the follow-up questionnaire than they had in the initial questionnaire. The median response to this question in the initial questionnaire was a 3, indicating “I have no opinion on coverage,” while the median response in the follow-up questionnaire was a 2, representing “I somewhat favor coverage.” After the program had been in place, thirty-six judges had more favorable attitudes toward electronic coverage of civil proceedings than they had reported in the initial questionnaire, fifteen had less favorable attitudes, and sixty-one reported the same attitude that they had in the initial questionnaire.

District judges also indicated less opposition to coverage of criminal proceedings in the follow-up questionnaire, moving from a median of 4 in the initial questionnaire (indicating “I somewhat oppose coverage”) to a median of 3 (indicating “I have no opinion on coverage”). In the follow-up questionnaire, thirty-five judges reported more favorable attitudes toward criminal coverage than they had in the initial questionnaire, seventeen reported less favorable attitudes, and sixty-one reported the same attitude they had initially.

### *Appellate Judges*

Experience with electronic media coverage appears not to have changed the appellate judges’ ratings of the effects of cameras. In both the initial and follow-up questionnaires, appellate judges’ median ratings of effects were generally 1 (indicating the effect occurs “to little or no extent”) or 2 (indicating the effect occurs “to some extent”). The following table shows responses of appellate judges with electronic media experience to the question in the follow-up survey about the effects of coverage.

**Table 3. Ratings of Effects by Appellate Judges with Experience in the Program, by Percentage\***

<b>Effect</b>	<b>To little or no extent</b>	<b>To some extent</b>	<b>To a moderate extent</b>	<b>To a great extent</b>	<b>To a very great extent</b>	<b>No opinion</b>
Prompts attorneys to come to oral argument better prepared	52	26	0	17	0	4
Causes attorneys to be more theatrical in their presentation	48	30	9	4	4	4
Causes attorneys to change the emphasis or content of their oral argument	39	43	9	0	4	4
Increases judges' attentiveness at oral argument	70	26	4	0	0	0
Prompts judges to be more courteous in questioning attorneys	57	35	9	0	0	0
Causes judges to change the emphasis or content of their questions at oral argument	65	30	4	0	0	0
Disrupts courtroom proceedings	74	22	0	4	0	0
Educates the public about the work of the court of appeals	17	30	30	9	9	4

\*Note: The figure in each cell represents the percentage of responding judges (N = 23) who selected that answer.

The responses shown in Table 3 do not differ significantly from responses to the same questions in the initial questionnaire. Similarly, appellate judges' overall attitudes toward coverage, both before and after experience with the pilot program, were favorable. In both the initial and follow-up questionnaire their median response to a question about overall attitudes toward civil appellate coverage corresponded with "I somewhat favor coverage." Altogether, of the appellate judges responding to this question on both questionnaires, nine were more favorable to civil appellate coverage after the program, four were less favorable, and sixteen held the same attitude toward civil coverage as they had prior to the program.

With respect to coverage of criminal appellate proceedings, appellate judges' median rating on the initial questionnaire was "I have no opinion on coverage," while their median rating for the follow-up questionnaire was "I somewhat favor coverage." In particular, eleven appellate judges were more favorable to coverage of criminal cases after the program, four were less favorable, and fourteen held the same attitudes as previously.

The overall questionnaire results (district and appellate) suggest judges' attitudes toward electronic media coverage of civil and criminal proceedings generally stayed the same or became more favorable after experience with the program. In addition, judges who dealt with electronic media coverage experienced potential effects to either the same or a lesser extent than they had expected. In overall before–after comparisons for judges in each type of court, there were no potential negative effects that were rated significantly higher (i.e., as occurring to a greater extent) after experience with cameras than before.

It should be noted that not all judges held favorable attitudes toward electronic media coverage, and some had strong objections. The written questionnaire comments of judges, some of which express negative views, are on file with the Federal Judicial Center.

## **Attorney Questionnaires**

### ***Method***

After the pilot program had been in operation for over two years, questionnaires were sent to lead plaintiff and defense attorneys from 100 cases covered by electronic media during the first two years of the program. All 32 cases reported to have been covered by extended-coverage networks were included in the sample, and the remaining 68 cases were selected randomly from among other cases covered under the program. Questionnaires were

returned from 110 out of 191<sup>20</sup> attorneys surveyed (58%), with respondents divided fairly equally between plaintiff and defense (or appellee and appellant) attorneys.<sup>21</sup>

We asked attorneys about the following issues: (1) if the court adequately considered their views and those of their clients in deciding whether to approve coverage requests; (2) whether potential witnesses refused to testify because of the prospect of camera coverage; (3) what effects of electronic media coverage they observed; (4) whether electronic media coverage affected the fairness of the proceedings; (5) whether, overall, they favor electronic media coverage of civil proceedings; and (6) whether their views toward electronic media coverage have changed as a result of participation in the program.

### **Results**

Overall, 72 out of 109 attorneys responding (66%) indicated they somewhat or greatly favor electronic media coverage of civil proceedings. Fourteen (13%) said they had no opinion on coverage, while the remaining 23 (21%) were somewhat or greatly opposed to electronic media coverage. In response to a separate question about whether experience with coverage had changed their views, twenty-nine out of 104<sup>22</sup> attorneys responding (28%) reported they were more favorable toward electronic coverage now than they had been prior to having experience with it, 4 (4%) said they were less favorable after experience, and 71 (68%) said their opinions had not changed.

Sixty-three percent of attorneys responding to the survey reported that they had been given adequate time to notify their clients after learning of the prospect of camera coverage, and most (76%) indicated they had been given an opportunity to object to coverage, although few (8%) had actually registered an objection. The majority of both district and appellate court attorneys responding thought the court had given adequate consideration to the views of counsel and of the parties in deciding whether to allow

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20. No information was available for nine attorneys in the sampled cases.

21. In particular, of those attorneys responding to this item on the district court questionnaire, forty-six identified themselves as representing a plaintiff in the case, thirty-six identified themselves as representing a defendant, and two identified themselves as “other” (e.g., representing a respondent to a subpoena). Of attorneys responding to the appellate questionnaire, eleven identified themselves as representing the appellant, eleven as representing the appellee, and one as “other.”

22. Not all attorneys answered every question.

**Table 4. Attorney Ratings of Electronic Media Effects in Proceedings in Which They Were Involved, by Percentage\***

<b>Effect</b>	<b>To little or no extent</b>	<b>To some extent</b>	<b>To a moderate extent</b>	<b>To a great extent</b>	<b>To a very great extent</b>	<b>No opinion</b>
Motivate witnesses to be more truthful than they otherwise would be (N = 70)*	58	3	2	0	0	38
Distract witnesses (N = 66)*	52	18	9	5	0	17
Make witnesses more nervous than they otherwise would be (N = 66)*	46	21	12	5	2	15
Increase juror attentiveness (N = 53)*	26	6	8	6	0	55
Distract jurors (N = 54)*	30	9	6	4	0	52
Motivate attorneys to come to court better-prepared (N = 97)	71	11	7	4	1	6
Cause attorneys to be more theatrical in their presentations (N = 103)	78	7	9	2	3	2

*(continued)*

**Table 4 (continued)**

<b>Effect</b>	<b>To little or no extent</b>	<b>To some extent</b>	<b>To a moderate extent</b>	<b>To a great extent</b>	<b>To a very great extent</b>	<b>No opinion</b>
Distract attorneys ( <i>N</i> = 103)	73	20	6	1	0	1
Prompt attorneys to be more courteous ( <i>N</i> = 103)	80	12	3	1	0	5
Increase judge attentiveness ( <i>N</i> = 101)	54	17	10	6	1	12
Prompt judges to be more courteous ( <i>N</i> = 101)	62	12	8	4	3	11
Disrupt the courtroom proceedings ( <i>N</i> = 103)	77	10	8	3	0	3

\**Note:* The figure in each cell represents the percentage of responding attorneys selecting that answer. Items marked with an asterisk were presented only to attorneys in district court cases; other items were presented to attorneys in both district and appellate court cases.

electronic media coverage. Fifty-eight percent of attorneys in the district courts and 83% of attorneys in the appellate courts did not believe their clients would have chosen to refuse coverage if given an absolute right to do so. Only one attorney reported having a witness or witnesses who declined to testify because of the prospect of camera coverage.

When asked whether the presence of cameras affected the overall fairness of the proceeding in which they had been involved, ninety-seven said camera presence had no effect on fairness, three said camera presence increased the fairness of the proceeding, and four said it decreased the fairness of the proceeding.

Table 4 shows the number of attorneys selecting each answer in response to questions about effects of electronic media coverage in the case in which they participated.

The table shows that attorneys with experience under the program who expressed an opinion generally indicated that various effects occurred “to little or no extent.” These results are consistent with questionnaire results of judges who experienced electronic media coverage under the program.

## **Telephone Interviews**

### ***Method***

In September and October 1993, we conducted telephone interviews with three groups of participants in the pilot program: (1) judges with the greatest amount of experience with electronic media coverage under the pilot program; (2) representatives of media organizations that covered cases under the pilot program; and (3) court staff responsible for the day-to-day administration of the program in each of the pilot courts. Members of each of these groups were asked specific questions about their experiences with electronic media coverage under the pilot program.<sup>23</sup>

The overall results from the interviews suggest that judges, media representatives, and court staff thought the Judicial Conference guidelines were very workable and that the pooling arrangements worked particularly smoothly. A number of interviewees said that the issue of whether habeas proceedings were eligible for coverage had been raised in their court. This issue—which was not addressed by the program guidelines—was resolved by the Committee on Court Administration and Case Management, which determined that post-conviction habeas corpus hearings (including death

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23. Questions used in each set of interviews are on file in the Research Division of the Federal Judicial Center.

penalty habeas hearings) were eligible for coverage but preconviction habeas hearings were not.<sup>24</sup>

### *Judges with Greatest Experience Under the Pilot Program*

Twenty judges with the greatest experience with electronic media under the pilot program (as measured by the number of cases covered in which they presided on an appellate panel or were the presiding district court judge) were interviewed. This group comprised judges from each of the pilot courts and included four appellate judges, fifteen district judges, and one bankruptcy judge. Our database showed that these twenty judges were involved in sixty-seven proceedings covered under the program. The greatest number of covered cases in which any one judge was involved was five for district judges and five for appellate judges.

Experienced judges were asked a number of questions about their practices in allowing electronic media coverage under the pilot program; their perceptions regarding the effects of electronic media on attorneys, jurors, witnesses, themselves, and on courtroom decorum and the administration of justice; and their overall attitudes toward electronic media coverage.

### *Representatives of Media Organizations That Covered Cases Under the Program*

We interviewed representatives of media organizations that most frequently covered cases under the program. This included representatives from nine local news stations in the pilot court markets, two extended-coverage networks, two legal newspapers, and one national organization for radio and television news directors. Media representatives were asked how they learned about cases to cover and made decisions about what to cover; how electronic media access to the courtroom had affected the quantity of their coverage; about their experiences with and views of the program, including the guidelines; and how they used courtroom footage to enhance coverage.

### *Court Administrative Liaisons*

Each pilot court designated an administrative liaison—generally a member of the clerk’s office staff—to monitor activity under the pilot program, provide information to the FJC, and oversee the day-to-day administration of the program. Issues addressed in interviews with these individuals included the amount of time spent administering and overseeing the program,

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24. The committee also determined that extradition hearings were ineligible for coverage.

what functions they performed in administering the program, whether any problems were encountered, and whether the guidelines were workable.

## **Results**

### *Judges with Greatest Experience Under the Pilot Program*

1. *Benefits and disadvantages of electronic media coverage.* Judges were asked what they saw as potential benefits and potential disadvantages of electronic media coverage of court proceedings, and whether they thought these effects were realized under the pilot program. Nearly all judges thought that educating the public about how the federal courts work was the greatest potential benefit of coverage, and most thought this benefit could be more fully realized with electronic media rather than traditional media. However, most judges said the educational benefit had been realized only to a moderate extent or not at all under the program. Several judges expressed the view that the education function was best served through extended coverage of proceedings rather than brief “snippets” of coverage. The potential disadvantage of electronic media coverage most frequently mentioned by judges was the possibility of distorting or misrepresenting what goes on in court, although generally they did not feel this problem had occurred under the program.

2. *Practices in ruling on applications.* Most of the judges interviewed had never denied coverage; those who had did so because the nature of the proceeding was particularly sensitive or the proceeding was being held in chambers. In reaching decisions on applications, about half of the judges either solicited the views of counsel and/or parties, or at least notified counsel of the prospect of camera coverage. Most judges also reported giving attorneys an opportunity to object to coverage, with several mentioning they have overruled objections on this issue on one or more occasions. Judges who heard attorney objections on the issue generally reported that this took only a small amount of their time. When asked, most judges expressed the view that coverage would be reduced considerably if parties or witnesses had an absolute right to refuse coverage in a case.

3. *Witness privacy issues.* District judges were asked whether they thought witness privacy concerns presented a problem for electronic media coverage in civil cases. Most said this was not a big problem in civil cases and that the presiding judge in a particular case would be able to address the problem if it arose. One judge thought that even though witness privacy could be an issue in some instances, “the public’s right to know outweighs the privacy issue.”

4. *Effects of electronic media on trial participants.* When asked about the effects of electronic media coverage on various trial participants, most judges

who had experienced electronic media in their courts reported no major or detrimental effects. Nearly all such district judges said they saw no significant effect of electronic media presence on jurors, with two indicating that jurors noticed the cameras for the first few moments of the trial but then ignored their presence. One district judge said that he had closely observed the result of a jury trial over which he presided and had spoken with jurors after the trial to determine whether the presence of a camera had had an effect; his conclusion was that the jurors were not concerned about the camera “nor was the result out of line.” Most district judges explained the presence of cameras to jurors at the beginning of a trial, informing them that they would not be photographed, that the presence of cameras for a particular portion of a trial should not be considered significant, and that jurors should not watch coverage of the trial on television. All district judges indicated they were not aware of any instances in which jurors had viewed televised coverage of trials in which they were sitting as jurors.

Most district judges also did not observe an effect of cameras on witnesses, with one judge pointing out that because of the increasing use of video depositions, many witnesses are already “used to having cameras poked in their faces.” Two judges said they thought witnesses were more affected than other trial participants, but they did not think the effect was strong.

Most district and appellate judges found electric media to have no effect or a positive effect on the performance and behavior of counsel. As one judge said, “[counsel] shouldn’t do anything for cameras they wouldn’t do for me or the jury.” Similarly, most judges thought they themselves were not affected by the presence of cameras, or that they were affected in a positive way (e.g., by being more courteous to counsel or more vigilant regarding proper courtroom procedures).

5. *Courtroom decorum and the administration of justice.* District and appellate judges were also asked whether the presence of electronic media negatively affected courtroom decorum, and whether it interfered with the administration of justice in any cases in which they had been involved. All but one judge who responded to the decorum question said that the presence of electronic media did not negatively affect courtroom decorum; the judge who did report a negative effect described a case involving “a lot of politicians” in which counsel “played to the TV” and their “arguments were overly zealous and exaggerated.” Two judges said that courtroom decorum could be even better preserved if cameras could be installed permanently in courtrooms in concealed locations.

With respect to effects on administration of justice, all but one judge thought the presence of electronic media had no effect. One judge was concerned that the click of a still camera at certain points in a proceeding “puts an exclamation point on certain testimony,” but thought this was usually not a problem in civil cases.

6. *Effects on settlement.* District judges were asked whether, to the best of their knowledge, the prospect of camera coverage affected settlement in any cases before them. Although the majority of judges said they had not seen this, four said this had happened in one or more of their own cases, one reported having seen it happen in other judges’ cases, and one said that in settlement discussions with the parties in a case “there might have been a time or two when a party was being outlandish . . . and I might have suggested [that] would look interesting on TV.”

7. *Experiences with the media.* Judges were also asked about their working relationship with representatives from the electronic media. All judges who had experience with cases in which camera coverage was pooled were satisfied with this arrangement, and most said that issues concerning pooling were not brought to the attention of the court. Two judges pointed out that the camera pooling resulted in fewer media representatives being present in the courtroom, because members of the press who would normally be in the courtroom would choose to watch the proceedings from a room down the hall where the electronic feed from the pool camera was sent and where they could continue other activities without disturbing the court (e.g., chat, make phone calls). Judges in courts for which a media coordinator had been hired were also pleased with how that system worked. All experienced judges also said—often very enthusiastically—that members of the media generally complied with the Judicial Conference guidelines and with any additional restrictions imposed by presiding judges, although one appellate judge related a concern about the “noisy shutters” of still cameras in a quiet courtroom, and another appellate judge mentioned an episode where a still photographer used a “bright flash” that he found distracting.<sup>25</sup>

8. *Administrative requirements.* Judges reported that involvement in the pilot program had very little effect on their administrative responsibilities except for the necessity of dealing with some additional paperwork and additional people in the cases covered by electronic media. Two judges who had served as media liaison judges for their courts reported a slightly greater time involvement than those who were not liaison judges, particularly when

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25. Use of a flash attachment is prohibited by the guidelines.

the program was first starting. In general, however, judges said that court staff absorbed most of the administrative burdens of the program.

9. *Use of footage.* Judges were asked whether they thought the audio and video material obtained as a result of the program enhanced news coverage of the cases; they were also asked how electronic coverage compares to conventional coverage in terms of informing the public about the court's work. The majority thought that audio and video access enhanced news coverage and that electronic coverage was somewhat more beneficial and realistic than conventional coverage. Several judges pointed out that many people obtain their information these days through television rather than through the print press.

10. *Media knowledge.* Judges were asked whether they thought members of the media were generally well informed about cases that might be considered for coverage. About half thought the media were not well informed, with one judge lamenting that "they're poorly informed and I don't know how to get them informed without denigrating our impartiality." Others thought the media were reasonably well informed, particularly in courts where the media received information about upcoming cases from the court or a media coordinator. Several judges added that they thought some electronic media representatives were not well informed about court procedures. For example, one judge cited an instance in which a news story indicated that the judge had decided a case when in fact it had been decided by a jury; it appears, however, that misinformation such as this was an anomaly.

11. *Potential direct costs associated with electronic media coverage.* Judges were asked to comment on potential costs of electronic media coverage identified by the Judicial Conference in 1984, including the need for increased sequestration of jurors, increased difficulty impaneling an impartial jury in the event a retrial was necessary, and the need for larger jury panels. All judges responding to this question said they had not seen any evidence of these potential costs, although five mentioned they thought the potential costs would be of greater concern in criminal cases.

12. *Changes in the guidelines.* Though we asked, most judges did not suggest changes in the guidelines governing the program. Three said it would be helpful for the guidelines to suggest how to handle and weigh litigant or witness objections to coverage. Another interviewee suggested that the guidelines cover where cameras can be placed in a courtroom. One appellate judge mentioned a preference for presumptive coverage (i.e., not requiring judge consent), at least for appellate proceedings. Finally, one judge suggested the media should be required to notify judges when their plans for coverage change.

13. *Overall attitudes toward coverage in civil cases.* Consistent with the judge questionnaire results, when asked whether their attitudes toward electronic media coverage had changed after experience in the program, ten district judges indicated their attitudes had remained relatively stable, four said they are now more favorable toward electronic coverage, and one reported being less favorable. The judge who reported being less favorable explained that, “Originally [I] thought cameras would be a good thing; now, [I’m] not so sure. TV destroys the dignity of the courtroom . . . it does not give a true picture and more often than not distorts reality.” In contrast, two judges who reported being more favorable now indicated that concerns they had about electronic media coverage were alleviated after experience. The three appellate judges who answered this question indicated that their attitudes had remained stable.

14. *Extension of electronic media coverage to criminal proceedings.* Finally, judges were asked whether, based on their experiences, they would recommend extending camera coverage to criminal proceedings. Seven district judges answered yes to this question, two said no, and three said they would favor expansion with some hesitancy (e.g., proceeding on a pilot basis, giving parties the option of not being photographed). Of the remaining two judges,<sup>26</sup> one said he had not thought about the issue and did not know what his view would be, and the other said he would not favor extending coverage if it would affect a defendant’s decision regarding whether to testify. Of three appellate judges who answered this question, all said they would favor expanding coverage to criminal appellate proceedings, with two specifying they would not recommend allowing electronic media access to trial-level criminal proceedings.

### *Media Representatives*

1. *Overall experiences with the program.* Overall, the media representatives interviewed were pleased with their experiences in the pilot program, and thought that federal court personnel and judges were very cooperative with the media. The pooling procedures worked smoothly, as most media organizations were already familiar with pooling arrangements from state court coverage or other contexts. Last-minute changes in court schedules generally did not pose a problem for media organizations, as they normally found out about these changes before sending a crew to the courthouse.

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26. Some judges did not complete the full interview, either because of time constraints or because they did not think they had enough experience to answer specific questions.

2. *Information about proceedings to consider for coverage.* Most media representatives learned about proceedings that might be considered for coverage through a media coordinator (if there was one for the court they covered) or by their own tracking of a case once they had learned about it at the time of filing (i.e., prior to when schedules were set for case events). Representatives from legal newspapers said they have reporters who are constantly tracking cases in the local federal courts. Most media representatives also said that the media coordinators played an important function in keeping the media abreast of interesting cases—indeed, several suggested that media coverage would undoubtedly be increased through the presence of this type of coordinator for each court. In addition, media representatives said court staff or judges occasionally alerted them to upcoming cases that might be considered for coverage. Most media representatives thought they had generally been informed about cases with enough time to make coverage decisions, with some saying they would like the courts to provide more information to the media.

3. *Judgments about which cases to cover.* Media representatives reported they used the following criteria in deciding whether to cover cases with electronic media (in descending order of frequency of mention): whether the subject matter of the case had universal relevance or broad applicability; whether it was “newsworthy”; whether the story was relevant to local interests; and whether the case involved “high profile” litigants.

4. *Extent of coverage.* Most representatives from local news stations said their organizations did not generally cover cases electronically from start to finish, because of limitations on station resources. Aspects of proceedings most frequently mentioned as being covered included opening arguments, key testimony, closing arguments, and the verdict, all of which suggest an emphasis on trial proceedings. This is in contrast to extended-coverage networks, representatives of which reported they cover proceedings from beginning to end (“gavel-to-gavel”).

5. *Amount of coverage.* The majority of media interviewees from television stations said their organizations report on more cases now in the federal courts than they did before camera and audio access was allowed. Descriptions of this increase in coverage ranged from “maybe a tad bit more now” to “much more frequent [now].” Most local media representatives said that since the pilot program started they had reported on some cases in the pilot courts without including camera footage. When this occurred, it was most frequently because camera access was denied or the station or newspaper did not have a photographer available to cover the proceeding.

6. *Denial of access.* About half of the media representatives interviewed said their organization had been denied access to one or more proceedings. In addition, one extended-coverage network representative reported that the network declined coverage of one approved case because additional conditions were imposed that made coverage impractical. In particular, the presiding judge indicated that witnesses could not be covered if they objected to coverage, but this would not be known until each witness appeared to testify. This condition made it impossible for the network to plan coverage.

7. *Adequacy of lighting and sound systems.* Media representatives generally thought the lighting and sound systems in the federal courtrooms were technically adequate, although there were problems in some situations. One media representative said his organization did not rely on the court's sound system.

8. *Use of courtroom footage.* Local news media representatives were asked in what way audio and video material obtained through the pilot program enhanced news coverage of cases. The two most common responses to this question were that use of courtroom footage produced a more realistic depiction of the proceedings and that it allowed viewers to see the expressions and emotions of the courtroom participants. As one respondent described, "Video tells a much better story than a sketch artist's rendition—one can see when a judge gets angry and the facial and body expressions of the parties."

9. *Experiences with the program guidelines.* The majority of media interviewees said the program guidelines were applied consistently. When asked whether they would recommend changes in the program guidelines, they most frequently suggested extension of the program to criminal proceedings and shortening of the deadlines for media applications for coverage, or at least allowing for extenuating circumstances. Three interviewees, including representatives from two extended-coverage networks, suggested permitting two cameras in trial courtrooms. When respondents were explicitly asked how often their organizations would take advantage of the opportunity to use two cameras in trial courtrooms, the majority of local news station representatives said they would use this opportunity in half or fewer of the cases they covered, while extended-coverage network representatives indicated they would make use of two cameras in nearly every case. As one representative of an extended-coverage network pointed out, if only one camera is permitted and an attorney steps in front of that camera for half an hour, this causes serious problems for a network trying to broadcast an entire proceeding.

10. *Predictions about coverage of criminal cases.* Media representatives were asked if they could give a guess as to the level of coverage their organizations

would provide if it were possible to cover criminal cases in the federal courts. Most predicted a substantial increase in the amount of coverage, although some—including representatives from two legal newspapers and one extended-coverage network—said their coverage would not increase much over what is being done for civil proceedings. Overall, the responses to this question ranged from a prediction of no increase in coverage to a prediction that coverage would increase “by a factor of ten.”

### *Court Administrative Liaisons*

1. *Amount of time spent administering program.* Court personnel responsible for the day-to-day administration of the electronic media program in the pilot courts were asked what percentage of their time was spent administering and overseeing the program. These estimates ranged from 1% to 25% of their time, with most interviewees indicating that the time they spent on the program was greatest when it was first starting up and that the amount of time demanded of them fluctuated.

2. *Functions performed.* Court personnel performed the following functions in administering the program: received applications from the media and forwarded them to presiding judges; notified media of judges’ decisions on coverage applications; generally served as liaison between the court and the media (e.g., informed media of problems that arose); notified security personnel when representatives of electronic media were coming to the courthouse; dealt with the media on days when they came for coverage, escorted them to courtrooms, and showed them where to set up; generally ensured that media representatives complied with the guidelines; and kept records to document application and coverage activity.

3. *Experiences with the media and pooling arrangements.* Court administrators were very satisfied with the operation of pooling arrangements. Two interviewees said that in their courts the first media organization to file an application was automatically designated as the pool camera (i.e., the one located inside the courtroom). In all courts, it was up to the media to work out pooling arrangements, as required by the guidelines. The court administrators said that the media were very cooperative, although one mentioned that compliance with the dress code was occasionally a problem.

4. *Providing case information to the media.* Court administrators were asked whether they ever provided information to media organizations about cases that might be considered for coverage. Three interviewees said they did not do this, three said they provided general information about cases pending in the court (e.g., a listing of scheduled cases or a copy of the court’s calendar),

and three said that in some instances they apprised the media of specific pending cases that might be interesting to cover.

5. *Time periods for applications.* Most of the administrators said that the advance notification periods set by their courts for coverage applications, which ranged from one hour to seven days, were not strictly enforced. Most also thought the time periods could be shortened without a great deal of additional burden, although they generally said that deadlines were good to have so that not all requests would be made at the last minute. As one administrator said, “If [there is a] late-breaking news story, we can’t argue against a last-minute request—but this shouldn’t become a habit.”

6. *Media “no shows.”* Administrators were asked whether they found it problematic when media representatives did not show up to cover an approved proceeding. Most did not think this was a problem, with four reporting it had never happened in their court.

7. *Problems in the administration of the program.* Administrators were asked whether they had encountered any problems in the overall administration of the program or in particular cases. Most reported no problems, with two reporting minor disruptions in particular proceedings.

8. *Issues not covered by the guidelines.* Court administrators were asked whether any situations had arisen in their courts that were not covered by the guidelines. Four responded that the issue of whether habeas proceedings could be covered under the program had been raised in their court.

9. *Changes in program guidelines.* Administrators were asked if they would recommend any changes in the program guidelines. Three said they did not have specific suggestions, four recommended expanding coverage to criminal proceedings, one suggested that courtrooms have cameras installed permanently (at media expense), and one suggested that interviews be allowed inside the courtroom after proceedings have adjourned.

## **Content Analysis of Evening News Broadcasts**

### ***Method***

Part of the Center’s evaluation, as approved by the Judicial Conference, involved an analysis of how courtroom footage obtained under the pilot program was used and what information about the recorded proceedings was made available to the public. Our main approach to this issue depended on a content analysis<sup>27</sup> of evening news broadcasts using footage obtained during

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27. Content analysis is the objective and systematic description of communicative material. The content analysis performed for this study proceeded in two phases. First, a qualitative analysis was used to identify the symbols, stylistic devices, and nar-

the pilot program; this analysis was conducted by the Center for Media and Public Affairs under a contract with the FJC.<sup>28</sup>

Initially, the Ad Hoc Committee on Cameras in the Courtroom, at the request of the Center, required media organizations to provide any footage and photographs that were used on the air or published. At the request of media representatives who pointed out many practical problems, the requirement was modified to require only television footage to be submitted. The requirement was also changed from mandatory to voluntary after a test period that determined that an adequate number of tapes would be submitted voluntarily. The relaxation of the mandatory submission requirement means that the cases analyzed in the content analysis do not represent all stories produced under the program, or even a random sample of the stories produced; thus, conclusions based on this analysis must be viewed with caution.<sup>29</sup>

At three points (November/December 1991, April 1992, and May 1993) the Center requested footage obtained under the program. Stations responded to our requests for footage 58% of the time, either by provision of a tape or an explanation of why it could not be provided.<sup>30</sup> A total of ninety news stories were obtained for use in the content analysis. These stories, which covered thirty-six different cases, were broadcast on twenty television stations located in nine media markets.

The content analysis technique was used to examine how courtroom footage was used in the news stories; the type and quality of information provided to viewers about the particular cases covered; and the quality of information that news stories conveyed about the legal process.

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rative techniques shaping the form and substance of the news stories; this allowed the researchers to develop analytic categories based on the actual content of the stories rather than imposing *a priori* categories. Second, the analytic categories that were developed and pre-tested formed the basis of a quantitative analysis, which involved the systematic coding of story content into discrete categories.

28. The contractor's report and code book are on file with the Research Division of the FJC.

29. For example, it is conceivable—though we have no reason to believe this—that stations refrained from sending broadcast tapes containing uses of courtroom footage that they thought would be considered lacking in educational value.

30. Some requested footage could not be provided because the tapes were no longer available.

## **Results**

### *Use of Courtroom Footage in News Reports*

The content analysis revealed that in news stories on covered proceedings footage from the courtroom occupied 59% of the total air time. The ninety stories analyzed presented a total of one hour and twenty-five minutes of courtroom footage, with an average of fifty-six seconds of courtroom footage per story. Across stations, the total amount of courtroom footage used ranged from a low of 20% of a story to a high of 97%. Stories that aired on the first day of the pilot program and that were generally aimed at explaining the media access available under the program used the least amount of courtroom footage, averaging 47% of air time. Stories covering cases over several days did not use a significantly higher proportion of courtroom footage than did stories covered on a single day.

The analysis also examined the extent to which courtroom footage was voiced over by a reporter's narration. On average, reporters narrated 63% of all courtroom footage.<sup>31</sup> The percentage of the story narrated by a reporter varied widely across stations and across cases covered, but did not appear to be related to either the length of the story or the nature of the case.

Overall, participants in the federal proceedings (witnesses, parties, attorneys) spoke on camera during or outside the proceedings for just under forty-seven minutes, or 31% of the total air time. Most stations used a mixture of participant statements from inside and outside the courtroom. Overall, plaintiffs were given 42% of the total air time that was devoted to participant statements, while defendants spoke for 27%.<sup>32</sup> Other participants who spoke in broadcast coverage included judges, outside experts or analysts, witnesses, and court personnel.

In addition to verbal coverage, visual patterns of courtroom coverage were also examined. For this analysis, each camera shot that appeared on screen was separated out. The results were similar to the analysis of speaking time, with plaintiffs (and their attorneys) shown in 30% of the shots that were devoted to participants, and defendants (and their attorneys) shown in 20% of these shots.

### *Information Provided in Stories About the Cases Covered*

A second aspect of the content analysis examined how well the stories conveyed the facts or details of the cases presented. Four variables were developed to assess the information provided in the stories: (1) identification of

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31. With "first day" stories removed from the analysis, this drops to 61%.

32. These figures include the parties and their attorneys.

the participants; (2) descriptions of the nature of the matter before the court; (3) statements of the facts of the case; and (4) mentions of what the plaintiff sought in the case.

Overall, 91% of the stories identified the plaintiff and 86% identified the defendant; with first day stories removed from the analysis, all but one story identified the plaintiff and all but two identified the defendant. In addition, 100% of the non-first day stories mentioned the nature of the case (e.g., that it was a civil rights suit) before the court. In half of these stories, information on the nature of the case was provided by reporters or anchors without relying on the participants, while in 44% of the stories this information was provided by a combination of reporters and participants in the courtroom. The remaining 6% of stories conveyed information about the nature of the case through a combination of reporters and participants outside the courtroom.

The stories were also analyzed for information about the facts of the case, including who was involved in the proceedings, what happened to start the dispute between the parties, and when and where the events in question occurred. Ninety-nine percent of the non-first day stories provided at least two of these four elements. Most stories identified the parties involved and mentioned the reason the case was in court; the location and time of the events at issue were less frequently mentioned.

Finally, the stories were examined for a mention or explanation of what the plaintiff in the case was seeking or what would happen if the plaintiff prevailed. Sixty-two percent of the non-first day stories mentioned the plaintiff's goals, and 34% of the stories explained in more detail what the plaintiff sought. Virtually all (94%) statements of plaintiffs' goals were made by reporters.

An overall analysis of these measures reveals that most stories contained an explanation of the basic details of the case. Multiple-day coverage of a case slightly improved the depth of coverage. Interestingly, there was no correlation between the percentage of courtroom footage used in the story and the performance on the above measures. The contractors conclude that "it would appear from viewing the tapes that the participants' comments frequently added color or emotion rather than substance to the discussion."

### *Information Provided in Stories About the Legal Process*

To determine the extent to which the stories provided basic educational information about the legal system, the content analysis of news stories also examined the information available to viewers about the legal process. The analysis examined whether five pieces of information were conveyed to the viewer: (1) identification of the case as a civil matter; (2) identification of the

type of proceeding (e.g., hearing, trial); (3) statements about whether a jury was present; (4) descriptions of the proceedings on a given day; and (5) discussion of the next step in the legal process.

The vast majority of stories (95% of non-first day stories) did not identify the proceeding covered as a civil matter. In addition, 77% of the stories failed to identify the type of proceeding involved. Almost three-quarters (74%) of all stories did not provide information about whether a jury was present, including half of the stories that identified the covered proceeding as a trial.

Most stories (74%) did explain what transpired in court on a particular day, such as who testified or what evidence was presented. In multiple-day cases, 90% of the stories explained the daily proceedings, compared to 63% in single-day stories. Seventy-six percent of the daily proceedings in a story were explained by a combination of reporter narration and participant discussion. Only 29% of stories mentioned the next step in the litigation process in the case.

Thus, the stories did not provide a high level of detail about the legal process in the cases covered. In addition, the analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

Overall, the content analysis revealed considerable variation—across both stations and cases—of the following: amount of courtroom footage used and its integration with other elements of the story; the information conveyed about the facts of the case and the legal processes involved; and the degree to which both sides of the case were presented. There were, however, certain patterns identified in the analysis.

First, most footage was accompanied by a reporter's narration rather than the story being told through the words and actions of the participants; thus, the visual information was typically used to reinforce a verbal presentation, rather than to add new and different material to the report. Second, plaintiffs and their attorneys received more air time than defendants and their attorneys. Third, the stories did a fairly good job of providing information to the viewer about the specific cases covered; however, the amount of courtroom footage was not related to the amount of information communicated. Fourth, the coverage did a poor job of providing information to viewers about the legal process.

## **Collection of Information About Extended Coverage of Civil Proceedings**

Because the content analysis was limited to televised evening news broadcasts, we also obtained information about more extended coverage provided by Court-TV and C-SPAN, which were the two national networks most active in the program. Each of these networks provided information to the Center—in the form of printed material and interview responses by network representatives—about the cases they had covered under the program and the content of their coverage.

Thirty-two cases in the pilot program received extended coverage between July 1, 1991, and June 30, 1993. FJC records indicate that most of these cases were in district or appellate courtrooms where two cameras operated. Network representatives said that working with a single camera causes problems for “gavel-to-gavel” coverage, because participants will occasionally block the camera for extended periods of time. As a result, they said that if two-camera access were allowed, they would take advantage of this opportunity in nearly every case covered.

Court-TV Network, which covered and broadcast twenty-eight cases under the program during the evaluation period, covers cases in their entirety when they are broadcast live. When taped proceedings are broadcast they are sometimes edited to take out moments of inactivity, such as sidebar conferences. Recaps of events that have occurred in the proceeding are provided at regular intervals, and experts in relevant areas of law provide commentary and analysis of the legal proceedings covered.

Similarly, C-SPAN, which covered and broadcast seven cases between July 1, 1991, and June 30, 1993, covers gavel-to-gavel and provides supplementary information to viewers about each case, including interviews with counsel, parties, and relevant interest groups concerning the proceeding being covered. In addition, C-SPAN representatives say they have conducted and broadcast interviews with judges in the cases being covered. In the interviews, judges were asked to talk about how the federal courts function and what being a federal judge involves, not about the specific case at hand.

Thus, according to network representatives, these networks provide extended coverage of proceedings as well as educational information about individual cases, substantive law, and court processes.

## **Review of State Studies of Electronic Media Effects on Jurors and Witnesses**

In response to an inquiry from the Committee on Court Administration and Case Management, we reviewed the results of studies others have done on the effects of electronic media on jurors and witnesses. The studies report that the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns. These findings are consistent with what judges and lawyers in the pilot courts observed about jurors and witnesses in those courts.

Below we summarize results from studies conducted in state courts (Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio, and Virginia) of the potential effects of electronic media on witnesses and jurors.<sup>33</sup> For witnesses, researchers have looked at such effects as distraction, nervousness, distortion or modification of testimony, fear of harm, and reluctance or unwillingness to testify with electronic media present. For jurors, researchers examined such effects as distraction, effect on deliberations or case outcome, making a case or witness seem “more important,” and reluctance to serve with electronic media present. Most state evaluations have studied jurors and witnesses through surveys, although California researchers also observed the behaviors of jurors and witnesses in proceedings covered and not covered by electronic media.

We should note that in all of the state courts whose evaluations are discussed here, electronic media coverage was allowed in criminal as well as civil cases, and the majority of coverage was in fact in criminal cases. As pointed out by several judges interviewed in our study, certain effects could be expected to occur to a greater extent in criminal cases than in civil cases (e.g., a witness’ fear of harm from being seen on television). Thus, it might

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33. Studies of the effects of electronic media in state courts have generally been conducted by state court administrators, special advisory committees appointed by the court, bar associations, or outside consultants. A handful of state studies other than those mentioned here address juror and witness issues; we did not include all of them, however, because some reports do not provide enough detail about methods to determine what questions were asked and how, and others used methods we did not consider sufficiently rigorous to rely on for this evaluation (e.g., a judge polling one jury after a trial about whether cameras affected them). But even the less rigorous studies tend to report results that are similar to our findings and other state court findings. A more detailed description of the studies summarized in this report is on file with the Research Division of the FJC.

be expected that the findings of these studies would be more negative than findings from studies focused solely on experiences in civil cases.

### ***Effects on Witnesses***

- *Distraction.* One concern is that witnesses in cases covered by electronic media will be distracted and unable to focus on their testimony. A number of state evaluations addressed this issue in surveys and found that, although a small number of witnesses reported being distracted, the vast majority reported no distraction at all or only initial distraction.
- *Nervousness.* Another concern is that witnesses will be made nervous by the presence of electronic media, that this nervousness will make them uncomfortable, and thus that jurors will find it difficult to judge the veracity of their testimony. In state studies that asked witnesses about nervousness, the great majority said they were not at all or were only slightly nervous due to the presence of electronic media during their testimony. In addition, jurors in a 1991 New York survey were asked whether the credibility of witnesses was affected by their relative insecurity or tenseness caused by audio or visual coverage. The majority of jurors indicated this did “not at all” affect the credibility of witnesses, and most indicated that the presence of audio and visual media did not in fact tend to make witnesses appear tense or insecure. Similarly, over 90% of responding jurors in Florida and New Jersey surveys said the presence of electronic media had “no effect” on their ability to judge the truthfulness of witnesses.

Finally, in addition to surveying witnesses, the consultants who conducted the California study systematically observed proceedings in which electronic media were and were not present. They concluded that witnesses were equally effective at communicating in both sets of circumstances.<sup>34</sup>

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34. In an experimental study comparing the effects of conventional and electronic media coverage on mock witnesses and jurors, researchers at the University of Minnesota found that witnesses who were covered by electronic media reported being more distracted and more nervous about media presence than witnesses who were covered by conventional media. There was no difference between the two conditions, however, in mock juror perceptions of the quality of witness testimony, including ratings of the extent to which the testimony was believable. See Eugene

- *Distortion or modification of testimony.* One of the more serious concerns is that witnesses who testify will distort or modify their testimony because of the presence of electronic media. In state evaluations in which this issue was addressed, most witnesses reported that the presence of electronic media had no effect on their testimony and did not make it more difficult for them to testify. A small number of witnesses indicated an inhibitory effect.
- *Fear of harm.* Several surveys in state studies asked witnesses—most of whom had testified in criminal trials—whether the presence of electronic media caused them to fear they would be harmed. Most witnesses surveyed said they had no fear of harm stemming from electronic media coverage of a proceeding in which they testified, although a minority said they did fear harm to some extent.
- *Reluctance to testify with electronic media.* Surveys in several states asked witnesses if they were reluctant to testify at all because of electronic media or if they would be reluctant to testify again in a proceeding covered by electronic media. In general, about 80% to 90% of witnesses said the presence of electronic media did not affect their desire to participate or would not affect their willingness to serve as a witness in a future proceeding, a finding closely parallel to the attorney survey responses on this issue in our study.<sup>35</sup>

### ***Effects on Jurors***

As in the federal pilot program, most state programs discussed here did not allow electronic media coverage of jurors. In some programs, the jury could be shown in the background of a shot, but no individual juror could be shown in an identifiable way. Other kinds of problems have, however, been posited.

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Borgida et al., *Cameras in the Courtroom: The Effects of Media Coverage on Witness Testimony and Juror Perceptions*, 14 Law & Hum. Behav. 489 (1990).

35. In our attorney survey, we asked attorneys who participated in proceedings covered by electronic media whether they had any witnesses who declined to testify because of the prospect of electronic media coverage. Out of sixty-eight district court attorneys responding to this question, sixty-three (93%) reported they had no witnesses who declined to testify, one reported he had, and four reported they couldn't say.

- *Distraction.* If the presence of cameras were distracting to jurors, this could decrease their ability to concentrate on testimony, potentially affecting the outcome of the proceedings. The state court results, however, suggest that this is not a problem for the majority of jurors. In California, results of the observational portion of the study indicated that jurors in proceedings covered by electronic media were slightly more attentive to testimony than jurors in proceedings not covered by electronic media. In addition, when asked about their level of distraction from the electronic media presence, most jurors responding to surveys in state court evaluations indicated they were not distracted or were distracted only at first.
- *Effect on deliberations or outcome.* Some commentators on electronic media in the courtroom fear that coverage will influence jurors' decisions—for example, by creating more public pressure to decide the case in a particular way. At least four state studies have surveyed jurors about this issue; all found that the vast majority said there was no influence of electronic media coverage on their deliberations or that they did not feel pressured by the media to decide the case in a particular way. In addition, the California researchers found that jurors who had experience with electronic media coverage were less likely to think it would affect the outcome of trials than did jurors who did not have experience with electronic media coverage.
- *Highlighting importance of a case or witness.* Another concern about cameras in the courtroom is their potential to distort the importance of a case or, if present only for a portion of the proceedings, that they will make jurors think certain witnesses or testimony are more important than others. The state court results on this issue indicate that the majority of jurors do not think the presence of electronic media signals that a case or witness is more important, although a minority do think it lends importance to the *case* (very few think it makes a witness more important).
- *Reluctance to serve as a juror.* There is some concern that allowing camera access to proceedings will make it more difficult to impanel juries because some prospective jurors will try to avoid jury duty in a particular case if they think it will be covered by electronic media. Again, the state court results suggest that this is not

likely to be a problem, with the vast majority of jurors reporting that the presence of electronic media would not affect their willingness to serve in a future proceeding.

The results summarized above are consistent with our findings from the judge and attorney surveys; that is, for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent, while a minority indicated the effects occur to more than a slight extent. The state court findings, to the extent they are credible, lend support to our findings and the recommendations made in our initial report.

Although indications from even a small number of participants that cameras have negative effects can be cause for concern, perhaps these concerns are addressed adequately by the federal court guidelines. These guidelines give the judge trying the case discretion to limit or prohibit, if necessary, coverage of any proceeding or of a particular witness or witnesses. In addition, coverage of jurors is proscribed (see Appendix ).

# Recommendations

Note that these are recommendations of the research project staff, not of the Federal Judicial Center or its Board.

## *On Access Generally*

**Recommendation 1:** The research project staff recommends that the Judicial Conference authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms, subject to Conference guidelines (as discussed below). This recommendation is based on information obtained in response to questions presented by the Judicial Conference and addressed in this report and does not imply any position on legal or constitutional issues.

**Explanation:** The converging results from each of our inquiries suggest that members of the electronic media generally complied with program guidelines and that their presence did not disrupt court proceedings, affect participants in the proceedings, or interfere with the administration of justice. To the extent decisions about expanding access would rest on these considerations, our results support expansion.

## *On Guidelines*

**Recommendation 2:** The research project staff recommends that if the committee and Conference decide to continue or expand the program, the guidelines in effect for the pilot program remain in effect, subject to the modifications recommended in the Center's initial report (and set forth as Recommendations 3, 4, and 5 below).

**Explanation:** As we reported, judges, court staff, and media representatives all indicated that the guidelines are very workable and provide judges with the discretion needed to deny or limit electronic media coverage based on the circumstances of a particular case.

**Recommendation 3:** The research project staff recommends that the guidelines be modified to call for a standard practice of informing counsel or a party appearing *pro se* that an application for media coverage has been re-

ceived. We do not recommend that there be guidelines for ruling on these applications.

**Explanation:** Some attorneys responding to our survey complained that they were not informed about electronic media coverage prior to appearing for a hearing or trial. Because most judges are willing to entertain attorney and party objections, a notice requirement seems reasonable. However, experience in the pilot program suggests that conditions that might warrant denial of an application are so specific that guidelines would have to be so general as to provide little help. The inevitably general guidelines would then be likely to produce unnecessary motion activity. The basic questions arising from the assertion of personal right to privacy and the public right to know should be left for decision in the normal course of litigation.

**Recommendation 4:** The research project staff recommends that the guidelines be modified to reflect the committee's determinations regarding the eligibility of extradition and habeas proceedings for electronic media coverage.

**Explanation:** We learned in telephone interviews that the issue of whether habeas proceedings could be covered was raised in several of the pilot courts. If the program is continued or expanded, we recommend the committee's determinations on these issues be incorporated into the guidelines so they will not be raised anew by media representatives unaware of the committee's determinations.

## ***On Facilities***

**Recommendation 5:** The research project staff recommends that the guidelines be revised to permit two television cameras in trial courtrooms and appellate courtrooms.

**Explanation:** The absence of problems reported from the Southern District of New York suggests that permitting two cameras in trial courtrooms does not cause additional disruptions. In addition, permitting two television cameras in the trial courtroom encourages coverage by extended-coverage networks, which provide the type of coverage that most judges favor. The majority of cases covered under the program by extended-coverage networks were in courts (both trial and appellate) that allow two television cameras, and represen-

tatives from extended coverage networks indicated in interviews that the ability to use two cameras is important when providing “gavel-to-gavel” coverage of proceedings. In comparing the type of coverage provided by extended-coverage networks to the type of coverage analyzed in the content analysis, it would appear that extended coverage likely serves a greater educational function, which is a function judge interviewees identified as the greatest potential benefit of allowing electronic media access to the courts. Judges would retain discretion under the guidelines to limit the number of cameras in a particular case.

**Recommendation 6:** The research project staff recommends that media organizations be invited to submit to the Committee on Court Administration and Case Management proposals for constructing and regulating use of permanent camera facilities in federal courthouses.<sup>36</sup>

**Explanation:** Several interview and questionnaire respondents (including judges, court administrators, attorneys, and media representatives) expressed the view that electronic media coverage of proceedings would be least intrusive if cameras were installed permanently in federal courtrooms. Most who raised the issue suggested this be done at media expense.

## ***The Issue of Judge Opt-Out***

In our initial report, we brought the following issue to the attention of the Committee on Court Administration and Case Management without making a recommendation:

Another policy issue the committee and Conference may want to consider is the extent to which individual judges in a court should be able to opt out completely from allowing electronic media coverage in their courtrooms. Media representatives argue that the question of coverage should not depend on the fortuity of the judge to whom a case is assigned, and several judges in the pilot program expressed disappointment at the less-than-full participation of their court. On the other hand, judges who chose not to

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36. Subject to numerous assumptions set forth in more detail in our Supplemental Report to the Committee on Court Administration and Case Management (January 18, 1994), we estimate the cost of permanently equipping one federal courtroom for electronic media coverage of cases would be \$70,000–\$120,000. The *Supplemental Report* is on file with the Research Division of the FJC.

participate in the program have strong objections to coverage, as indicated by their questionnaire responses and comments.

**Explanation:** This issue is entirely one of policy and is not addressed by the research project. Research staff has no empirical basis on which to make a recommendation on the relative values of uniform practice and individual judge control.

# Appendix

## ***Guidelines for the Pilot Program on Photographing, Recording, and Broadcasting in the Courtroom***

(Approved by the Judicial Conference of the United States, September 1990.  
Revised June 1991.)

### **1. General Provisions.**

(a) Media coverage of federal court proceedings under the pilot program on cameras in the courtroom is permissible only in accordance with these guidelines.

(b) Reasonable advance notice is required from the media of a request to be present to broadcast, televise, record electronically, or take photographs at a particular session. In the absence of such notice, the presiding judicial officer may refuse to permit media coverage.

(c) A presiding judicial officer may refuse, limit, or terminate media coverage of an entire case, portions thereof, or testimony of particular witnesses, in the interests of justice to protect the rights of the parties, witnesses, and the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate by the presiding judicial officer.

(d) No direct public expense is to be incurred for equipment, wiring, or personnel needed to provide media coverage.

(e) Nothing in these guidelines shall prevent a court from placing additional restrictions, or prohibiting altogether, photographing, recording, or broadcasting in designated areas of the courthouse.

(f) These guidelines take effect July 1, 1991, and expire June 30, 1994.

### **2. Limitations.**

(a) Coverage of criminal proceedings, both at the trial and appellate levels, is prohibited.

(b) There shall be no audio pickup or broadcast of conferences which occur in a court facility between attorneys and their clients, between co-counsel of a client, or between counsel and the presiding judicial officer, whether held in the courtroom or in chambers.

(c) No coverage of the jury, or of any juror or alternate juror, while in the jury box, in the courtroom, in the jury deliberation room, or during recess, or while going to or from the deliberation room at any time, shall be permitted. Coverage of the prospective jury during voir dire is also prohibited.

### **3. Equipment and Personnel.**

(a) Not more than one television camera, operated by not more than one camera person and one stationary sound operator, shall be permitted in any trial court proceeding. Not more than two television cameras, operated by not more than one camera person each and one stationary sound person, shall be permitted in any appellate court proceeding.

(b) Not more than one still photographer, utilizing not more than one camera and related equipment, shall be permitted in any proceeding in a trial or appellate court.

(c) If two or more media representatives apply to cover a proceeding, no such coverage may begin until all such representatives have agreed upon a pooling arrangement for their respective news media. Such pooling arrangements shall include the designation of pool operators, procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. The presiding judicial officer may not be called upon to mediate or resolve any dispute as to such arrangements.

(d) Equipment or clothing shall not bear the insignia or marking of a media agency. Camera operators shall wear appropriate business attire.

### **4. Sound and Light Criteria.**

(a) Equipment shall not produce distracting sound or light. Signal lights or devices to show when equipment is operating shall not be visible. Moving lights, flash attachments, or sudden light changes shall not be used.

(b) Except as otherwise approved by the presiding judicial officer, existing courtroom sound and light systems shall be used without modification. Audio pickup for all media purposes shall be accomplished from existing audio systems present in the court facility, or from a television camera's built-in microphone. If no technically suitable audio system exists in the court facility, microphones and related wiring essential for media purposes shall be unobtrusive and shall be located in places designated in advance of any proceeding by the presiding judicial officer.

### **5. Location of Equipment and Personnel.**

(a) The presiding judicial officer shall designate the location in the courtroom for the camera equipment and operators.

(b) During the proceedings, operating personnel shall not move about nor shall there be placement, movement, or removal of equipment, or the changing of film, film magazines, or lenses. All such activities shall take place each day before the proceeding begins, after it ends, or during a recess.

**6. Compliance.**

Any media representative who fails to comply with these guidelines shall be subject to appropriate sanction, as determined by the presiding judicial officer.

**7. Review.**

It is not intended that a grant or denial of media coverage be subject to appellate review insofar as it pertains to and arises under these guidelines, except as otherwise provided by law.

**Guidelines Addendum:**

The Judicial Conference Committee on Court Administration and Case Management made a number of recommendations in a June 1991 report to the Judicial Conference Executive Committee. The recommendations, subsequently approved, include:

(1) That the Executive Committee endorse the [CACM] Committee's interpretation that the ban on the changing of film included in guideline 5(b), does not include the changing of video cassettes.

(2) That the Executive Committee approve an expansion of the experiment to permit the Southern District of New York to allow the use of two cameras during court proceedings.

(3) That the Executive Committee direct the Committee on Court Administration and Case Management to notify courts that strict adherence to the guidelines approved by the Conference is a condition for participation as a pilot.

# Tab 4

# Of Cameras and Courtrooms

Alex Kozinski & Robert Johnson\*

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## INTRODUCTION

You can't talk about cameras in the courtroom without talking about The Juice. And we'll get there. But this tale actually begins earlier, with a 1935 trial described by H.L. Mencken as "the greatest story since the Resurrection."<sup>1</sup> The defendant, Bruno

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<sup>1</sup> David A. Sellers, *The Circus Comes to Town: The Media and High-Profile Trials*, 71 LAW & CONTEMP. PROBS. 181, 182 (2008). The quote may be apocryphal, but it shows up in so many sources, always attributed to Mencken, that it seems irrelevant at this point whether he actually said it. He ought to have.

The story of broadcasting from the courtroom actually begins earlier, with the radio broadcast of the infamous Scopes monkey trial. See L. SPRAGUE DE CAMP, *THE GREAT MONKEY TRIAL* 160 (1968). Mencken was present for that trial, too. See, e.g., H.L. MENCKEN, *A RELIGIOUS ORGY IN TENNESSEE: A REPORTER'S ACCOUNT OF THE SCOPES MONKEY TRIAL* (2006). As Mencken tells it, the local residents didn't react kindly to the publicity in that case:

[W]hen the main guard of Eastern and Northern journalists swarmed down . . . then the yokels began to sweat coldly, and in a few days they were full of terror and indignation. . . . When the last of [the journalists] departs Daytonians will disinfect the town with sulphur candles . . . .

Hauptmann, was charged with kidnapping and murdering the one-year-old child of Charles Lindbergh, famous transatlantic aviator.<sup>2</sup> An estimated 700 reporters came to town for the trial, and over 130 cameramen jockeyed for pictures.<sup>3</sup> The gallery was unruly and vocal.<sup>4</sup> Messengers ran back-and-forth, updating journalists outside the room.<sup>5</sup> Spectators “posed for pictures in the witness chair and the jury box, carved their initials in the woodwork, and carried off spittoons and pieces of tables and chairs as souvenirs.”<sup>6</sup> Ginger Rogers and Jack Benny came to watch.<sup>7</sup> And footage of the spectacle played in movie theaters nationwide.<sup>8</sup>

Why should we care about any of this today? The first answer is that the Hauptmann trial inaugurated a profound distrust of cameras in the courtroom.<sup>9</sup> Just a few years later, the American Bar Association incorporated a ban on cameras into its canon of judicial ethics, opining that cameras “are calculated to detract from the essential dignity of the proceedings” and that they “create misconceptions with respect [to the court] in the mind of the public.”<sup>10</sup> With some variations, critics of courtroom cameras have been making the same arguments ever since: Cameras poison

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*Id.* at 96.

<sup>2</sup> See generally *State v. Hauptmann*, 180 A. 809 (N.J. 1935). For descriptions of the resulting trial, see David A. Anderson, *Democracy and the Demystification of Courts: An Essay*, 14 REV. LITIG. 627, 627–31 (1995); Richard B. Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 17–18 (1979); Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 793 (2004).

<sup>3</sup> Kielbowicz, *supra* note 2, at 18.

<sup>4</sup> See *Hauptmann*, 180 A. at 827.

<sup>5</sup> See *id.*

<sup>6</sup> Anderson, *supra* note 2, at 629.

<sup>7</sup> *Id.*

<sup>8</sup> Kielbowicz, *supra* note 2, at 18–19.

<sup>9</sup> See *id.* at 20–21. Interestingly, Kielbowicz concludes that the presence of cameras in the Hauptmann trial was not generally disruptive, and that accounts of photographers “clamber[ing] on counsel’s table and shov[ing] flashbulbs into the faces of witnesses” have been exaggerated. *Id.* at 17. Most film footage of the trial was actually taken after-the-fact, as witnesses would restate the highlights of their testimony after court had adjourned. *Id.* at 18. Kielbowicz concludes that the real problem was sensational media coverage more generally, and that banning cameras “was an inappropriate remedy for the problems made evident by the Hauptmann trial.” *Id.* at 23.

<sup>10</sup> *Canons of Judicial Ethics*, 62 ABA ANN. REP. 1123, 1134–35 (1937).

the atmosphere inside the courtroom, and they distort the public's view outside it.

The second possible answer to the question of why we should care about the Hauptmann trial today is that, truth be told, we shouldn't. Opponents of cameras in the courtroom posit a pre-Hauptmann Garden of Eden to which we should aspire to return: a small, rural courtroom, presided over by a stern but kindly judge vaguely reminiscent of Fred Gwynne in *My Cousin Vinny*.<sup>11</sup> The lawyers, the judges, the witnesses and the litigants are the only ones in the room, except, perhaps, a local journalist and a few spectators from the neighborhood. Everyone knows everyone. The room is open to the public, but this is effectively a quasi-secret proceeding. For the vast majority of the population—those lacking the time or resources to travel to this out-of-the-way destination—the trial will be experienced, if at all, via second-hand accounts in the press.

The Hauptmann proceedings shattered this world, if it ever existed, and many felt the change was for the worse. But a lot has happened in the seventy-five years since Bruno Hauptmann stood trial: We invented the ballpoint pen, the microwave and Velcro; swing music came and went; you (probably) were born. We live in the twenty-first century. After so long, the time has come to rethink our aversion to cameras in the courtroom. In fact, cameras have become an essential tool to give the public a full and fair picture of what goes on inside the courtrooms that they pay for.

## I. IN THE COURTROOM

The first criticism of cameras sounded by the ABA after the Hauptmann trial had to do with their effects inside the courtroom. Let's start there.

There was a time when cameras could legitimately be expected to disrupt the pre-Hauptmann ideal by creating chaos in the courtroom. As late as 1965, in an opinion that temporarily put the constitutional kibosh on courtroom cameras, the Supreme Court

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<sup>11</sup> MY COUSIN VINNY (Palo Vista Productions, Peter V. Miller Investment Corporation, Twentieth Century Fox Film Corporation 1992).

described a courtroom with “at least 12 cameramen,” “[c]ables and wires . . . snaked across the courtroom floor, three microphones . . . on the judge’s bench and others . . . beamed at the jury box and the counsel table.”<sup>12</sup> Not exactly a low profile operation; the parties conceded that “the activities of the television crews . . . led to considerable disruption.”<sup>13</sup> But a mere sixteen years later, in an opinion lifting the prohibition, the Court noted evidence that those concerns were “less substantial factors” in 1981.<sup>14</sup> Today’s cameras are small, easily concealed and capable of operating without obtrusive lighting or microphones. Even during the O.J. Simpson trial, widely considered a low point for cameras in the courtroom, nobody criticized the equipment or its operators as a physical distraction.<sup>15</sup>

Critics also worry that cameras disrupt the status quo and cause lawyers, judges, witnesses and jurors to alter their behavior.<sup>16</sup> And that’s undoubtedly true. Cameras in the courtrooms mean change, and if there’s one thing you can say about change, it’s that it changes things. Critics tend to focus on the negative aspects: Some lawyers will ham it up for the camera. Some jurors won’t be able to forget the camera is in the room. Some witnesses will feel extra nervous. And some judges won’t be able to resist the

<sup>12</sup> *Estes v. Texas*, 381 U.S. 532, 536 (1965).

<sup>13</sup> *Id.*

<sup>14</sup> *Chandler v. Florida*, 449 U.S. 560, 576 (1981).

<sup>15</sup> Judge Lance Ito carefully restricted the physical presence of the camera by limiting the press to a single shared camera, operated by Court TV, and by requiring that the camera be unobtrusive and remote-controlled. See M.L. Stein, *Camera Will Stay in O.J. Trial Courtroom*, EDITOR & PUBLISHER MAG., Nov. 12, 1994, at 18.

<sup>16</sup> See, e.g., *Estes*, 381 U.S. at 546 (“[N]ot only will the juror’s eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting . . . .”); *id.* at 547 (“The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable.”); *id.* at 548 (“Judges are human beings also and are subject to the same psychological reactions as laymen.”); *id.* at 570 (Warren, C.J., concurring) (“[T]he evil of televised trials . . . lies not in the noise and appearance of the cameras, but in the trial participants’ awareness that they are being televised.”); Andrew G.T. Moore II, *The O.J. Simpson Trial—Triumph of Justice or Debacle?*, 41 ST. LOUIS U. L.J. 9, 10 (1996) (“Unfortunately, the [O.J. Simpson] trial became a stage for the jury, lawyers and judge to pursue their own self-serving purposes. With the defense attorneys claiming their client was the real ‘victim,’ the prosecution losing sight of its duty to present evidence fairly, a judge totally smitten with his own self-generated celebrity status, and jurors being discharged for a variety of problems, including misconduct, the whole proceeding became an embarrassing reflection of the American legal system.”).

temptation to make themselves the central character in their own reality TV show. Take Judge Larry Seidlin (a.k.a. “Judge Larry”), a former Bronx cab driver who presided over the Anna Nicole Smith body custody hearing.<sup>17</sup> That judge’s antics—including lengthy and personal monologues,<sup>18</sup> crying while delivering the judgment<sup>19</sup> and making an appearance on *Larry King Live*<sup>20</sup>—inspired ridicule<sup>21</sup> and led some to speculate that he was hoping to launch his own “Judge Judy”-esque show.<sup>22</sup> Judges, it turns out, are sometimes human too.

It’s natural to focus on what can go wrong when things change, and to ignore what could go right. It’s much easier to anticipate problems than imagine improvements. But when it comes to cameras in the courtrooms, there may be significant benefits. The first of these is mentioned by no less of an authority than Judge Judy: “[C]itizens of this country pay for a very expensive judicial

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<sup>17</sup> *Anna Nicole Smith Judge Is a Former New York City Cabbie*, FOXNEWS.COM, Feb. 16, 2007, <http://www.foxnews.com/story/0,2933,252428,00.html>.

<sup>18</sup> *Judge from the Anna Nicole Case*, YOUTUBE, <http://www.youtube.com/watch?v=5zYalp0jJco&feature=related> (last visited Apr. 9, 2010).

<sup>19</sup> *Anna Nicole Smith Judge Breaks Down*, YOUTUBE, <http://www.youtube.com/watch?v=lknVuCKX9SI> (last visited Apr. 9, 2010).

<sup>20</sup> *Judge Larry Seidlin Meets Dannielyn*, YOUTUBE, <http://www.youtube.com/watch?v=nE5HX8Btd4> (last visited Mar. 21, 2010).

<sup>21</sup> See, e.g., *Buzz Fleischman Parodies Judge Larry Seidlin*, YOUTUBE, <http://www.youtube.com/watch?v=OM9mepY4BmE> (last visited Mar. 21, 2010) (“There’s no business like law business. Like no business I know. Everybody in my court will hear me. Every word I speak is made of gold.”); Seth, *‘Blubbing’ Judge Seidlin Dumps the Anna Nicole Problem on Her Daughter’s Guardian*, DEFAMER, GAWKER’S COLUMN FROM HOLLYWOOD (Feb. 22, 2007, 5:54 PM), <http://defamer.gawker.com/238993/blubbing-judge-seidlin-dumps-the-anna-nicole-problem-on-her-daughters-guardian> (referring to the “weepy-yet-wise” ruling of “a seemingly premenstrual Circuit Judge Larry Seidlin”).

<sup>22</sup> See, e.g., *All Rise!!! Judge Seidlin Says He’s Ready for TV*, TMZ.COM (Feb. 20, 2007), <http://www.tMZ.com/2007/02/20/all-rise-judge-seidlin-says-hes-ready-for-tv>. Judge Larry did reportedly tape a pilot episode after resigning from the bench. See Wanda J. DeMarzo, *Allegations Cloud Exit of Anna Nicole Judge*, MIAMI HERALD, June 30, 2007, at A1. But nothing ever came of it; last we heard of him, Judge Larry was embroiled in a nasty civil lawsuit brought by an elderly widow who claimed he bilked her out of her money. Bob Norman, *Witness: Judge Larry Seidlin Schemed for Widow’s Cash*, NEW TIMES BROWARD-PALM BEACH, Mar. 18, 2010, <http://www.browardpalmbeach.com/2010-03-18/news/witness-judge-larry-seidlin-is-lazy-and-a-schemer>. For more on the good judge’s antics, see generally TMZ.COM, <http://www.tMZ.com> (last visited Apr. 24, 2010).

system and they are entitled to see how it's functioning.”<sup>23</sup> The public can better monitor the judiciary—to ensure that its processes are fair, that its results are (generally) just and that its proceedings are carried out with an appropriate amount of dignity and seriousness—if it has an accurate perception of what happens in the courtroom.

Increased public scrutiny, in turn, may ultimately improve the trial process. Judges may avoid falling asleep on the bench or take more care explaining their decisions and avoiding arbitrary rulings or excessively lax courtroom management. Some lawyers will act with greater decorum and do a better job for their clients when they think that colleagues, classmates and potential clients may be watching. Some witnesses may feel too nervous to lie; others may hesitate to make up a story when they know that someone able to spot the falsehood may hear them talk. Conscience, after all, is that little voice in your head that tells you someone may be listening after all. And that someone might be the guy who was walking his dog on the golf course and knows for certain that you, the witness, couldn't possibly have been across town at eleven o'clock Wednesday morning. And some jurors may pay greater attention, and approach their task with greater seriousness, when they know their friends and family will be following the trial on TV and will be ready to second-guess the verdict after the trial is over.

There was a time when we had no idea how these changes would add up, and it may have been reasonable to assume that the risks outweigh the potential benefits.<sup>24</sup> But that time is long gone. In 1991, the Federal Judicial Center launched a three-year pilot program in the trial courts of six districts, and the appellate courts

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<sup>23</sup> *Larry King Live* (CNN television broadcast Feb. 17, 2010), available at <http://transcripts.cnn.com/TRANSCRIPTS/1002/17/lkl.01.html>.

<sup>24</sup> See *Chandler v. Florida*, 449 U.S. 560, 578–79 (1981) (“[A]t present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process.”). Prior to *Chandler*, the Court in *Estes* rejected the notion that its concerns were “purely hypothetical” based on the fact that the federal courts and all but two states banned cameras in the courtroom. *Estes v. Texas*, 381 U.S. 532, 550 (1965). As explained *infra*, that’s no longer the case.

of two circuits, that studied the question.<sup>25</sup> The study concluded that judges and attorneys reported “small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.”<sup>26</sup> In fact, the study concluded, the “attitudes of judges towards electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.”<sup>27</sup>

You can peruse the data from the pilot program in this article’s appendix, but here are a few of the highlights: Only 19% of lawyers thought cameras made witnesses even moderately more nervous (only 2% thought they had this effect to a very great extent);<sup>28</sup> only 10% of lawyers thought cameras even moderately distracted jurors (and none thought they had this effect to a very

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<sup>25</sup> See FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS (1994) [hereinafter FJC REPORT]. Specifically, the study involved courts in the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania and Western District of Washington, as well as the Second and Ninth Circuits. *Id.* at 4. The districts were selected for size, caseload and proximity to major media markets, as well as to provide a cross-section of regions and circuits. *Id.*

<sup>26</sup> *Id.* at 7. The program didn’t directly survey witnesses and jurors, as they lack the experience needed to meaningfully compare their experience to a courtroom without cameras, but it did survey the opinions of lawyers and judges regarding the effect on other participants. *Id.* at 8. For instance, only 19% of judges thought cameras made witnesses less willing to appear in court to even “a moderate extent;” and the same percentage thought cameras even moderately distracted witnesses. *Id.* at 14. The Federal Judicial Center explained these findings, in part, by noting that “increasing use of video depositions” meant that “many witnesses are already ‘used to having cameras poked in their faces.’” *Id.* at 25.

Judges also reported that cameras had “no effect or a positive effect on the performance and behavior of counsel.” *Id.* The most negative finding appears to be that 27% of judges thought cameras made counsel at least moderately more theatrical, but significantly only 7% saw this effect to a “great” or “very great” extent. *Id.* at 15. A significant majority, 66%, saw this effect only to “little or no” or “some” extent. *Id.* And judges also reported some positive effects: For instance, 34% thought cameras made attorneys at least moderately more courteous. *Id.*

The impact on judges was also minimal or positive. At least some judges reported positive effects: 27% thought cameras made them at least moderately more attentive, and 22% thought cameras made them at least moderately more courteous. *Id.* Judges also resoundingly rejected the idea that the presence of cameras had any impact on their own decisionmaking. *Id.*

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 20.

great extent);<sup>29</sup> 25% of judges thought cameras at least moderately increased jurors' sense of responsibility for their verdict (although none saw this to a very great extent);<sup>30</sup> and 32% of judges thought cameras made attorneys at least moderately better prepared (7% thought they had this effect to a very great extent).<sup>31</sup> Anyone who thinks that allowing cameras in the courtroom will bring the end of civilization as we know it should give those numbers (and the other numbers in the appendix) a second look.

Ever since a study by the Florida judiciary concluded that "on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings,"<sup>32</sup> we've also seen a growing presence of cameras in state courts.<sup>33</sup> In fact, perhaps the most telling statistic about cameras in the courtroom is this one: After decades of experience, forty-four states now allow at least some camera access to trial courts.<sup>34</sup> Many of those states,

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 14.

<sup>31</sup> *Id.* at 15.

<sup>32</sup> *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979); *see also* *Chandler v. Florida*, 449 U.S. 560, 565 (1981).

<sup>33</sup> In 1981, the Supreme Court decided a case relaxing constitutional restrictions on cameras in the courtroom. *Chandler*, 449 U.S. at 582–83. The case arose after Florida, following a limited pilot program, approved television coverage of court proceedings by a single, fixed camera, without artificial lighting, using the court's own audio equipment. *Id.* at 566. The Supreme Court expressed some concerns with cameras, but stated that the defendants in *Chandler* had "offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage." *Id.* at 579.

The ABA revised its model code of judicial ethics to relax the prohibition on cameras one year later, ABA CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982), and in 1989, it removed the ethical provisions relating to electronic media altogether. *See* ABA COMM. ON ETHICS & PROF'L RESPONSIBILITY, REPORT TO THE HOUSE OF DELEGATES § III (1990). Around the same time, in federal courts, the Judicial Council of the United States relaxed its position on cameras—particularly with respect to appellate arguments. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 17 (1996) [hereinafter JUDICIAL CONFERENCE REPORT].

<sup>34</sup> *See Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, [http://www.rtdna.org/pages/media\\_items/cameras-in-the-court-a-state-by-state-guide55.php](http://www.rtdna.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php) (last visited Feb. 18, 2010). All fifty states allow some form of camera access, but Illinois, Louisiana, Nebraska, New York and South Dakota generally limit access to appellate courts, while Utah limits access to still cameras. *Id.*; *see also* LORRAINE H. TONG, CONG. RESEARCH SERV., TELEVISION SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES 17 (2006). At least, that's where

including California, leave the question of access largely to the discretion of the presiding judge.<sup>35</sup> The decisions of so many states, over so many years, tell us more than any survey data ever could.

And, if that's not enough for you, empirical evidence from the states is also positive. After reviewing multiple studies of state judiciaries, the Federal Judicial Center concluded that "for each of several potential negative effects of electronic media on jurors and witnesses, the majority of respondents indicated the effect does not occur or occurs only to a slight extent."<sup>36</sup> For instance, 90% of surveyed jurors in Florida and New Jersey thought cameras "had 'no effect' on their ability to judge the truthfulness of witnesses;"<sup>37</sup> "most witnesses reported that the presence of electronic media had no effect on their testimony;"<sup>38</sup> and "most jurors . . . indicated they were not distracted or were distracted only at first" by the presence of cameras.<sup>39</sup> Anecdotally, witnesses, judges, jurors and attorneys report that once a trial gets under way they tend to forget the cameras are there.<sup>40</sup>

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things stood in 2007, when the RTDNA conducted its survey. Since then, Nebraska has launched a pilot program experimenting with cameras in its trial courts. *See* Press Release, Neb. Supreme Court, Supreme Court Authorizes Television News Cameras in Trial Courts (Mar. 13, 2008), *available at* <http://www.supremecourt.ne.gov/press/2008-releases/tvs-trial-courts-first-dist.pdf>.

<sup>35</sup> *Cameras in the Court: A State-by-State Guide*, *supra* note 34. At least one court has found that bans on cameras in the courtroom violate the freedom of the press. *See* *People v. Boss*, 701 N.Y.S.2d 891, 895 (N.Y. Sup. Ct. 2000). Another court has indicated that they might someday, but don't just yet. *See* *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 23–24 (2d Cir. 1984). Of course, that was twenty-six years ago.

<sup>36</sup> FJC REPORT, *supra* note 25, at 42. The report summarized data from Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio and Virginia. *Id.* at 38; *see also* MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 62–64 (1998) (surveying studies and concluding that "all the studies arrived at the same conclusion: that camera coverage generally did not affect the proceedings negatively").

<sup>37</sup> FJC REPORT, *supra* note 25, at 39.

<sup>38</sup> *Id.* at 40.

<sup>39</sup> *Id.* at 41.

<sup>40</sup> *See* COHN & DOW, *supra* note 36, at 67 ("The authors asked dozens of judges, lawyers, witnesses and jurors who had participated in televised proceedings a central question: did the camera make a difference? . . . [M]any who did admit a difference had a common response: they felt the camera's impact initially and soon forgot about it.").

Nobody seriously believes that cameras should be allowed for every moment of every trial. Where there are legitimate concerns with witness safety, or other special circumstances, cameras can be turned off or witnesses' faces can be blurred. As with any question of courtroom management, judges may be trusted to use their good sense and judgment to ensure a fair trial and balance competing concerns. But decades of experience in state courts, and ample empirical evidence, simply does not support a blanket prohibition on cameras in the courtroom.

Those who say that cameras will change the atmosphere of the courtroom must do more than blindly oppose the new and the different. The pre-Hauptmann ideal isn't enshrined in any rule book as *The Way Things Ought to Be*. Things change, and that's not a bad thing. Otherwise, why not reach back further, to a time when every juror was also a neighbor and close acquaintance of the defendant? I'm sure that system had its advantages. Or why not even earlier, to a time when we tried defendants by ordeal? Was it really so bad? There's no reason to think that allowing cameras in the courtroom will prove any worse than all the changes that have come before, and there's plenty of reasons to think it will be a good thing. The premise that transparency and accountability are good for institutions has animated our traditional preference for open courtrooms, and there's no reason to turn our back on it today.

But, you're probably thinking: What about O.J.? The case against cameras in the courtroom may begin with Hauptmann, but it ends with O.J. And so does the very brief story of cameras in the federal courts. The Judicial Conference of the United States, the main policymaking body for the federal judiciary, appeared in the early 1990s to be on the verge of approving cameras in both the circuit and district courts.<sup>41</sup> And then Judge Lance Ito, after some initial hesitation, decided to allow a single pool camera operated by Court TV into the O.J. Simpson courtroom.<sup>42</sup> An estimated 150

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<sup>41</sup> See, e.g., JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 103-04 (1990); FJC REPORT, *supra* note 25, at 43.

<sup>42</sup> Stein, *supra* note 15, at 18. For a description of the limits Judge Ito placed upon the camera, see *supra* note 15. Judge Ito also prohibited the camera from filming the jury,

million people watched the verdict on live TV; smaller, but still significant, numbers watched the rest of the trial.<sup>43</sup> The spectacle was widely thought to be a disaster and a circus, many blamed the camera, and plans for cameras in the federal district courts were put on ice, and largely remain there today<sup>44</sup>—with the notable exception of two districts in New York.<sup>45</sup>

A lot of people have called the post-O.J. backlash an overreaction.<sup>46</sup> But I won't deny that the camera in the O.J. courtroom changed that proceeding in a host of ways. Every person in that courtroom, for better or worse, undoubtedly believed

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and Court TV had the feed on a seven-second delay so that an employee could monitor to see that no errors occurred. Kim Cobb, *Ito Furious over Snafu with Video*, HOUSTON CHRON., Jan. 25, 1995, at A6. That system wasn't always successful, and one juror who leaned forward in her seat entered the camera's eye for eight-tenths of a second. *Id.* Judge Ito was furious. *Id.*

<sup>43</sup> Jefferson Graham, *O.J. Verdict Watched by 150 Million*, USA TODAY, Oct. 5, 1995, at 1D. This was more people than watched either the JFK funeral or the Apollo 13 moon landing. *Id.* The most-watched Super Bowl ever, in 2010, drew a paltry 106.5 million viewers. Neil Best, *Super Bowl New King of TV*, NEWSDAY, Feb. 9, 2010, at A05.

<sup>44</sup> Compare FJC REPORT, *supra* note 25, at 43, with JUDICIAL CONFERENCE REPORT, *supra* note 33, at 17. Dean Erwin Chemerinsky is on record with a telling anecdote: "There was . . . a panel discussion after the O.J. Simpson case. I was standing in the back of the room, and a judge said, 'Good thing the O.J. case happened, we'll never now have to deal with cameras in our Federal Courts.'" Symposium, *Justice in the Spotlight*, 21 T.M. COOLEY L. REV. 337, 349 (2004); see also Henry J. Reske, *Courtroom Cameras Face New Scrutiny*, 81 ABA J. 48D (1995).

<sup>45</sup> CIV. R. 1.8 (S.D.N.Y. 2009); CIV. R. 1.8 (E.D.N.Y. 2009).

<sup>46</sup> As Dalia Lithwick has put it, "Ultimately, the way in which the O.J. Simpson case differed from the celebrity trials that came before and after has little to do with the fact that the television cameras invited us in the courtroom, and everything to do with the fact that we showed up. And stayed." Dahlia Lithwick, *We Won't Get O.J.-ed Again*, SLATE (June 9, 2004), <http://www.slate.com/id/2102084/>; see also Symposium, *Justice in the Spotlight*, *supra* note 44, at 349 (statement of Dean Chemerinsky) ("I truly believe that when the jury was in the courtroom, the lawyers did not try the case any differently than if there had not been a camera in the courtroom."); Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1519 (1996) ("[T]he courtroom camera . . . has been singled out as the purported cause of every imaginable evil associated with the trial."); Jane Kirtley, *Forget O.J.: Cameras Belong in Court*, AM. JOURNALISM REV., Oct. 1995, at 66 ("[C]ameras in the court [are] unfairly labeled as the perpetrator, when the fault, if there is one, rests with reporting practices that are as old as journalism itself."); Scott Libin, *OJ Simpson and the Backlash Against Cameras in Court*, POYNTER ONLINE (Oct. 1, 1999), [http://www.poynter.org/content/content\\_view.asp?id=5477&sid=14](http://www.poynter.org/content/content_view.asp?id=5477&sid=14) ("[W]hat disgusted so many people about the OJ Simpson case would have happened with or without cameras in court. In fact, it might well have been worse.").

he was part of the biggest television event of all time. Not being omniscient, I won't try to imagine exactly how the trial would have looked without the dynamic created by that belief. Maybe Judge Ito would have kept firmer control of the proceedings, or maybe he would have felt less reason to exert any control at all. Maybe some lawyers would have acted with greater dignity; maybe some would have felt even greater license to engage in bad behavior.

But one thing is certain: However all the changes added up, it's dollars to doughnuts the jury would still have voted to acquit, although the public wouldn't be in nearly as good a position to judge the rightness or wrongness of that verdict or to evaluate the process that led the jury to reach it. We'd all assume the jury had its reasons; after all, we weren't there to see the whites of Kato Kaelin's eyes. We'd assume the judge, lawyers and other trial participants did their level best; the defense attorneys were latter-day Perry Masons, the prosecutors were Robert Jackson personified and the jurors were twelve little Solomons.<sup>47</sup> O.J. would be a celebrity in good standing, acquitted by an impartial jury of his peers and rewarded with his own reality TV show and a sponsorship deal for the Ford Bronco. Some might well prefer this model of the trial-as-black-box over the knowledge that somebody they believe committed murder is (or at least was) walking free, writing memoirs and pawning off his sports memorabilia. It's the "ignorance is bliss" school of justice.

So of course we blame the camera, just like generations before us have always shot the messenger. We blame the camera for letting us see the evidence, so that we could know we disagree with the way the case was decided. We blame the camera for exposing us to the lawyers, the judge and the witnesses—all of whom have been accused of falling short. We blame the camera for making the entire trial less legitimate, when in fact the only thing that tainted the trial was the trial itself. Better for the whole thing to have proceeded in sleepy obscurity, we say. At least then,

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<sup>47</sup> In fact, perhaps they were. See *United States ex rel. Balzer Pac. Equip. Co. v. Fid. & Deposit Co. of Md.*, 895 F.2d 546, 555 n.5 (9th Cir. 1990) (Kozinski, J., dissenting in part).

if the defense decided to ask for nullification, and the jury decided to oblige, we wouldn't have to see it in such vivid detail.

The problem with this response to the O.J. trial is that the public has a right and even an obligation to know the truth. We can't bury our heads in the sand when it comes to matters as important as the administration of justice; that's the very reason trials are public. If the jury acquits a guilty man, the public absolutely should be upset; nothing says a man found not guilty by a jury has a right to be considered innocent by the world at large. If prosecutors misbehave, or judges fail to do their job, the public should express its disapproval and demand change. And if defense attorneys cross an ethical line, they should pay the price in diminished reputation. As Justice Brandeis put it, "Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."<sup>48</sup> If we don't like the way courtrooms look on camera, the solution is to change the courtrooms, not toss out the cameras. At least that's how a free and open society ought to work.

## II. OUTSIDE THE COURTROOM

Which brings me to the second concern advanced by the ABA after the Hauptmann trial: that cameras "create misconceptions with respect [to the court] in the mind of the public."<sup>49</sup> Cameras in the courtroom have been accused of sensationalizing courtroom proceedings and of giving the public a less accurate description than might be gleaned from a written report. If the goal of camera access is increased transparency and public access, this argument goes, cameras are actually counterproductive.

Once again, we have to be careful to avoid turning cameras into scapegoats. We know that a trial can be transformed into a

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<sup>48</sup> *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (Nat'l Home Library Found. ed. 1933)) (internal quotation marks omitted); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (Burger, C.J.) ("[A] trial courtroom also is a public place where the people generally . . . have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.").

<sup>49</sup> *Canons of Judicial Ethics*, *supra* note 10, at 1135.

spectacle, and the rights of a defendant unfairly prejudiced, without any help from cameras in the courtroom. Consider *Sheppard v. Maxwell*,<sup>50</sup> the trial of a Cleveland surgeon for the murder of his wife (and the inspiration for *The Fugitive*).<sup>51</sup> In that case, newspapers did the job—publishing articles that “emphasized evidence that tended to incriminate Sheppard” and “portray[ing] Sheppard as a Lothario” based on evidence that was never introduced in court.<sup>52</sup> The Supreme Court concluded that Sheppard’s trial compared unfavorably to a proceeding that *had* been filmed and broadcast: “The press coverage of the *Estes* trial was not nearly as massive and pervasive as the attention given . . . to Sheppard’s prosecution.”<sup>53</sup> Likewise, in the O.J. Simpson trial, many of the worst media practices—including sensationalist coverage and excessive pretrial publicity—had nothing to do with cameras.<sup>54</sup> Sensational reporting, and its effect on the public, is the inevitable price we pay for public trials.

Sensational press coverage may be unfair to individuals caught in the justice system, and it may complicate the job of the court, but it’s also essential that the public have a full and fair understanding of what goes on in court.<sup>55</sup> If the public instead

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<sup>50</sup> 384 U.S. 333 (1966). There, a coroner’s inquest into the murder was filmed and broadcast, but the trial wasn’t. *Id.* at 339, 343–44. During the trial, cameramen did wait to catch people entering and leaving the courtroom. *Id.* at 344.

<sup>51</sup> THE FUGITIVE (Warner Brothers 1993).

<sup>52</sup> *Sheppard*, 384 U.S. at 340.

<sup>53</sup> *Id.* at 353–54. The Court also noted that “[t]he *Estes* jury saw none of the television broadcasts from the courtroom,” because it was sequestered, whereas “the *Sheppard* jurors were subjected to newspaper, radio and television coverage of the trial” even though there were no cameras in the courtroom. *Id.* at 353.

<sup>54</sup> When Judge Ito approved the presence of cameras, he noted that he had concerns about the media’s coverage, but that the cameras were innocent of wrongdoing. See Michael Fleeman, *Ito Allows Cameras in Simpson Trial*, ASSOCIATED PRESS, Nov. 7, 1994; Sally Ann Stewart, *Ito Allows Televised Trial*, USA TODAY, Nov. 8, 1994, at 1A.

For a detailed description of the excesses of the O.J. Simpson trial, see Moore, *supra* note 16. Moore concludes that the Los Angeles D.A. gave out so many sensational details about the crime before trial, including false information, that he “fail[ed] in his professional responsibilities,” *id.* at 12, and that defense lawyers improperly engaged in a “publicity blitz to influence potential jurors” before the beginning of trial, *id.* at 19.

<sup>55</sup> See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980); Symposium, *Justice in the Spotlight*, *supra* note 44, at 351 (statement of Dean Chemerinsky) (“[F]ree press is quite complementary to a fair trial. The opposite of a free press, closed

lacks the tools to understand why cases are decided as they are, those outcomes will come to seem arbitrary and capricious, and the public will lose respect for our system of justice. My former boss, Chief Justice Burger, put it nicely: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>56</sup>

What the guarantee of an open trial means has changed over the years. There was a time, back in the pre-Hauptmann Garden of Eden, when the cost and time required to travel to see a distant proceeding was so great that few, if any, would ever undertake it. Today, even if a trial is held in California, residents of New York are able to exercise their right to see it, at least so long as they are willing to shell out the cost of a cross-country flight. Trials have opened in other ways, as well, as observers have begun twittering and live blogging from the gallery. Outside the federal courts—in Congress, state courts and most other public institutions—the definition of a “public” proceeding has also come to include cameras. If courts fail to provide forms of access that accord with those changing expectations,<sup>57</sup> limits on access that once seemed perfectly reasonable will appear increasingly secretive, and judicial proceedings will lose a measure of the public’s respect as a result. At a time when we’ve had gavel-to-gavel coverage of both houses of Congress for over two decades,<sup>58</sup> it’s hard to explain why the

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proceedings, leads to the star-chamber type abuses that occurred during the Middle Ages.”).

<sup>56</sup> *Richmond Newspapers*, 448 U.S. at 572.

<sup>57</sup> See, e.g., Editorial, *Cameras in Our Federal Courts—The Time Has Come*, 93 JUDICATURE 136, 172 (2010); Editorial, *A Step Forward for Cameras in Court*, STAR TRIB. (Minneapolis, Minn.), Feb. 21, 2009, at 14A; Editorial, *Cameras in the Courtroom: It’s Time to Shine More Light into the Federal Courthouse*, ROANOKE TIMES, Mar. 17, 2010, at A16; Editorial, *Cameras in the Courtroom*, ST. PETERSBURG TIMES, Oct. 4, 2005, at 12A; Editorial, *Cameras in the Courts*, N.Y. TIMES, May 15, 2007, at A18; Editorial, *Cameras Open Courts to Public*, NEW HAVEN REG., Apr. 16, 2007, at A6; Editorial, *Case Made for Cameras in the Courts*, DAILY HERALD (Chi., Ill.), Mar. 12, 2008, at 14; Editorial, *Expand Court Access by Allowing Cameras*, DES MOINES REG., Nov. 8, 2007, at A14; Editorial, *Seeing for Ourselves*, N.Y. DAILY NEWS, Feb. 3, 2010, at 24; Editorial, *The Case for Cameras*, L.A. TIMES, May 26, 2009, at A20; Editorial, *Trial Shows Value of Cameras in Court*, LINCOLN J. STAR, May 24, 2008, at B5.

<sup>58</sup> *Marking 30 Years Covering Washington Like No Other*, C-SPAN.ORG, <http://www.c-span.org/30Years/default.aspx> (last visited Apr. 21, 2010) (noting that C-

prospect of broadcasting a judicial trial to a courtroom across the country merits the emergency intervention of the Supreme Court.<sup>59</sup>

At the same time, change doesn't have to be a suicide march. Trials would be more open and transparent if they were held in Madison Square Garden, and that would certainly be technologically feasible. Yet the Supreme Court has said that a defendant "is entitled to his day in court, not in a stadium."<sup>60</sup> If cameras in the courtroom rob criminal defendants and civil litigants of their dignity, and promote a public perception of trials as more about sensational entertainment than a sober search for truth, courts may be justified in parting ways with other public institutions, and public expectations, to exclude cameras in favor of forms of reporting that better advance respect for the rule of law and the guarantee of a fair trial.

Unlike concern with the effect of cameras inside the courtroom, this argument retains real bite after the O.J. experience. Consider footage of the verdict (available now on YouTube).<sup>61</sup> It's high drama: As the courtroom waited, the camera zoomed in for an intense close-up of O.J.'s face, and remained there for the agonizing moments before—and during—the verdict. Because the camera was positioned above the jury, O.J. appeared to gaze ominously into the camera's eye. Ron Goldman's sister began to cry, and the camera pivoted for a close-up of her face. From there, to the stunned faces of the prosecution. And back to Ron Goldman's sister. As the Supreme Court has said, "[t]he television camera is a powerful weapon" and "inevitable close-ups of [the accused's] gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities [and] his dignity."<sup>62</sup> That's to say nothing of the impact on the victim's family, or the public perception of a trial depicted in such a manner.

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SPAN has televised 28,603 hours of live U.S. House debate since March 19, 1979 and that C-SPAN2 has televised 26,954 hours of live U.S. Senate debate since June 2, 1986).

<sup>59</sup> See *Hollingsworth v. Perry*, 130 S. Ct. 705, 709, 715 (2010) (per curiam).

<sup>60</sup> *Estes v. Texas*, 381 U.S. 532, 549 (1965).

<sup>61</sup> See *The O.J. Simpson Trial Verdict Is Revealed* (Oct. 3, 1995), YOUTUBE, [http://www.youtube.com/watch?v=jED\\_PB5YQgk](http://www.youtube.com/watch?v=jED_PB5YQgk) (last visited Feb. 16, 2010).

<sup>62</sup> *Estes*, 381 U.S. at 549.

No doubt many would prefer to return to the pre-Hauptmann ideal of the stalwart beat reporter, alone in the courtroom with his pad and pencil. I'm thinking of journalists like the Supreme Court's Linda Greenhouse and Nina Totenberg, but at the trial level; repeat-players in the courtroom who have incentives to maintain a sterling reputation, who know and understand what they're seeing and who earn their living making courtroom drama intelligible to a lay audience. The trusty beat reporter doesn't sensationalize, if only because it will sour his relationship with the court. And he knows how to give an account of judicial proceedings for a lay audience that is in some ways superior to a seat inside the courtroom. When the public sees a trial for itself, or through the lens of the camera, there's always a risk of misunderstanding: The public may mistake zealous advocacy for obstruction of justice, or vice versa. A judge's impartial ruling, based on binding law, may seem arbitrary or even biased; when a defendant prevails on an obscure legal ground like immunity or jurisdiction, some will see injustice. On the other hand, the trusty beat reporter can fairly and accurately explain the trial so as to educate the public while avoiding misunderstanding.

Sounds good, and if the choice were between that and the O.J. media circus, we would have a hard choice indeed. But, in truth, we may never have had the ability to restrict media coverage to these super-journalists. Such reporters have occasionally walked the earth, but print media isn't uniformly composed of the best of the best. The *Sheppard* case, for example, illustrates what can happen when newspaper journalism goes bad. And even if print media were all goodness and light, banning cameras from the courtroom wouldn't prevent TV coverage. Many people, disappointed at not being able to watch the recent trial of Michael Jackson, watched a daily reenactment on the E! network instead.<sup>63</sup> And the TV media also can't be stopped from capturing

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<sup>63</sup> Tom Shales, *Holding E! in Contempt for Trial Reenactment*, WASH. POST, Mar. 2, 2005, at C1 (describing "a bargain-basement reenactment" that "does have a sticky irresistibility, like a glazed doughnut that's gone all gooey"); see also Geoffrey A. Fowler, *Prop 8 Trial Testimony Gets a Marisa Tomei Makeover*, WALL ST. J. L. BLOG (May 13, 2010, 3:43 PM), <http://blogs.wsj.com/law/2010/05/13/prop-8-trial-testimony-gets-a-marisa-tomei-makeover/>; *Prop 8 Trial Re-enactment, Day 1 Chapter 1*, YOUTUBE, [http://www.youtube.com/watch?v=tDmA\\_n5yGS4&NR=1](http://www.youtube.com/watch?v=tDmA_n5yGS4&NR=1) (last visited Mar. 29, 2010).

sensationalist footage of the defendant or the victims outside the courtroom.<sup>64</sup>

The trusty beat reporter is also proving increasingly elusive, and will only become more so in the future. We've seen a long, slow decline in the newspaper industry, and it recently got a lot worse: In 2009, over one hundred newspapers closed, and over 10,000 newspaper jobs were lost.<sup>65</sup> There's no reason to think those papers and jobs will come back; if anything, the state of the print industry is only going to decline further. Craig killed the classifieds; newspaper.com cannibalized The Newspaper; JDate wooed away the personals; Monster devoured help wanted; and the fastest way to get the news is through the blogosphere (or, better yet, the Twitterverse).<sup>66</sup> The old business model is no longer sustainable, and as newspapers decline the beat reporter will disappear along with them.

Instead, we're witnessing the rise of a much more diffuse style of reporting. Consider the recent criminal prosecution of the chemical company W.R. Grace (of *A Civil Action*<sup>67</sup> fame) for mining practices that allegedly caused a lung cancer outbreak in

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<sup>64</sup> One court, fearing that a ban on photographing the defendant in court would be circumvented by photographing the defendant *out* of court, tried to ban all photography of the defendant in the judicial complex; the New Mexico Supreme Court found that didn't fly. *State ex rel. N.M. Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982). Another court, frustrated with bright lights and pandemonium in the corridors of the courthouse, tried to ban cameras there; the Florida Supreme Court thought that violated the First Amendment too. *In re Adoption of Proposed Local Rule 17*, 339 So. 2d 181 (Fla. 1976); *see also* *Dorfman v. Meiszner*, 430 F.2d 558 (7th Cir. 1970) (per curiam) (striking down a ban on all photography within federal building containing a courtroom).

<sup>65</sup> Preethi Dumpala, *The Year the Newspaper Died*, BUS. INSIDER (July 4, 2009), <http://www.businessinsider.com/the-death-of-the-american-newspaper-2009-7>; *see also* Stephanie Chen, *Newspapers Fold as Readers Defect and Economy Sours*, CNN.COM, Mar. 19, 2009, <http://www.cnn.com/2009/US/03/19/newspaper.decline.layoff/index.html>.

<sup>66</sup> *See* Megan McArdle, *Old Media Blues*, ATLANTIC, July 1, 2009, [http://meganmcardle.theatlantic.com/archives/2009/07/old\\_media\\_blues.php](http://meganmcardle.theatlantic.com/archives/2009/07/old_media_blues.php) (adding that "Google took those tiny ads for weird products. And Macy's can email its own damn customers to announce a sale.").

<sup>67</sup> *A CIVIL ACTION* (Touchstone Pictures, Paramount Pictures, Wildwood Enterprises, Scott Rudin Productions 1998).

Libby, Montana.<sup>68</sup> The trial was in Missoula, but the prosecution requested the creation of an overflow room in Libby—a four-hour drive away.<sup>69</sup> The court denied the request in light of the ban on cameras in federal criminal trials.<sup>70</sup> But the result wasn't that members of the Libby community had to wait patiently for a trusted beat reporter to file an evening dispatch. The trial was covered in real-time via Twitter, at feeds such as *msIngracetri* (a local print journalist),<sup>71</sup> *UMGraceCase* (a group of students from the University of Montana),<sup>72</sup> *wrgracetri* (a local TV station)<sup>73</sup> and *asinvestigates* (an investigative reporter).<sup>74</sup>

Some of this coverage may have been provided by impartial journalists, but much of it wasn't. Tweets from *asinvestigates*, for instance, were stridently pro-prosecution. When the defense seemed to score points, *asinvestigates* suggested that “Grace lawyers team[ed] up to stifle government expert witness.”<sup>75</sup> Or, in another tweet: “Second week of Grace trial ends with defense using usual tricks to discredit physicians.”<sup>76</sup> On the other hand, when the prosecution scored points it was a triumph of justice: “Defense fails to prove that EPA’s top emergency response wizard was a cowboy who made bad decisions.”<sup>77</sup> *Asinvestigates* also

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<sup>68</sup> See generally *Indictment, United States v. W.R. Grace*, No. CR 05-07-M-DWM (D. Mont. Feb. 7, 2005).

<sup>69</sup> Order at 1–2, *United States v. W.R. Grace*, No. CR 05-07-M-DWM (D. Mont. May 12, 2006).

<sup>70</sup> *Id.* at 2. The prosecution argued that this was necessary to comply with a federal statute affording victims “[t]he right not to be excluded from any public proceeding.” *Id.* (citing 18 U.S.C. § 3771(a) (2006)). The district court reasoned, however, that the “right accorded crime victims is the right to be physically present at court proceedings, not the right to have court proceedings broadcast.” *Id.* at 3.

<sup>71</sup> Profile of *msIngracetri*, TWITTER, <http://www.twitter.com/msIngracetri> (last visited Apr. 5, 2010).

<sup>72</sup> Profile of *UMGraceCase*, TWITTER, <http://www.twitter.com/UMGraceCase> (last visited Apr. 5, 2010). For an assessment of the University of Montana students’ coverage, see Nadia White, *UM’s Grace Case Project*, MONT. LAW., Apr. 2010, at 6.

<sup>73</sup> Profile of *wrgracetri*, TWITTER, <http://www.twitter.com/Wrgracetri> (last visited Apr. 14, 2010).

<sup>74</sup> Profile of *asinvestigates*, TWITTER, <http://www.twitter.com/asinvestigates> (last visited Apr. 14, 2010).

<sup>75</sup> Tweet of *asinvestigates*, TWITTER (Mar. 9, 2009, 9:20 PM), <http://www.twitter.com/asinvestigates>.

<sup>76</sup> *Id.* (Mar. 4, 2009, 10:54 PM).

<sup>77</sup> *Id.* (May 5, 2009, 7:59 PM).

made his feelings about the judge quite clear: “A statue of Lady Justice in Judge Molloy’s courtroom would need earplugs along with her blindfold.”<sup>78</sup> Without the context of a video recording, the public had no way to evaluate the truth of these observations.

Because the internet gives a platform to everybody who cares enough to make his voice heard, it’s often inevitable that the loudest voices will be those who care the most. During a recent medical malpractice trial in Massachusetts, a blogger named “Dr. Flea” provided a strongly pro-defense account.<sup>79</sup> The blog attracted a sympathetic following<sup>80</sup> and even won an award as one of the best medical blogs on the internet.<sup>81</sup> Surprise: It turned out that Dr. Flea was none other than the defendant.<sup>82</sup> It may not usually be litigants themselves who take to the blogs, but members of the public who feel some sort of a personal stake in a trial—because they know a litigant or victim, because they have had some similar experience or simply because they feel passionately about the issue—will frequently use the internet to disseminate their views. And they won’t always make their biases explicit.

Let’s be clear: There’s absolutely nothing wrong with opinionated people making their opinions known; it is every citizen’s right and privilege to express discontent with the way a trial has been handled, or to declare a firm belief that a defendant is guilty as sin (or innocent as virtue) and deserves to be convicted (or not). The problem arises when such coverage becomes the public’s primary means of experiencing a trial and—in particular—when the public lacks the tools to evaluate those

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<sup>78</sup> *Id.* (Apr. 22, 2009, 8:20 AM).

<sup>79</sup> See Sellers, *supra* note 1, at 193; Jonathan Saltzman, *Blogger Unmasked, Court Case Upended*, BOSTON GLOBE, May 31, 2007, at A1.

<sup>80</sup> See, e.g., *Dr. Flea Disappears*, DOCTOR ANONYMOUS (May 16, 2007, 1:01 AM), <http://doctoranonymous.blogspot.com/2007/05/dr-flea-disappears.html> (“I’m going to very much miss Dr. Flea and his witty rantings. Dr. Flea, if you’re still out there, you have an open invitation to guest post on my blog any time. Best of luck in your court case. We’re all pulling for you.”).

<sup>81</sup> See *2006 Medical Weblog Awards: Meet the Winners!*, MEDGADGET (Jan. 19, 2007), [http://medgadget.com/archives/2007/01/2006\\_medical\\_we.html](http://medgadget.com/archives/2007/01/2006_medical_we.html).

<sup>82</sup> Saltzman, *supra* note 79. In the end, the doctor’s approach wasn’t the most successful; Dr. Flea ridiculed the jury for dozing off during trial, and when Dr. Flea’s identity was revealed in court the defendant quickly settled the case for a substantial sum. *Id.*

opinions. If partisans dominate the public's understanding of what goes on inside the courtroom, the public will become more likely to mistake a correct verdict for a miscarriage of justice, or to miss a genuinely unjust verdict because the wrongly prevailing party made a lot of (metaphorical) noise online. That can only erode the public's respect for the business of the courts and, ultimately, the public's regard for the rule of law.

The trusty beat reporter can't help us out of this new paradigm; even if he weren't disappearing, no single voice could rise out of the online din to establish itself as sufficiently authoritative to serve that function today. Nor is the solution to keep new forms of media out of the courtroom. If judges banish laptops and smart phones, bloggers will simply wait to post until after court is out, and tweeters will run across the hall to tweet where the tweeting's good. If judges forbid tweeting in the hallway, they'll just tweet on the courthouse steps. Judges obviously can't ban the public from using the internet altogether, and the reality today is that the internet gives every member of the public a platform to make his opinion known. When a high-profile case attracts attention, the people who care the most will seize that platform and make every effort to skew the public's perception of the trial. What we urgently need is an impartial voice, capable of truthfully and authoritatively recounting the events of trial for the absent public in order to set the record straight.

Luckily, the courtroom camera is ready, willing and able to step into that role. It's no longer the case that the courtroom camera must be operated by the media, as it was during the O.J. trial. Video cameras have become cheap and ubiquitous, and many courtrooms already have cameras installed for internal court use: to create video records,<sup>83</sup> to allow participants to make remote appearances<sup>84</sup> and to provide overflow facilities in nearby rooms.<sup>85</sup> The internet has also made it possible to cheaply disseminate video worldwide. It's only a small step—both in terms of expense and technical knowhow—for courts to make footage from a court-

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<sup>83</sup> Fredric I. Lederer, *Technology Comes to the Courtroom, and . . .*, 43 EMORY L.J. 1095, 1111–12 (1994).

<sup>84</sup> *Id.* at 1118–19.

<sup>85</sup> Sellers, *supra* note 1, at 189.

operated camera available online. In fact, a number of jurisdictions, including the Ninth Circuit, have already taken or considered such measures.<sup>86</sup> Combined with a delay before posting, this approach gives judges and litigants an opportunity to prevent dissemination of video if the need arises. And such video can be presented in as boring and straightforward a fashion as you please: no close-ups, no moving camera and no filming of the defense table or the gallery.

Perhaps most significantly, footage of the trial can also be posted online in full, without editing or interruption. This matters because, although the camera doesn't lie, editors sometimes do: Choice selection of footage can pull words out of context and warp the meaning of statements by lawyers, witnesses and judges. Editing will also often focus public attention on the sensational aspects of the trial, at the expense of the proceedings' bread and butter. This, in turn, distorts public perceptions and diminishes public respect for the seriousness of the judicial process. In fact, when the Federal Judicial Center ran its pilot program of cameras in federal courts, the lack of gavel-to-gavel coverage was one of its few negative findings,<sup>87</sup> although the study nevertheless found that judges overwhelmingly believed that cameras in the courtroom helped to educate the public about the courts.<sup>88</sup> If courts control the cameras, those already considerable benefits will be magnified, and the public will be provided with the impartial and authoritative account of proceedings that is required in our present internet age.

While the choice between the court-operated camera and the trusty beat reporter might be a tough one, the choice between the camera and the Twitterverse isn't. The days when a trial could

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<sup>86</sup> The Judicial Conference of the Ninth Circuit voted in 2007 to reconsider its prohibition on all cameras in district courts, and lawyers and judges (voting separately) approved the resolution by resounding margins. In 2009, the Ninth Circuit approved a limited pilot program for non-jury civil cases; the experience from that will guide the circuit's consideration of a permanent rule change. *See also* Stepniak, *supra* note 2, at 821–22.

<sup>87</sup> FJC REPORT, *supra* note 25, at 36.

<sup>88</sup> After the three-year program, 30% of judges felt that the presence of cameras educated the public about court procedures to a "very great extent," 24% thought it did so to a "great extent" and 12% saw this effect to a "moderate extent." *Id.* at 15. Only 12% of judges thought cameras educated the public to "little or no extent." *Id.*

proceed in sleepy obscurity, unless reported by “reputable” and trustworthy journalists, are gone—if they ever existed. The spectators have arrived, and they’re armed with laptops, Blackberries and iPhones. If the public is going to judge the resulting cascade of information, it must be given the tools and information necessary to decide for itself whom to believe. We must let cameras into the courtroom for the same reason that we kicked them out 75 years ago: to advance the public’s understanding of the justice system.

### CONCLUSION

And yet, in the federal district courts, the pre-Hauptmann status quo remains remarkably unchanged, at least when it comes to cameras. So far, Congress has been patient with that glacial pace of change, but such forbearance cannot last forever. Legislation is currently pending that would authorize district judges to allow media recording and broadcast of court proceedings.<sup>89</sup> If the federal courts don’t change with the times, others will institute change for us.

Rightly so. If the public is to appreciate our justice system, and the legal regime that it upholds, the public must have full and fair information about proceedings in the courts. That means something different today than it did in 1935, when courts and members of the bar first considered the issue of cameras in the courtroom. We must consider the issue again, in light of the world today.

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<sup>89</sup> See Sunshine in the Courtroom Act of 2009, S. 657, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-657>; Sunshine in the Courtroom Act of 2009, H.R. 3054, 111th Cong. (2009), available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-3054>.

## APPENDIX

**Table 1. Ratings of Effects by District Judges Who Experienced Electronic Media Coverage Under the Federal Judicial Center Pilot Program, by Percentage<sup>90</sup>**

Effect	To Little or No Extent	To Some Extent	To a Moderate Extent	To a Great Extent	To a Very Great Extent	No Opinion
Motivates witnesses to be truthful	61	7	7	2	0	22
Violates witnesses' privacy	37	34	10	7	5	7
Makes witnesses less willing to appear in court	32	27	15	2	2	22
Distracts witnesses	51	22	15	2	2	7
Makes witnesses more nervous than they would otherwise be	24	37	22	5	0	12
Increases juror attentiveness	46	22	7	7	2	15

<sup>90</sup> FJC REPORT, *supra* note 25, at 14–15.

<b>Effect</b>	<b>To Little or No Extent</b>	<b>To Some Extent</b>	<b>To a Moderate Extent</b>	<b>To a Great Extent</b>	<b>To a Very Great Extent</b>	<b>No Opinion</b>
Signals to jurors that a witness or argument is particularly important	51	15	10	5	7	12
Increases jurors' sense of responsibility for their verdict	49	15	15	10	0	12
Prompts people who see the coverage to try to influence juror-friends	54	10	7	0	0	27
Motivates attorneys to come to court better prepared	32	32	15	10	7	5
Causes attorneys to be more theatrical in their presentation	29	37	20	2	5	7

<b>Effect</b>	<b>To Little or No Extent</b>	<b>To Some Extent</b>	<b>To a Moderate Extent</b>	<b>To a Great Extent</b>	<b>To a Very Great Extent</b>	<b>No Opinion</b>
Prompts attorneys to be more courteous	44	20	15	17	2	2
Increases judge attentiveness	63	10	15	10	2	0
Causes judges to avoid unpopular decisions or positions	88	2	5	2	0	2
Prompts judges to be more courteous	56	22	15	7	0	0
Disrupts courtroom proceedings	83	15	0	2	0	0
Educates the public about courtroom procedure	12	20	12	24	30	2

**Table 2. Attorney Ratings of Electronic Media Effects in Proceedings in Which They Were Involved During the Federal Judicial Center Pilot Program, by Percentage<sup>91</sup>**

Effect	To Little or No Extent	To Some Extent	To a Moderate Extent	To a Great Extent	To a Very Great Extent	No Opinion
Motivate witnesses to be more truthful than they otherwise would	58	3	2	0	0	38
Distract witnesses	52	18	9	5	0	17
Make witnesses more nervous than they otherwise would be	46	21	12	5	2	15
Increase juror attentiveness	26	6	8	6	0	55
Distract jurors	30	9	6	4	0	52

<sup>91</sup> *Id.* at 20–21.

<b>Effect</b>	<b>To Little or No Extent</b>	<b>To Some Extent</b>	<b>To a Moderate Extent</b>	<b>To a Great Extent</b>	<b>To a Very Great Extent</b>	<b>No Opinion</b>
Motivate attorneys to come to court better prepared	71	11	7	4	1	6
Cause attorneys to be more theatrical in their presentation	78	7	9	2	3	2
Distract attorneys	73	20	6	1	0	1
Prompt attorneys to be more courteous	80	12	3	1	0	5
Increase judge attentiveness	54	17	10	6	1	12
Prompt judges to be more courteous	62	12	8	4	3	11
Disrupt the courtroom proceedings	77	10	8	3	0	3

# Tab 5



Supreme Court of the United States  
 Billie Sol ESTES, Petitioner,  
 v.  
 STATE OF TEXAS.

No. 256.  
 Argued April 1, 1965.  
 Decided June 7, 1965.  
 Rehearing Denied Oct. 11, 1965.

See 86 S.Ct. 18.

The defendant was convicted in the District Court for the Seventh Judicial District of Texas at Tyler for swindling. The conviction was affirmed by the Texas Court of Criminal Appeals. Certiorari was granted. The Supreme Court held that defendant was deprived of his right under the Fourteenth Amendment to due process by the televising of his notorious, heavily publicized and highly sensational criminal trial.

Reversed.

Mr. Chief Justice Warren filed concurring opinion in which Mr. Justice Douglas and Mr. Justice Goldberg joined.

Mr. Justice Harlan filed limited concurring opinion.

Mr. Justice Stewart filed dissenting opinion in which Mr. Justice Black, Mr. Justice Brennan, and Mr. Justice White joined.

Mr. Justice White filed dissenting opinion in which Mr. Justice Brennan joined.

Mr. Justice Brennan filed dissenting opinion.

West Headnotes

**[1] Constitutional Law 92** ⚔️ **4605**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)4 Proceedings and Trial  
 92k4603 Public Trial  
 92k4605 k. Publicity. Most Cited

Cases  
 (Formerly 92k268(7), 92k268)

**Criminal Law 110** ⚔️ **633.16**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases  
 (Formerly 110k633(1), 92k268(7), 92k268)

Defendant was deprived of his right under the Fourteenth Amendment to due process by the televising of his notorious, heavily publicized and highly sensational criminal trial. U.S.C.A.Const. Amend. 14.

**[2] Criminal Law 110** ⚔️ **635.2**

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k635 Public Trial  
 110k635.2 k. Purpose of Public Trial.  
 Most Cited Cases  
 (Formerly 110k635)

The purpose of requirement of public trial is to guarantee that the accused will be fairly dealt with and not unjustly condemned. U.S.C.A.Const. Amend. 6.

**[3] Criminal Law 110** ⚔️ **633.16**

110 Criminal Law

110XX Trial  
 110XX(B) Course and Conduct of Trial in  
 General  
 110k633.16 k. Cameras, Recording  
 Devices, Sketches, and Drawings. Most Cited  
 Cases  
 (Formerly 110k635)

The refusal to permit televising of trial does  
 not discriminate in favor of the press.

#### [4] Constitutional Law 92 ↪4605

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)4 Proceedings and Trial  
 92k4603 Public Trial  
 92k4605 k. Publicity. Most Cited  
 Cases  
 (Formerly 92k268(7), 92k268)

#### Criminal Law 110 ↪633.16

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in  
 General  
 110k633.16 k. Cameras, Recording  
 Devices, Sketches, and Drawings. Most Cited  
 Cases  
 (Formerly 110k633(1), 92k268(7), 92k268)

Isolatable prejudice did not have to be shown  
 to reach conclusion that defendant was deprived of  
 due process by the televising of his highly publi-  
 cized criminal trial. U.S.C.A.Const. Amend. 14.

**\*\*1628 \*534** John D. Cofer and Hume Cofer, Aus-  
 tin, Tex., for petitioner.

Waggoner Carr, Austin, Tex., and Leon Jaworski,  
 Houston, Tex., for respondent.

Mr. Justice CLARK delivered the opinion of the  
 Court.<sup>FN\*</sup>

FN\* Mr. Justice HARLAN concurs in this  
 opinion subject to the reservations and to  
 the extent indicated in his concurring opin-  
 ion, post, p. 1662.

[1] The question presented here is whether the  
 petitioner, who stands convicted in the District  
 Court for the Seventh Judicial District of Texas at  
 Tyler for swindling,<sup>FN1</sup> was **\*535** deprived of his  
**\*\*1629** right under the Fourteenth Amendment to  
 due process by the televising and broadcasting of  
 his trial. Both the trial court and the Texas Court of  
 Criminal Appeals found against the petitioner. We  
 hold to the contrary and reverse his conviction.

FN1. The evidence indicated that petition-  
 er, through false pretenses and fraudulent  
 representations, induced certain farmers to  
 purchase fertilizer tanks and accompanying  
 equipment, which in fact did not exist, and  
 to sign and deliver to him chattel mort-  
 gages on the fictitious property.

#### I.

While petitioner recites his claim in the frame-  
 work of Canon 35 of the Judicial Canons of the  
 American Bar Association he does not contend that  
 we should enshrine Canon 35 in the Fourteenth  
 Amendment, but only that the time honored prin-  
 ciples of a fair trial were not followed in his case  
 and that he was thus convicted without due process  
 of law. Canon 35, of course, has of itself no binding  
 effect on the courts but merely expresses the view  
 of the Association in opposition to the broadcast-  
 ing, televising and photographing of court proceed-  
 ings. Likewise, Judicial Canon 28 of the Integrated  
 State Bar of Texas, 27 Tex.B.J. 102 (1964), which  
 leaves to the trial judge's sound discretion the tele-  
 casting and photographing of court proceedings, is  
 of itself not law. In short, the question here is not  
 the validity of either Canon 35 of the American Bar  
 Association or Canon 28 of the State Bar of Texas,  
 but only whether petitioner was tried in a manner  
 which comports with the due process requirement  
 of the Fourteenth Amendment.

Petitioner's case was originally called for trial on September 24, 1962, in Smith County after a change of venue from Reeves County, some 500 miles west. Massive pretrial publicity totaling 11 volumes of press clippings, which are on file with the Clerk, had given it national notoriety. All available seats in the courtroom were taken and some 30 persons stood in the aisles. However, at that time a defense motion to prevent telecasting, broadcasting by radio and news photography and a defense motion for continuance were presented, and after a two-day hearing the former was denied and the latter granted.

\*536 These initial hearings were carried live by both radio and television, and news photography was permitted throughout. The videotapes of these hearings clearly illustrate that the picture presented was not one of that judicial serenity and calm to which petitioner was entitled. Cf. *Wood v. Georgia*, 370 U.S. 375, 383, 82 S.Ct. 1364, 1369, 8 L.Ed.2d 569 (1962); *Turner v. State of Louisiana*, 379 U.S. 466, 472, 85 S.Ct. 546, 549, 13 L.Ed.2d 424 (1965); *Cox v. State of Louisiana*, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487 (1965). Indeed, at least 12 cameramen were engaged in the courtroom throughout the hearing taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings. Moreover, veniremen had been summoned and were present in the courtroom during the entire hearing but were later released after petitioner's motion for continuance had been granted. The court also had the names of the witnesses called; some answered but the absence of others led to a continuance of the case until October 22, 1962. It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be

more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us. All of this two-day affair was highly publicized and could only have impressed those present, and also the community\*\*1630 at large, with the notorious character of the petitioner as well as the proceeding. The trial witnesses present at the hearing, as well as the original jury panel, were undoubtedly\*537 made aware of the peculiar public importance of the case by the press and television coverage being provided, and by the fact that they themselves were televised live and their pictures rebroadcast on the evening show.

When the case was called for trial on October 22 the scene had been altered. A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

Because of continual objection, the rules governing live telecasting, as well as radio and still photos, were changed as the exigencies of the situation seemed to require. As a result, live telecasting was prohibited during a great portion of the actual trial. Only the opening<sup>FN2</sup> and closing arguments of the State, the return of the jury's verdict and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.

FN2. Due to mechanical difficulty there was no picture during the opening argu-

ment.

Because of the varying restrictions placed on sound and live telecasting the telecasts of the trial were confined largely to film clips shown on the stations' regularly scheduled news programs. The news commentators would use the film of a particular part of the day's trial activities as a backdrop for their reports. Their commentary\*538 included excerpts from testimony and the usual reportorial remarks. On one occasion the videotapes of the September hearings were rebroadcast in place of the 'late movie.'

## II.

In *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), this Court constructed a rule that the televising of a defendant in the act of confessing to a crime was inherently invalid under the Due Process Clause of the Fourteenth Amendment even without a showing of prejudice or a demonstration of the nexus between the televised confession and the trial. See *id.*, at 729, 83 S.Ct. 1421 (dissenting opinion of Clark, J.). Here, although there was nothing so dramatic as a home-viewed confession, there had been a bombardment of the community with the sights and sounds of a two-day hearing during which the original jury panel, the petitioner, the lawyers and the judge were highly publicized. The petitioner was subjected to characterization and minute electronic scrutiny to such an extent that at one point the photographers were found attempting to picture the page of the paper from which he was reading while sitting at the counsel table. The two-day hearing and the order permitting television at the actual trial were widely known throughout the community. This emphasized the notorious character that the trial would take and, therefore, set it apart in the public mind as an extraordinary case or, as Shaw would say, something 'not conventionally unconventional.' When the new jury was empaneled at the trial four of the jurors selected had seen and heard all or part of the broadcasts of the earlier proceedings.

\*\*1631 III.

[2][3] We start with the proposition that it is a 'public trial' that the Sixth Amendment guarantees to the 'accused.' The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and \*539 not unjustly condemned. History had proven that secret tribunals were effective instruments of oppression. As our Brother Black so well said in *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948):

'The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. \* \* \* Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.' At 268-270, 68 S.Ct. at 505-506. (Footnotes omitted.)

It is said however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press.

The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. While the state and federal courts have differed over what spectators may be excluded from a criminal trial, 6 Wigmore, *Evidence* s 1834 (3d ed. 1940), the amici curiae brief of the National Association of Broadcasters and the Radio Television News Directors Association, says, as indeed it must, that 'neither of these

two amendments (First and Sixth) speaks of an unlimited\*540 right of access to the courtroom on the part of the broadcasting media. \* \* \* At 7. Moreover, they recognize that the 'primary concern of all must be the proper administration of justice'; that 'the life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media'; and that 'the due process requirements in both the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require a procedure that will assure a fair trial. \* \* \*' At 3-4.

Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

#### IV.

Court proceedings are held for the solemn purpose of endeavoring to ascertain the truth which is the sine qua non of a fair trial. Over the centuries Anglo-American courts have devised careful safeguards by rule and otherwise to protect and facilitate the performance of this high function. As a result, at this time those safeguards do not permit the televising and photographing of a criminal trial, save in two States and there only under restrictions. The federal courts prohibit it by specific rule. This is weighty evidence that our concepts of a \*\*1632 fair trial do not tolerate such an indulgence. We have always held that the atmosphere essential to the preservation of a fair trial-the most fundamental of all freedoms-must be maintained at all costs. Our approach has been through rules, contempt proceedings and reversal of convictions obtained under unfair conditions. Here the remedy is \*541 clear and certain of application and it is our duty to continue to enforce the principles that from time imme-

morial have proven efficacious and necessary to a fair trial.

#### V.

The State contends that the televising of portions of a criminal trial does not constitute a denial of due process. Its position is that because no prejudice has been shown by the petitioner as resulting from the televising, it is permissible; that claims of 'distractions' during the trial due to the physical presence of television are wholly unfounded; and that psychological considerations are for psychologists, not courts, because they are purely hypothetical. It argues further that the public has a right to know what goes on in the courts; that the court has no power to 'suppress, edit, or censor events, which transpire in proceedings before it,' citing *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546 (1947); and that the televising of criminal trials would be enlightening to the public and would promote greater respect for the courts.

At the outset the motion should be dispelled that telecasting is dangerous because it is new. It is true that our empirical knowledge of its full effect on the public, the jury or the participants in a trial, including the judge, witnesses and lawyers, is limited. However, the nub of the question is not its newness but, as Mr. Justice Douglas says, 'the insidious influences which it puts to work in the administration of justice.' Douglas, *The Public Trial and the Free Press*, 33 *Rocky Mt. L.Rev.* 1 (1960). These influences will be detailed below, but before turning to them the State's argument that the public has a right to know what goes on in the courtroom should be dealt with.

It is true that the public has the right to be informed as to what occurs in its courts, but reporters of all media, including television, are always present if they wish to be \*542 and are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. State of California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192 (1941), and *Pennekamp v. State of Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed.

1295 (1946), which we reaffirm. These reportorial privileges of the press were stated years ago:

'The law, however, favors publicity in legal proceedings, so far as that object can be attained without injustice to the persons immediately concerned. The public are permitted to attend nearly all judicial inquiries, and there appears to be no sufficient reason why they should not also be allowed to see in print the reports of trials, if they can thus have them presented as fully as they are exhibited in court, or at least all the material portion of the proceedings impartially stated, so that one shall not, by means of them, derive erroneous impressions, which he would not have been likely to receive from hearing the trial itself.' 2 Cooley's Constitutional Limitations 931-932 (Carrington ed. 1927).

[4] The State, however, says that the use of television in the instant case was 'without injustice to the person immediately concerned,' basing its position on the fact that the petitioner has established no isolatable prejudice and that this must be shown in order to invalidate a conviction in these circumstances. The State paints too broadly in this contention, for this Court itself has found instances in which a showing of actual prejudice is not a prerequisite to reversal. This is such a case. It is true that in **\*\*1633** most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due **\*543** process. Such a case was *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), where Mr. Justice Black for the Court pointed up with his usual clarity and force:

'A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. \* \* \* (T)o perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United*

*States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13 (99 L.Ed. 11).' At 136, 75 S.Ct. at 625. (Emphasis supplied.)

And, as Chief Justice Taft said in *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, almost 30 years before:

'the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice. Every procedure which would offer a possible temptation to the average man \* \* \* to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law.' At 532, 47 S.Ct. at 444. (Emphasis supplied.)

This rule was followed in *Rideau*, supra, and in *Turner v. State of Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). In each of these cases the Court departed from the approach it charted in *Stroble v. State of California*, 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, (1952), and in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), where we made a careful examination of the facts in order to determine whether prejudice resulted. In *Rideau* and *Turner* the Court did not stop to consider the actual effect of the practice but struck down the conviction on the ground that prejudice was inherent in it. Likewise in *Gideon v. Wainwright*, **\*544** 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193 (1963), we applied the same rule, although in different contexts.

In this case it is even clearer that such a rule must be applied. In *Rideau*, *Irvin* and *Stroble*, the pretrial publicity occurred outside the courtroom and could not be effectively curtailed. The only recourse other than reversal was by contempt proceedings. In *Turner* the probability of prejudice was present through the use of deputy sheriffs, who were also witnesses in the case, as shepherds for the jury. No prejudice was shown but the circumstances

were held to be inherently suspect, and therefore, such a showing was not held to be a requisite to reversal. Likewise in this case the application of this principle is especially appropriate. 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. This was found true in Murchison, Tumey, Rideau and Turner. Such untoward circumstances as were found in those cases are inherently bad and prejudice to the accused was presumed. Forty-eight of our States and the Federal Rules have deemed the use of television improper in the courtroom. This fact is most telling in buttressing our conclusion that any change in procedure which would permit its use would **\*\*1634** be inconsistent with our concepts of due process in this field.

## VI.

As has been said, the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather its use amounts to the injection of an irrelevant factor into court proceedings. In addition experience teaches that there are numerous situations **\*545** in which it might cause actual unfairness—some so subtle as to defy detection by the accused or control by the judge. We enumerate some in summary:

1. The potential impact of television on the jurors is perhaps of the greatest significance. They are the nerve center of the fact-finding process. It is true that in States like Texas where they are required to be sequestered in trials of this nature the jurors will probably not see any of the proceedings as televised from the courtroom. But the inquiry cannot end there. From the moment the trial judge announces that a case will be televised it becomes a cause ce le bre. The whole community, including prospective jurors, becomes interested in all the morbid details surrounding it. The approaching trial immediately assumes an important status in the

public press and the accused is highly publicized along with the offense with which he is charged. Every juror carries with him into the jury box these solemn facts and thus increases the change of prejudice that is present in every criminal case. And we must remember that realistically it is only the notorious trial which will be broadcast, because of the necessity for paid sponsorship. The conscious or unconscious effect that this may have on the juror's judgment cannot be evaluated, but experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence. Where pretrial publicity of all kinds has created intense public feeling which is aggravated by the telecasting or picturing of the trial the televised jurors cannot help but feel the pressures of knowing that friends and neighbors have their eyes upon them. If the community be hostile to an accused a televised juror, realizing that he must return to neighbors who saw the trial themselves, may well be led 'not to hold the balance nice, clear and true between the State and the accused. \* \* \*'

**\*546** Moreover, while it is practically impossible to assess the effect of television on jury attentiveness, those of us who know juries realize the problem of jury 'distraction.' The State argues this is de minimis since the physical disturbances have been eliminated. But we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights. It is the awareness of the fact of telecasting that is felt by the juror throughout the trial. We are all self-conscious and uneasy when being televised. Human nature being what it is, not only will a juror's eyes be fixed on the camera, but also his mind will be preoccupied with the telecasting rather than with the testimony.

Furthermore, in many States the jurors serving in the trial may see the broadcasts of the trial proceedings. Admittedly, the Texas sequestration rule would prevent this occurring there.<sup>FN3</sup> In other States following no such practice jurors would return home and turn on the TV if only to see how

they appeared upon it. They would also be subjected to reenactment and emphasis of the selected parts of the proceedings which the requirements of the broadcasters determined would be telecast and would be subconsciously influenced the more by \*\*1635 that testimony. Moreover, they would be subjected to the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets.

FN3. Only six States, in addition to Texas, require sequestration of the jury prior to its deliberations in a non-capital felony trial. The great majority of jurisdictions leave the matter to the trial judge's discretion, while in at least one State the jury will be kept together in such circumstances only upon a showing of cause by the defendant.

Finally, new trials plainly would be jeopardized in that potential jurors will often have seen and heard the original trial when it was telecast. Yet viewers may later \*547 be called upon to sit in the jury box during the new trial. These very dangers are illustrated in this case where the court, due to the defendant's objections, permitted only the State's opening and closing arguments to be broadcast with sound to the public.

2. The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and 'cranks' might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot 'prove' the existence of such factors. Yet we all know from experience that they exist.

In addition the invocation of the rule against witnesses is frustrated. In most instances witnesses would be able to go to their homes and view broadcasts of the day's trial proceedings, notwithstanding the fact that they had been admonished not to do so. They could view and hear the testimony of preceding witnesses, and so shape their own testimony as to make its impact crucial. And even in the absence of sound, the influences of such viewing on the attitude of the witness toward testifying, his frame of mind upon taking the stand or his apprehension of withering cross-examination defy objective assessment. Indeed, the mere fact that the trial is to be televised might render witnesses reluctant to appear and thereby impede the trial as well as the discovery of the truth.

\*548 While some of the dangers mentioned above are present as well in newspaper coverage of any important trial, the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage.

3. A major aspect of the problem is the additional responsibilities the presence of television places on the trial judge. His job is to make certain that the accused receives a fair trial. This most difficult task requires his undivided attention. Still when television comes into the courtroom he must also supervise it. In this trial, for example, the judge on several different occasions-aside from the two days of pretrial-was obliged to have a hearing or enter an order made necessary solely because of the presence of television. Thus, where telecasting is restricted as it was here, and as even the State concedes it must be, his task is made much more difficult and exacting. And, as happened here, such rulings may unfortunately militate against the fairness of the trial. In addition, laying physical interruptions aside, there is the ever-present distraction that the mere awareness of television's presence prompts. Judges are human beings also and are subject to the same psychological reactions as laymen.

Telecasting is particularly bad where the judge is elected, as is the case in all save a half dozen of our States. The telecasting of a trial becomes a political weapon, which, along with other distractions inherent in broadcasting, diverts his attention from the task at hand—the fair trial of the accused.

But this is not all. There is the initial decision that must be made as to whether the use of television will be permitted. **\*\*1636** This is perhaps an even more crucial consideration. Our judges are highminded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly **\*549** and through the shaping of public opinion. Moreover, where one judge in a district or even in a State permits telecasting, the requirement that the others do the same is almost mandatory. Especially is this true where the judge is selected at the ballot box.

4. Finally, we cannot ignore the impact of courtroom television on the defendant. Its presence is a form of mental—if not physical—harassment, resembling a police line-up or the third degree. The inevitable close-ups of his gestures and expressions during the ordeal of his trial might well transgress his personal sensibilities, his dignity, and his ability to concentrate on the proceedings before him—sometimes the difference between life and death—dispassionately, freely and without the distraction of wide public surveillance. A defendant on trial for a specific crime is entitled to his day in court, not in a stadium, or a city or nationwide arena. The heightened public clamor resulting from radio and television coverage will inevitably result in prejudice. Trial by television is, therefore, foreign to our system. Furthermore, telecasting may also deprive an accused of effective counsel. The distractions, intrusions into confidential attorney-client relationships and the temptation offered by television to play to the public audience might often have a direct effect not only upon the lawyers, but the judge, the jury and the witnesses. See Pye, *The Lessons of Dallas—Threats to Fair Trial and Free Press*, Nation-

al Civil Liberties Clearing House, 16th Annual Conference.

The television camera is a powerful weapon. Intentionally or inadvertently it can destroy an accused and his case in the eyes of the public. While our telecasters are honorable men, they too are human. The necessity for sponsorship weighs heavily in favor of the televising of only notorious cases, such as this one, and invariably focuses the lens upon the unpopular or infamous **\*550** accused. Such a selection is necessary in order to obtain a sponsor willing to pay a sufficient fee to cover the costs and return a profit. We have already examined the ways in which public sentiment can affect the trial participants. To the extent that television shapes that sentiment, it can strip the accused of a fair trial.

The State would dispose of all these observations with the simple statement that they are for psychologists because they are purely hypothetical. But we cannot afford the luxury of saying that, because these factors are difficult of ascertainment in particular cases, they must be ignored. Nor are they 'purely hypothetical.' They are no more hypothetical than were the considerations deemed controlling in *Tumey*, *Murchison*, *Rideau* and *Turner*. They are real enough to have convinced the Judicial Conference of the United States, this Court and the Congress that television should be barred in federal trials by the Federal Rules of Criminal Procedure; in addition they have persuaded all but two of our States to prohibit television in the courtroom. They are effects that may, and in some combination almost certainly will, exist in any case in which television is injected into the trial process.

## VII.

The facts in this case demonstrate clearly the necessity for the application of the rule announced in *Rideau*. The sole issue before the court for two days of pretrial hearing was the question now before us. The hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom

was a mass of wires, television cameras, microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses\*\*1637 and the lawyers were all exposed to this untoward situation. The judge decided that the trial \*551 proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner and together with the subsequent televising of the trial beginning 30 days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part of those broadcasts. The trial, on the other hand, lasted only three days.

Moreover, the trial judge was himself harassed. After the initial decision to permit telecasting he apparently decided that a booth should be built at the broadcasters' expense to confine its operations; he then decided to limit the parts of the trial that might be televised live; then he decided to film the testimony of the witnesses without sound in an attempt to protect those under the rule; and finally he ordered that defense counsel and their argument not be televised, in the light of their objection. Plagued by his original error-recurring each day of the trial-his day-to-day orders made the trial more confusing to the jury, the participants and to the viewers. Indeed, it resulted in a public presentation of only the State's side of the case.

As Mr. Justice Holmes said in *Patterson v. People of State of Colorado, ex rel. Attorney General*, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907):

'The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.'

It is said that the ever-advancing techniques of public communication and the adjustment of the public to its \*552 presence may bring about a change in the effect of telecasting upon the fairness of criminal trials. But we are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today.

The judgment is therefore reversed.

Reversed.

Mr. Chief Justice WARREN, whom Mr. Justice DOUGLAS and Mr. Justice GOLDBERG join, concurring.

While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.

#### I.

Petitioner, a much-publicized financier, was indicted by a Reeves County, Texas, grand jury for obtaining property through false pretenses. The case was transferred to the City of Tyler, in Smith County, Texas, and was set for trial on September 24, 1962. Prior to that date petitioner's counsel informed the trial judge that he would make a motion on September 24 to exclude all cameras from the courtroom during the trial.

On September 24, a hearing was held to consider petitioner's motion to prohibit television, motion pictures, and still photography at the trial. The courtroom was filled with newspaper reporters and \*\*1638 cameramen, television cameramen, and spectators. At least 12 cameramen with \*553 their

equipment were seen by one observer, and there were 30 or more people standing in the aisles. An article appearing in the New York Times the next day stated:

'A television motor van, big as an intercontinental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates. \* \* \*

(Cables and wires snaked over the floor.)<sup>FN1</sup>

FN1. N.Y. Times, Sept. 25, 1962, p. 46, col. 4. See Appendix Photographs 1, 2, 3.

With photographers roaming at will through the courtroom, petitioner's counsel made his motion that all cameras be excluded. As he spoke, a cameraman wandered behind the judge's bench and snapped his picture. Counsel argued that the presence of cameras would make it difficult for him to consult with his client, make his client ill at ease, and make it impossible to obtain a fair trial since the cameras would distract the jury, witnesses and lawyers. He also expressed the view that televising selected cases tends to give the jury an impression that the particular trial is different from ordinary criminal trials. The court, however, ruled that the taking of pictures and televising would be allowed so long as the cameramen stood outside the railing that separates the trial participants from the spectators. The court also ruled that if a complaint was made that any camera was too noisy, the cameramen would have to stop taking pictures; that no pictures could be taken in the corridors outside the courtroom; and that those with microphones were not to pick up conversations between petitioner and his lawyers. Subsequent to the court's ruling petitioner arrived in the courtroom,<sup>FN2</sup> and the defense introduced testimony\*554 concerning the atmosphere in the court on that day. At the conclusion of the day's hearing the judge reasserted his earlier ruling. He then ordered a roll call of the prosecution

witnesses, at least some of whom had been in the courtroom during the proceedings.

FN2. Counsel explained to the trial court that he desired to protect petitioner from the cameras until the court had made its ruling.

The entire hearing on September 24 was televised live by station KLTV of Tyler, Texas, and station WFAA-TV of Dallas, Texas. Commercials were inserted when there was a pause in the proceedings. On the evening of Monday, September 24, both stations ran an edited tape of the day's proceedings and interrupted the tape to play the commercials ordinarily seen in the particular time slot. In addition to the live television coverage there was also a live radio pickup of the proceedings by at least one station.

The proceedings continued on September 25. There was again a significant number of cameramen taking motion pictures, still pictures and television pictures. The judge once more ordered cameramen to stay on the other side of the railing and stated that this order was to be observed even during court recesses. The panel from which the petit jury was to be selected was then sworn in the presence of the cameramen. The panel was excused to permit counsel to renew his motion to prohibit photography in the courtroom. The court denied the motion, but granted a continuance of trial until October 22 and dismissed the jury panel. At the suggestion of petitioner's counsel the trial judge warned the prosecution witnesses who were present not to discuss the case during the continuance. The proceedings were televised live and portions of the television tape were shown on the regularly scheduled evening news programs. Live radio transmission apparently occurred as on the day before.

\*\*1639 On October 1, 1962, the trial judge is sued an order explaining what coverage he would permit during the trial. The judge delivered the order in his chambers for the \*555 benefit of television cameramen so that they could film him. The

judge ruled that although he would permit television cameras to be present during the trial, they would not be permitted to present live coverage of the interrogation of prospective jurors or the testimony of witnesses. He ruled that each of the three major television networks, NBC, CBS, ABC, and the local television station KLTV could install one camera not equipped to pick up sound and the film would be available to other television stations on a pooled basis. In addition, he ruled that with respect to news photographers only cameramen for the local press, Associated Press, and United Press would be permitted in the courtroom. Photographs taken were also to be made available to others on a pooled basis. The judge did not explain how he decided which television cameramen and which still photographers were to be permitted in the courtroom and which were to be excluded.

For the proceedings beginning on October 22, station KLTV, at its own expense, and with the permission of the court, had constructed a booth in the rear of the courtroom painted the same or near the same color as the courtroom. An opening running lengthwise across the booth permitted the four television cameras to photograph the proceedings. The courtroom was small and the cameras were clearly visible to all in the courtroom.<sup>FN3</sup> The cameras were equipped with 'electronic sound on camera' which permitted them to take both film and sound. Upon entering the courtroom the judge told all those with television cameras to go back to the booth; asked the press photographers not to move around any more than necessary; ordered that no flashbulbs or floodlights be used; and again told cameramen that they could not go inside the railing. Defense counsel renewed his motion \*556 to ban all 'sound equipment \* \* \* still cameras, movie cameras and television; and all radio facilities' from the courtroom. Witnesses were again called on this issue, but at the conclusion of the hearing the trial judge reaffirmed his prior ruling to permit cameramen in the courtroom. In response to petitioner's argument that his rights under the Constitution of the United States were being violated, the judge re-

marked that the 'case (was) not being tried under the Federal Constitution.'

FN3. See Appendix, Photograph 6.

None of the proceedings on October 22 was televised live. Television cameras, however, recorded the day's entire proceedings with sound for later showings. Apparently none of the October 22 proceedings was carried live on radio, although the proceedings were recorded on tape. The still photographers admitted by the court were free to take photographs from outside the railing.

On October 23 the selection of the jury began. Overnight an additional strip had been placed across the television booth so that the opening for the television cameras was reduced, but the cameras and their operators were still quite visible.<sup>FN4</sup> A panel of 86 prospective jurors was ready for the voir dire. The judge excused the jurors from the courtroom and made still another ruling on news coverage at the trial. He ordered the television recording to proceed from that point on without an audio pickup, and, in addition, forbade radio tapes of any further proceedings until all the evidence had been introduced. During the course of the trial the television cameras recorded without sound whatever matters appeared interesting to them for use on later newscasts; radio broadcasts in the form of spot reports were made from a room next to the courtroom. There was no live television or radio coverage until November 7 when the trial judge permitted live \*\*1640 coverage of the prosecution's \*557 arguments to the jury, the return of the jury's verdict and its acceptance by the court. Since the defense objected to being photographed during the summation, the judge prohibited television cameramen or still photographers from taking any pictures of the defense during its argument. But the show went on, and while the defense was speaking the cameras were directed at the judge and the arguments were monitored by audio equipment and relayed to the television audience by an announcer. On November 7 the judge, for the first time, directed news photographers desiring to take pictures to

take them only from the back of the room. Up until this time the trial judge's orders merely limited news photographers to the spectator section.

FN4. See Appendix, Photograph 7.

## II.

The decision below affirming petitioner's conviction runs counter to the evolution of Anglo-American criminal procedure over a period of centuries. During that time the criminal trial has developed from a ritual practically devoid of rational justification<sup>FN5</sup> to a fact-finding process, the acknowledged purpose of which is to provide a fair and reliable determination of guilt.<sup>FN6</sup>

FN5. Jenks, *A Short History of English Law* 46-47 (6th ed. 1949); I Stephen, *A History of the Criminal Law of England* 51-74 (1883).

FN6. See, e.g., *Craig v. Harney*, 331 U.S. 367, 378, 67 S.Ct. 1249, 1256, 91 L.Ed. 1546; *Irvin v. Dowd*, 366 U.S. 717, 728, 81 S.Ct. 1639, 1645, 6 L.Ed.2d 751; *Brady v. State of Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215; *Jackson v. Denno*, 378 U.S. 368, 391, 84 S.Ct. 1774, 1788, 12 L.Ed.2d 908.

An element of rationality was introduced in the guilt-determining process in England over 600 years ago when a rudimentary trial by jury became 'the principal institution for criminal cases.'<sup>FN7</sup> Initially members of the jury were expected to make their own examinations of the cases they were to try and come to court already familiar \*558 with the facts,<sup>FN8</sup> which made it impossible to limit the jury's determination to legally relevant evidence. Gradually, however, the jury was transformed from a panel of witnesses to a panel of triers passing on evidence given by others in the courtroom.<sup>FN9</sup> The next step was to insure the independence of the jury, and this was accomplished by the decision in the case of *Edward Bushell*, 6 How.St.Tr. 999 (1670), which put an end to the practice of fining or

otherwise punishing jury members who failed to reach the decision directed by the court. As the purpose of trial as a vehicle for discovering the truth became clearer, it was recognized that the defendant should have the right to call witnesses and to place them under oath,<sup>FN10</sup> to be informed of the charges against him before the trial,<sup>FN11</sup> and to have counsel assist him with his defense.<sup>FN12</sup> All these protections, and others which could be cited, were part of a development by which 'the administration of criminal justice was set upon a firm and dignified basis.'<sup>FN13</sup>

FN7. See *Singer v. United States*, 380 U.S. 24, 27, 85 S.Ct. 783, 786, 13 L.Ed.2d 630.

FN8. II Pollock and Maitland, *The History of English Law* 621-622 (2d ed. 1906).

FN9. I Stephen, *supra*, note 5, at 260.

FN10. See 7 Will. 3, c. 3 (1695).

FN11. *Ibid.*

FN12. *Ibid.*; 6 & 7 Will. 4, c. 114 (1836).

FN13. I Stephen, *supra*, note 5, at 427.

When the colonists undertook the responsibility of governing themselves, one of their prime concerns was the establishment of trial procedures which would be consistent with the purpose of trial. The Continental Congress passed measures designed to safeguard the right to a fair trial,<sup>FN14</sup> and the various States adopted constitutional provisions \*559 directed to the \*\*1641 same end.<sup>FN15</sup> Eventually the Sixth Amendment incorporated into the Constitution certain provisions dealing with the conduct of trials:

FN14. I *Journals of the Continental Congress 1774-1789*, 69 (Ford ed. 1904).

FN15. Radin, *The Right to a Public Trial*, 6 *Temple L.Q.* 381, 383, n. 5a (1932).

'In all criminal prosecutions, the accused shall

enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.'

Significantly, in the Sixth Amendment the words 'speedy and public' qualify the term trial and the rest of the Amendment defines specific protections the accused is to have at his trial. Thus, the Sixth Amendment, by its own terms, not only requires that the accused have certain specific rights but also that he enjoy them at a trial—a word with a meaning of its own, see *Bridges v. State of California*, 314 U.S. 252, 271, 62 S.Ct. 190, 197, 86 L.Ed. 192.

The Fourteenth Amendment which places limitations on the States' administration of their criminal laws also gives content to the term trial. Whether the Sixth Amendment as a whole applies to the States through the Fourteenth,<sup>FN16</sup> or the Fourteenth Amendment embraces only those portions of the Sixth Amendment that are 'fundamental,'<sup>FN17</sup> or the Fourteenth Amendment incorporates a standard of 'ordered liberty' apart from the \*560 specific guarantees of the Bill of Rights,<sup>FN18</sup> it has been recognized that state prosecutions must, at the least, comport with 'the fundamental conception' of a fair trial.<sup>FN19</sup>

FN16. *Adamson v. People of State of California*, 332 U.S. 46, 71-72, 67 S.Ct. 1672, 1686, 91 L.Ed. 1903 (dissenting opinion of Mr. Justice Black).

FN17. *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799.

FN18. *Pointer v. State of Texas*, 380 U.S. 400, 408, 85 S.Ct. 1065 (opinion of Mr. Justice Harlan, concurring in the result).

FN19. *Cox v. State of Louisiana*, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487; *Frank v. Mangum*, 237 U.S. 309, 347, 35 S.Ct. 582, 595, 59 L.Ed. 969 (dissenting opinion of Justice Holmes). See *Adamson v. State of California*, 332 U.S. 46, 53, 67 S.Ct. 1672, 1676; *In re Murchison*, 349 U.S. 133, 136; *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642; *Jackson v. Denno*, 378 U.S. 368, 377, 84 S.Ct. 1774, 1781 (Court opinion), 424, 84 S.Ct. 1805 (dissenting opinion of Mr. Justice Clark), 428, 84 S.Ct. 1807 (dissenting opinion of Mr. Justice Harlan).

It has been held on one or another of these theories that the fundamental conception of a fair trial includes many of the specific provisions of the Sixth Amendment, such as the right to have the proceedings open to the public, *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, the right to notice of specific charges, *Cole v. State of Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644; the right to confrontation, *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923; *Douglas v. State of Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934, and the right to counsel, *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792. But it also has been agreed that neither the Sixth nor the Fourteenth Amendment is to be read formalistically, for the clear intent of the amendments is that these specific rights be enjoyed at a constitutional trial. In the words of Justice Holmes, even though 'every form (be) preserved,' the forms may amount to no 'more than an empty shell' when considered in the context or setting in which they were actually applied.<sup>FN20</sup>

FN20. *Frank v. Mangum*, 237 U.S. 309, 346, 35 S.Ct. 582, 594 (dissenting opinion).

**\*\*1642** In cases arising from state prosecutions this Court has acted to prevent the right to a constitutional trial from being reduced to a formality by the intrusion of factors into the trial process that

tend to subvert its purpose. The Court recognized in *Pennekamp v. State of Florida*, 328 U.S. \*561 331, 334, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295, that the ‘orderly operation of courts’ is ‘the primary and dominant requirement in the administration of justice.’ And, in *Moore v. Dempsey*, 261 U.S. 86, 90-91, 43 S.Ct. 265, 266-267, 67 L.Ed. 543, it was held that the atmosphere in and around the courtroom might be so hostile as to interfere with the trial process, even though an examination of the record disclosed that all the forms of trial conformed to the requirements of law: the defendant had counsel, the jury members stated they were impartial, the jury was correctly charged, and the evidence was legally sufficient to convict. Moreover, in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, a conviction was reversed where extensive pretrial publicity rendered a fair trial unlikely despite the observance of the formal requisites of a legal trial. We commented in that case:

‘No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one’s fellows is often its father.’ *Id.*, at 728, 81 S.Ct., at 1645.

To recognize that disorder can convert a trial into a ritual without meaning is not to pay homage to order as an end in itself. Rather, it recognizes that the courtroom in Anglo-American jurisprudence is more than a location with seats for a judge, jury, witnesses, defendant, prosecutor, defense counsel and public observers; the setting that the courtroom provides is itself an important element in the constitutional conception of trial, contributing a dignity essential to ‘the integrity of the trial’ process. *Craig v. Harney*, 331 U.S. 367, 377, 67 S.Ct. 1249, 1255. As Mr. Justice Black said, in another context: ‘The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.’<sup>FN21</sup> In light of this fundamental conception of what the term trial \*562 means, this Court has recognized that often, despite

widespread, hostile publicity about a case, it is possible to conduct a trial meeting constitutional standards. Significantly, in each of these cases, the basic premise behind the Court’s conclusion has been the notion that judicial proceedings can be conducted with dignity and integrity so as to shield the trial process itself from these irrelevant external factors, rather than to aggravate them as here. Thus, in reversing contempt convictions for out-of-court statements, this Court referred to ‘the power of courts to protect themselves from disturbances and disorder in the court room,’ *Bridges v. State of California*, 314 U.S. 252, 266, 62 S.Ct. 190, 195. (emphasis added); ‘the necessity for fair adjudication, free from interruption of its processes,’ *Pennekamp v. State of Florida*, 328 U.S. 331, 336, 66 S.Ct. 1029, 1032, ‘the integrity of the trial,’ *Craig v. Harney*, 331 U.S. 367, 377, 67 S.Ct. 1249, 1255. And, in upholding a conviction against a claim of unfavorable publicity, this Court commented ‘that petitioner’s trial was conducted in a calm judicial manner,’ *United States ex rel. Darcy v. Handy*, 351 U.S. 454, 463, 76 S.Ct. 965, 970, 100 L.Ed. 1331.

FN21. *Cox v. State of Louisiana*, 379 U.S. 559, 583, 85 S.Ct. 476, 471 (dissenting opinion).

Similarly, when state procedures have been found to thwart the purpose of trial this Court has declared those procedures to be unconstitutional. In *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749, the Court considered a state procedure under which judges were paid for presiding over a case only if the defendant was found guilty and costs assessed against him. An argument was \*\*1643 made that the practice should not be condemned broadly, since some judges undoubtedly would not let their judgment be affected by such an arrangement. However, the Court found the procedure so inconsistent with the conception of what a trial should be and so likely to produce prejudice that it declared the practice unconstitutional even though no specific prejudice was shown.

In *Lyons v. State of Oklahoma*, 322 U.S. 596,

64 S.Ct. 1208, 88 L.Ed. 1481, this Court stated that if an involuntary confession is introduced into evidence\*563 at a state trial the conviction must be reversed, even though there is other evidence in the record to justify a verdict of guilty. We explained the rationale behind this judgment in *Payne v. State of Arkansas*, 356 U.S. 560, 568, 78 S.Ct. 844, 850, 2 L.Ed.2d 975:

‘(W)here \* \* \* a coerced confession constitutes a part of the evidence before the jury and a general verdict is returned, no one can say what credit and weight the jury gave to the confession.’

Similar reasoning led to the decision last Term in *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774. We held there that when the voluntariness of a confession is at issue there must be a procedure adopted which provides ‘a reliable and clearcut determination of \* \* \* voluntariness.’ *Id.*, at 391, 84 S.Ct., at 1788. We found insufficient a procedure whereby the jury heard the confession but was instructed to disregard it if the jury found the confession involuntary:

‘(T)he New York procedure poses substantial threats to a defendant’s constitutional rights to have an involuntary confession entirely disregarded and have the coercion issue fairly and reliably determined. These hazards we cannot ignore.’ *Id.*, at 389, 84 S.Ct., at 1787.

Earlier this Term, in *Turner v. State of Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, we considered a case in which deputy sheriffs, who were the prosecution’s principal witnesses, were in charge of a sequestered jury during the trial. The Supreme Court of Louisiana criticized the practice but said that in the absence of a showing of prejudice there was no ground for reversal. We reversed because the ‘extreme prejudice inherent’ in the practice required its condemnation on constitutional grounds.

Finally, the Court has on numerous other occasions reversed convictions, where the formalities of trial were \*564 observed, because of practices that

negate the fundamental conception of trial.<sup>FN22</sup>

FN22. See *Mooney v. Holohan*, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791; *Alcorta v. State of Texas*, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9; *Napue v. People of State of Illinois*, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217; and *Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215.

This line of cases does not indicate a disregard for the position of the States in our federal system. Rather, it stands for the proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated.

### III.

For the Constitution to have vitality, this Court must be able to apply its principles to situations that may not have been foreseen at the time those principles were adopted. As was said in *Weems v. United States*, 217 U.S. 349, 373, 30 S.Ct. 544, 551, 54 L.Ed. 793, and reaffirmed in *Brown v. Board of Education*, 347 U.S. 483, 492-493, 74 S.Ct. 686, 690-691, 98 L.Ed. 873:

‘Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. \*\*1644 Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. \* \* \* In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent\*565 into impotent and lifeless formulas. Rights declared in words might be lost in reality.’

I believe that it violates the Sixth Amendment for federal courts and the Fourteenth Amendment for state courts to allow criminal trials to be televised to the public at large. I base this conclusion on three grounds: (1) that the televising of trials diverts the trial from its proper purpose in that it has an inevitable impact on all the trial participants; (2) that it gives the public the wrong impression about the purpose of trials, thereby detracting from the dignity of court proceedings and lessening the reliability of trials; and (3) that it singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.

I have attempted to show that our common-law heritage, our Constitution, and our experience in applying that Constitution have committed us irrevocably to the position that the criminal trial has one well-defined purpose—to provide a fair and reliable determination of guilt. In *Tumey v. State of Ohio*, supra, 273 U.S., at 532, 47 S.Ct., at 444, this Court condemned the procedure there employed for compensating judges because it offered a ‘possible temptation’ to judges ‘not to hold the balance nice, clear, and true between the state and the accused.’ How much more harmful is a procedure which not only offers the temptation to judges to use the bench as a vehicle for their own ends, but offers the same temptation to every participant in the trial, be he defense counsel, prosecutor, witness or juror! It is not necessary to speak in the abstract on this point. In the present case, on October 1, the trial judge invited the television cameras into his chambers so they could take films of him reading one of his pretrial orders. On this occasion, at least, the trial judge clearly took the initiative in placing himself before the television audience and in giving his order, and himself, the maximum possible publicity. Moreover, on October 22, when trial counsel renewed\*566 his motion to exclude television from the courtroom on the ground that it violated petitioner's rights under the Federal Constitution, the trial judge made the following speech:

‘This case is not being tried under the Federal

Constitution. This Defendant has been brought into this Court under the state laws, under the State Constitution.

‘I took an oath to uphold this Constitution; not the Federal Constitution but the State Constitution; and I am going to do my best to do that as long as I preside on this Court, and if it is distasteful in following my oath and upholding the constitution, it will just have to be distasteful.’

One is entitled to wonder if such a statement would be made in a court of justice by any state trial judge except as an appeal calculated to gain the favor of his viewing audience. I find it difficult to believe that this trial judge, with over 20 years' experience on the bench, was unfamiliar with the fundamental duty imposed on him by Article VI of the Constitution of the United States:

‘This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be \*\*1645 made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’

This is not to say that all participants in the trial would distort it by deliberately playing to the television audience, but some undoubtedly would. The even more serious danger is that neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go \*567 through trial without considering the effect of their conduct on the viewing public. It is admitted in dissent that ‘if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant.’ Post, p. 1675. But it is contended that what went on at the September hearing is irrelevant to the issue before us. With this I cannot agree. We granted certiorari to consider whether petitioner was denied due process when he was required to submit to a televised trial. In this, as in other cases

involving rights under the Due Process Clause, we have an obligation to make an independent examination of the record, e.g., *Watts v. State of Indiana*, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801; *Norris v. State of Alabama*, 294 U.S. 587, 590, 55 S.Ct. 579, 580, 79 L.Ed. 1074; and the limited grant of certiorari does not prohibit us from considering all the facts in this record relevant to the question before us. The parties to this case, and those who filed briefs as amici curiae, recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in *White v. State of Maryland*, 373 U.S. 59, 83 S.Ct. 1050, 10 L.Ed.2d 193, and *Hamilton v. State of Alabama*, 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114, clearly hold that an accused is entitled to procedural protections at pretrial hearings as well as at actual trial and his conviction will be reversed if he is not accorded these protections. In addition, in *Pointer v. State of Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial. Petitioner clearly did not have a fair determination of his motion to exclude cameras from the courtroom. The very presence of the cameras at the September hearing tended to impress upon the trial judge the power of the communications media and the criticism to which he would have been subjected if he had ruled that the presence of the cameras was inconsistent with petitioner's right to a fair trial. The prejudice to petitioner\*568 did not end here. Most of the trial participants were present at the September hearing—the judge, defense counsel, prosecutor, prosecution witnesses and defendant himself—and they saw for themselves the desecration of the courtroom. After undergoing this experience it is unrealistic to suppose that they would come to the October trial unaware that court procedures were being sacrificed in this case for the convenience of television. The manner in which the October proceedings were conducted only intensified this awareness. It was impossible for any of the trial participants ever to be unaware of the presence of television cameras in

court for the actual trial.<sup>FN23</sup> The snouts of the four television cameras protruded through the opening in the booth, and the cameras and their operators were not only readily visible but were impossible to ignore by all who were surveying the activities in this small courtroom. No one could forget that he was constantly in the focus of the 'all-seeing eye.' Although the law of Texas purportedly permits witnesses to object to being televised, it is ludicrous to place this burden on them. They would naturally accept the conditions of the \*\*1646 courtroom as the judge establishes them, and feel that it would be as presumptuous for them to object to the court's permitting television as to object to the court reporter's recording their testimony. Yet, it is argued that no witnesses objected to being televised. This is indeed a slender reed to rely on, particularly in view of the trial judge's failure, in the course of his self-exculpating statements justifying his decision to allow television, to advise the witnesses or the jurors that they had the right to object to being televised. Defense counsel, however, stated forcefully that he could not concentrate on the case because of the distraction caused by the cameras. And the trial judge's attention\*569 was distracted from the trial since he was compelled to make seven extensive rulings concerning television coverage during the October proceedings alone, when he should, instead, have been concentrating on the trial itself.

FN23. See Appendix, Photograph 7.

It is common knowledge that 'television \* \* \* can \* \* \* work profound changes in the behavior of the people it focuses on.'<sup>FN24</sup> The present record provides ample support for scholars who have claimed that awareness that a trial is being televised to a vast, but unseen audience, is bound to increase nervousness and tension,<sup>FN25</sup> cause an increased \*570 concern about appearances,<sup>FN26</sup> and bring to the surface latent opportunism that the traditional dignity of the courtroom would discourage. Whether they do so consciously or subconsciously, all trial participants act differently in the presence of

television cameras. And, even if all participants make a conscientious and studied effort to be unaffected by the presence of television, this effort in itself prevents them from giving their **\*\*1647** full attention to their proper functions at trial. Thus, the evil of televised trials, as demonstrated by this case, lies not in the noise and appearance of the cameras, but in the trial participants' awareness that they are being televised. To the extent that television has such an inevitable impact it undercuts the reliability of the trial process.

FN24. Keating, 'Not 'Bonanza,' Not 'Peyton Place,' But the U.S. Senate,' N.Y. Times Magazine, April 25, 1965, 67, 72. See, e.g., N.Y. Times, April 22, 1965, p. 43, col. 2 (in describing a televised stockholders' meeting the Times reported, 'Some stockholders seemed very much aware they were on camera'); Tinkham, Should Canon 35 Be Amended? A Question of Proper Judicial Administration, 42 A.B.A.J. 843, 845 (1956) (in giving examples of how people react when they know they are on television, the author describes the reactions of a television audience when the camera was turned on it as 'contorted, grimacing'); Gould, N. Y. Times, March 11, 1956, s 2, p. X 11, col. 2 ('The most experienced performers in show business know the horrors of stage fright before they go on TV. This psychological and emotional burden must not be placed on a layman whose testimony may have a bearing on whether, in a murder trial, another human being is to live or die.').

FN25. See, e.g., Douglas, The Public Trial and the Free Press, 46 A.B.A.J. 840, 842 (1960). In *United States v. Kleinman*, 107 F.Supp. 407 (D.C.D.C.1952), the court refused to hold in contempt witnesses in a congressional hearing who refused to answer questions while television cameras were focused on them. The court stated:

'The only reason for having a witness on the stand, either before a committee of Congress or before a court, is to get a thoughtful, calm, considered and, it is to be hoped, truthful disclosure of facts. That is not always accomplished, even under the best of circumstances. But at least the atmosphere of the forum should lend itself to that end.

'In the cases now to be decided, the stipulation of facts discloses that there were, in close proximity to the witness, television cameras, newsreel cameras, news photographers with their concomitant flashbulbs, radio microphones, a large and crowded hearing room with spectators standing along the walls, etc. The obdurate stand taken by these two defendants must be viewed in the context of all these conditions. The concentration of all of these elements seems to me necessarily so to disturb and distract any witness to the point that he might say today something that next week he will realize was erroneous. And the mistake could get him in trouble all over again.' *Id.*, at 408.

FN26. See, e.g., Douglas, *supra*, note 25, at 842; Yesawich, *Televising and Broadcasting Trials*, 37 Cornell L.Q. 701, 717 (1952).

In the early days of this country's development, the entertainment a trial might provide often tended to obfuscate its proper role.

'The people thought holding court one of the greatest performances in the range of their experience. \* \* \* The country folks would crowd in for ten miles to hear these 'great lawyers' plead; and it was a secondary matter with the client whether he won or lost his case, so the 'pleading' was loud and long.' FN27

FN27. Wigmore, *A Kaleidoscope of Justice* 487 (1941).

'In early frontier America, when no motion pictures, no television, and no radio provided entertainment,\*571 trial day in the county was like fair day, and from near and far citizens young and old converged on the county seat. The criminal trial was the theater and spectaculum of old rural America. Applause and cat calls were not infrequent. All too easily lawyers and judges became part-time actors at the bar. \* \* \*<sup>FN28</sup>

FN28. Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 U.Pa.L.Rev. 1, 6 (1961).

I had thought that these days of frontier justice were long behind us, but the courts below would return the theater to the courtroom.

The televising of trials would cause the public to equate the trial process with the forms of entertainment regularly seen on television and with the commercial objectives of the television industry. In the present case, tapes of the September 24 hearing were run in place of the 'Tonight Show' by one station and in place of the late night movie by another. Commercials for soft drinks, soups, eyedrops and seatcovers were inserted when there was a pause in the proceedings. In addition, if trials were televised there would be a natural tendency on the part of broadcasters to develop the personalities of the trial participants, so as to give the proceedings more of an element of drama. This tendency was noticeable in the present case. Television commentators gave the viewing audience a homey, flattering sketch about the trial judge, obviously to add an extra element of viewer appeal to the trial:

'Tomorrow morning at 9:55 the WFAA T.V. cameras will be in Tyler to telecast live (the trial judge's) decision whether or not he will permit live coverage of the Billie Sol Estes trial. If so, this will be the first such famous national criminal proceeding to be televised in its entirety live. (The trial

judge) \*572 was appointed to the bench here in Tyler in 1942 by (the Governor). The judge has served every two years since then. This very beautiful Smith County Courthouse was built and dedicated in 1954, but before that (the trial judge) had made a reputation for himself that reached not only throughout Texas, but throughout the United States as well. It is said that (the trial judge), who is now 53 years old, has tried more cases than any other judge during his time in office.'

The television industry might also decide that the bareboned trial itself does not contain sufficient drama to sustain an audience. It might provide expert commentary on the proceedings and hire persons with legal backgrounds to anticipate possible trial strategy, as the football expert anticipates plays for his audience. The trial judge himself stated at the September hearing that if he wanted \*\*1648 to see a ball game he would turn on his television set, so why not the same for a trial.

Moreover, should television become an accepted part of the courtroom, greater sacrifices would be made for the benefit of broadcasters. In the present case construction of a television booth in the courtroom made it necessary to alter the physical layout of the courtroom and to move from their accustomed position two benches reserved for spectators.<sup>FN29</sup> If this can be done in order better to accommodate the television industry, I see no reason why another court might not move a trial to a theater, if such a move would provide improved television coverage. Our memories are short indeed if we have already forgotten the wave of horror that swept over this country when Premier Fidel Castro conducted his prosecutions before 18,000 people in Havana Stadium.<sup>FN30</sup> But in the decision \*573 below, which completely ignores the importance of the courtroom in the trial process, we have the beginnings of a similar approach toward criminal 'justice.' This is not an abstract fear I am expressing because this very situation confronted the Nebraska Supreme Court in *Roberts v. State*, 100 Neb. 199, 203, 158 , n.W. 930, 931-932 (1916):

FN29. Compare Appendix, Photograph 5, with Appendix, Photograph 6.

FN30. N.Y. Times, Jan. 23, 1959, p. 1, col. 1.

'The court removed the trial from the courtroom to the theater, and stated as a reason therefor: 'By reason of the insufficiency of the courtroom to seat and accommodate the people applying for admission \* \* \* it is by the court ordered that the further trial of this cause be had at the Keith Theater, and thereupon the court was adjourned to Keith Theater, where trial proceeded.' The stage was occupied by court, counsel, jury, witnesses, and officers connected with the trial. The theater proper was crowded with curious spectators. Before the trial was completed it was returned to the courtroom and concluded there. At the adjournment of court on one occasion the bailiff announced from the stage: 'The regular show will be to-morrow; matinee in the afternoon and another performance at 8:30. Court is now adjourned until 7:30.'"

There would be a real threat to the integrity of the trial process if the television industry and trial judges were allowed to become partners in the staging of criminal proceedings. The trial judge in the case before us had several 'conferences (with) representatives of the news media.' Post, p. 1672. He then entered into a joint enterprise with a television station for the construction of a booth in his courtroom. The next logical step in this partnership might be to schedule the trial for a time that would permit the maximum number of viewers to watch and to schedule recesses to coincide with the need for station breaks. Should the television industry become an \*574 integral part of our system of criminal justice, it would not be unnatural for the public to attribute the shortcomings of the industry to the trial process itself. The public is aware of the television industry's consuming interest in ratings, and it is also aware of the steps that have been taken in the past to maintain viewer interest in television programs. Memories still recall vividly the scandal caused by the disclosure that quiz programs had

been corrupted in order to heighten their dramatic appeal. Can we be sure that similar efforts would not be made to heighten the dramatic appeal of televised trials? Can we be sure that the public would not inherently distrust our system of justice because of its intimate association with a commercial enterprise?

Broadcasting in the courtroom would give the television industry an awesome \*\*1649 power to condition the public mind either for or against an accused. By showing only those parts of its films or tapes which depict the defendant or his witnesses in an awkward or unattractive position, television directors could give the community, state or country a false and unfavorable impression of the man on trial. Moreover, if the case should end in a mistrial, the showing of selected portions of the trial, or even of the whole trial, would make it almost impossible to select an impartial jury for a second trial. Cf. *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663. To permit this powerful medium to use the trial process itself to influence the opinions of vast numbers of people, before a verdict of guilt or innocence has been rendered, would be entirely foreign to our system of justice.

The sense of fairness, dignity and integrity that all associate with the courtroom would become lost with its commercialization. Thus, the televising of trials would not only have an effect on those participating in the trials that are being televised, but also on those who observe the trials and later become trial participants.

\*575 It is argued that television not only entertains but also educates the public. But the function of a trial is not to provide an educational experience; and there is a serious danger that any attempt to use a trial as an educational tool will both divert it from its proper purpose and lead to suspicions concerning the integrity of the trial process. The Soviet Union's trial of Francis Gary Powers provides an example in point. The integrity of the trial was suspect because it was concerned not only with determining the guilt of the individual on trial

but also with providing an object lesson to the public. This divided effort undercut confidence in the guilt-determining aspect of the procedure and by so doing rendered the educational aspect self-defeating.

‘Was it prejudicial to (Powers) that the trial took place in a special hall with over 2,000 spectators, that it was televised, that prominent representatives of many organizations in various countries were invited to attend, that simultaneous oral translations of the proceedings \* \* \* were provided, and that detailed \* \* \* reports of the case in various languages were distributed to the press before, during and after the trial?’

\* \* \* (T)he Soviet legal system \* \* \* consciously and explicitly uses the trial, and indeed the very safeguards of justice themselves, as instruments of the social and political objectives of the state. \* \* \*

\* \* \* A Soviet trial is supposed to be correct, impartial, just, reasonable, and at the same time it is supposed to serve as an object-lesson to society, a means of teaching the participants, the spectators and the public generally to be loyal, obedient, disciplined fighters for Communist ideals. \* \* \*

\* \* \* (T)he tension between the demands of justice and the demands of politics can never be entirely \*576 eliminated. The fate of the accused is bound to be influenced in one way or another when the trial is lifted above its individual facts and deliberately made an object-lesson to the public.’

\* \* \* (T)he deliberate use of a trial as a means of political education threatens the integrity of the judicial process.<sup>FN31</sup>

FN31. Berman, Introduction to the Trial of the U 2 xiii, xii-xiii, xxix (1960).

Finally, if the televising of criminal proceedings were approved, trials would be selected for television coverage for reasons having nothing to

do with the purpose of trial. A trial might be televised because a particular judge has gained the fancy of the public by his unorthodox\*\*1650 approach; or because the district attorney has decided to run for another office and it is believed his appearance would attract a large audience; or simply because a particular courtroom has a layout that best accommodates television coverage.<sup>FN32</sup> For the most part, however, the most important factor that would draw television to the courtroom would be the nature of the case. The alleged perpetrator of the sensational murder, the fallen idol, or some other person who, like petitioner, has attracted the public interest would find his trial turned into \*577 a vehicle for television. Yet, these are the very persons who encounter the greatest difficulty in securing an impartial trial, even without the presence of television. This Court would no longer be able to point to the dignity and calmness of the courtroom as a protection from outside influences. For the television camera penetrates this protection and brings into the courtroom tangible evidence of the widespread interest in a case—an interest which has often been fanned by exhaustive reports in the newspapers, television and radio for weeks before trial. The present case presents a clear example of this danger. In the words of petitioner's counsel:

FN32. A revealing dialogue took place in the present case between defense counsel and one of the television executives present in the courtroom during the September 24 hearing.

‘Q. The camera on the other side of the room has to look over a corner of the jury box and past the jurors to be aimed at the witness box, does it not?’

‘A. I think that is pretty clear, sir. I don't think the jurors would be in the way there.’

‘Q. You don't think the jurors would get in the way of your operations?’

‘A. I don't mean that exactly, sir.’

'The Saturday Evening Post, The Readers Digest, Time, Life all had feature stories upon (petitioner's) story giving in detail his life history and the details of \* \* \* alleged fraudulent transactions. \* \* \*

'The metropolitan papers throughout the country featured the story daily. Each day for weeks the broadcasts carried some features of the story.'  
FN33

FN33. Petition for writ of certiorari, 35a.

After living in the glare of this publicity for weeks, petitioner came to court for a legal adjudication of the charges against him. As he approached the courthouse he was confronted by an army of photographers, reporters and television commentators shoving microphones in his face.<sup>FN34</sup> When he finally made his way into the courthouse it was reasonable for him to expect that he could have a respite from this merciless badgering and have his case adjudicated in a calm atmosphere. Instead, the carnival atmosphere of the September hearing served only to increase the publicity surrounding petitioner and to condition further the public's mind against him. Then, upon his entrance into the courtroom for his actual trial he was \*578 confronted with the sight of the television camera zeroed in on him and the ever-present still photographers snapping pictures of interest. As he opened a newspaper waiting for the proceedings to begin, the close-up lens of a television camera zoomed over his shoulder in an effort to find out what he was reading. In no sense did the dignity and integrity of the trial process shield this petitioner from the prejudicial publicity to which he had been exposed, because that publicity marched right through the courtroom door and made itself at home in heretofore unfamiliar surroundings. We stated in *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799, 'From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial

tribunals in which every defendant stands equal before the law.' This \*\*1651 principle was not applied by the courts below.

FN34. See Appendix, Photograph 4.

I believe petitioner in this case has shown that he was actually prejudiced by the conduct of these proceedings, but I cannot agree with those who say that a televised trial deprives a defendant of a fair trial only if 'actual prejudice' can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof,<sup>FN35</sup> but it would gradually erode our fundamental conception of trial.<sup>FN36</sup> A defendant may be unable to prove that he was actually prejudiced by a televised trial, just as he may be unable to prove that the introduction of a coerced confession at his trial influenced the jury to convict him when there was substantial evidence to support his conviction aside from the confession, *Payne v. State of Arkansas*, supra; that the jury refrained from making a \*579 clearcut determination on the voluntariness question, *Jackson v. Denno*, supra; that a particular judge was swayed by a direct financial interest in his conviction, *Tumey v. State of Ohio*, supra; or that the jury gave additional weight to the testimony of certain prosecution witnesses because of the jury's repeated contacts with those witnesses during the trial, *Turner v. State of Louisiana*, supra. How is the defendant to prove that the prosecutor acted differently than he ordinarily would have, that defense counsel was more concerned with impressing prospective clients than with the interests of the defendant, that a juror was so concerned with how he appeared on television that his mind continually wandered from the proceedings, that an important defense witness made a bad impression on the jury because he was 'playing' to the television audience or that the judge was a little more lenient or a little more strict than he usually might be? And then, how is petitioner to show that this combination of changed attitudes diverted the trial sufficiently from its purpose to deprive him of a fair trial? It is no answer to say that an appellate court can review for itself

tapes or films of the proceedings. In the first place, it is not clear that the court would be able to obtain unedited tapes or films to review. Even with the cooperation of counsel on both sides, this Court was unable to obtain films of this trial which were in any sense complete. In addition time limitations might restrict the television companies to taking pictures only of those portions of the trial that are most newsworthy and most likely to attract the attention of the viewing audience. More importantly, the tapes or films, even if unedited, could give a wrong impression of the proceedings. The camera which takes pictures cannot take a picture of itself. In addition, the camera cannot possibly cover the actions of all trial participants during the trial. While the camera is focused on the \*580 judge who is apparently acting properly, a juror may be glancing up to see where the camera is pointing and counsel may be looking around to see whether he can confer with his client without the close-up lens of the camera focusing on them. Needless to say, the camera cannot penetrate the minds of the trial participants and show their awareness that they may at that moment be the subject of the camera's focus. The most the camera can show is that a formally correct trial took place, but our Constitution requires more than form.

FN35. See, e.g., Douglas, *supra*, note 25, at 844.

FN36. Cf. *Fay v. People of State of New York*, 332 U.S. 261, 300, 67 S.Ct. 1613, 1633, 91 L.Ed. 2043 (dissenting opinion of Mr. Justice Murphy).

I recognize that the television industry has shown in the past that it can be an enlightening and informing institution, but like other institutions it must respect the rights of others and cannot demand that we alter fundamental constitutional conceptions for its benefit. We must take notice of the inherent unfairness of television\*\*1652 in the courtroom and rule that its presence is inconsistent with the 'fundamental conception' of what a trial should be. My conviction that this is the proper

holding in this case is buttressed by the almost unanimous condemnation of televised court proceedings by the judiciary in this country and by the strong opposition to the practice by the organized bar in this country. Canon 35 of the American Bar Association's Canons of Judicial Ethics prohibits the televising of court trials.<sup>FN37</sup> With only two, or possibly three exceptions,<sup>FN38</sup> The highest court of each \*581 State which has considered the question has declared that televised criminal trials are inconsistent with the Anglo-American conception of 'trial.'<sup>FN39</sup> Similarly, \*\*1653 Rule 53 of the Federal Rules of Criminal Procedure prohibits \*582 the 'broadcasting' of trials,<sup>FN40</sup> and the Judicial Conference of the United States has unanimously condemned televised trials.<sup>FN41</sup> This condemnation rests on more than notions of policy; it arises from an understanding of the \*583 constitutional conception of the term 'trial. Such a general consensus is certainly relevant to this Court's determination of the question. See *Mapp v. Ohio*, 367 U.S. 643, 651, 81 S.Ct. 1684, 1689, 6 L.Ed.2d 1081.

FN37. The Canon provides in pertinent part:

'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 or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.'

FN38. *Colorado, In re Hearings Concerning Canon 35 of Canons of Judicial Ethics*, 296 P.2d 465 (Colo.Sup.Ct.1956), and *Texas permit televising of trials in the discretion of the trial judge. The current situation in Oklahoma is unclear. In Lyles v. State*, 330 P.2d 734 (1958), the Criminal

Court of Appeals of Oklahoma stated that the televising of proceedings was in the discretion of the trial judge. In 1959, however, the Supreme Court adopted a rule prohibiting television during actual proceedings. Okl.Stat. Ann., Tit. 5, at 65-66 (1963 Supp.). Nevertheless, in 1961 the court again stated that the televising of trials is a matter for the trial judge's discretion. *Cody v. State*, 361 P.2d 307, 84 A.L.R.2d 997 (Ct.Crim.App.Okl.1961).

FN39. With the exceptions stated in note 38, *supra*, no State affirmatively permits televised trials. It has been stated that Canon 35 is in effect in 30 States. 48 J.Am.Jud.Soc. 80 (1964); Brief for Petitioner, p. 39. It is difficult to verify this figure because of the lack of uniformity among the States in reporting their court rules. However, the following States have clearly adopted Canon 35, or its equivalent: Alaska, Alaska Rules Crim.Proc. 48; Arizona, Ariz.Sup.Ct.Rule 45, 17 Ariz.Rev.Stat. Ann., at 40; Connecticut, Conn. Practice Book 27 (1963); Delaware, Del.Sup.Ct.Rule 33, 13 Del.Code Ann., at 23 (1964 Supp.) (adopted Canon 35 in its pre-1952 form, which does not explicitly prohibit television, but does prohibit 'the taking of photographs' and 'broadcasting of court proceedings'); Florida, Code of Ethics, Rule A35, 31 Fla.Stat. Ann., at 285 (1964 Supp.), see *Brumfield v. State*, 108 So.2d 33 (Fla.Sup.Ct.1958); Hawaii, Hawaii Sup.Ct.Rule 16, 43 Haw. 450; Illinois, 1964 Ann.Rep. of the Ill.Judicial Conference 168-169, see *People v. Ulrich*, 376 Ill. 461, 34 N.E.2d 393 (1941), *People v. Munday*, 280 Ill. 32, 117 N.E. 286 (1917); Iowa, Iowa Sup.Ct.Rule 119, 40 Iowa Code Ann., c. 610 (1964 Supp.); Kansas, Kansas Sup.Ct. Rule 117, 191 Kan. xxiv (1963) (does not refer specifically to television); Kentucky,

Ky.Ct.App.Rule 3.170, Russell's Kentucky Practice and Service 21 (1964); Louisiana, Canon of Judicial Ethics XXIII, 242 La. LI (1960); Michigan, Canon of Judicial Ethics 35, Callaghan's Michigan Pleading and Practice, Rules at 422-423 (2d ed. 1962). New Jersey, Canon of Judicial Ethics 35, 1 Waltzinger, New Jersey Practice 299 (Rev. ed. 1954); New Mexico, N.M.Sup.Ct.Rule 27, 4 N.M.Stat. Ann., at 95 (1963 Supp.); New York, N.Y. Rules of the Administrative Board of the Judicial Conference, Rule 5, N.Y. Judiciary Law, at 320 (1964 Supp.); Ohio, 176 Ohio St. lxiv (1964), see *State v. Clifford*, 162 Ohio St. 370, 123 N.E.2d 8 (1954), cert. denied, 349 U.S. 929, 75 S.Ct. 771, 99 L.Ed. 1259; Tennessee, Tenn.Sup.Ct.Rule 38, 209 Tenn. 818 (1961); Virginia, 201 Va. cvii (1960) (prohibits taking of photographs and broadcasting, although it does not refer specifically to television); Washington, 61 Wash.2d xxviii (1963); West Virginia, 141 W.Va. viii (1955).

In addition, Brand, Bar Associations, Attorneys and Judges (1956 and 1959 Supp.) reports that the Idaho Supreme Court adopted Canon 35 in its present form and the Supreme Courts of Oregon, South Dakota and Utah adopted the Canon when it merely prohibited 'photographing and 'broadcasting' without specifically mentioning television. It has also been reported that the Supreme Court of Arkansas adopted Canon 35. 44 J.Am.Jud.Soc. 120 (1960).

Moreover, the Supreme Court of California assumed it was 'improper' to televise criminal proceedings in *People v. Stroble*, 36 Cal.2d 615, 226 P.2d 330 (1951), affirmed 343 U.S. 181, 72 S.Ct. 599, 96 L.Ed. 872, rehearing denied 343 U.S. 952, 72 S.Ct. 1039, 96 L.Ed. 1353; see the rule adopted

by the Conference of California Judges, 24 Cal.State Bar J. 299 (1949); the Court of Appeals of Maryland in *Ex parte Sturm*, 152 Md. 114, 122, 136 A. 312, 315, 51 A.L.R. 356 (1927), used language indicating that Maryland would probably bar television from the courtroom if faced with the problem; and the Supreme Court of Pennsylvania cited with approval Canon 35 in *Mack Appeal*, 386 Pa. 251, 257, n. 5, 126 A.2d 679, 681-682, n. 4 (1956), cert. denied *Mack v. Com. of Pa.*, 352 U.S. 1002, 77 S.Ct. 559, 1 L.Ed.2d 547, see 48 J.Am.Jud.Soc. 200 (1965).

FN40. Rule 53 provides:

‘The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court.’

FN41. ‘Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceedings, and the broadcasting of judicial proceedings by radio, television, or other means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court.’ Annual Report of the Proceedings of the Judicial Conference of the United States, March 8-9, 1962, p. 10.

#### IV.

Nothing in this opinion is inconsistent with the constitutional guarantees of a public trial and the freedoms of speech and the press.

This Court explained in *In re Oliver*, 333 U.S. 257, 266, 270, 68 S.Ct. 499, 506, 92 L.Ed.2d 682, that the public trial provision of the Sixth Amendment is a ‘guarantee to an accused’ designed to ‘safeguard against any attempt to employ our courts

as instruments of persecution.’ Clearly the openness of the proceedings provides other benefits as well: it arguably improves the quality of testimony, it may induce unknown witnesses to come forward with relevant testimony, it may move all trial participants to perform their duties conscientiously, and it gives the public the opportunity to observe the courts in the performance of their duties and to determine whether they are performing adequately. FN42

But the guarantee of a public trial confers no special benefit on the press, the radio industry or the television industry. A public trial is a necessary component of an accused’s right to a fair trial and the concept of public trial cannot be used to defend conditions which prevent the trial process from providing a fair and reliable determination of guilt.

FN42. See, e.g., 3 Blackstone, Commentaries on the Laws of England 372-373 (15th ed. 1809); 6 Wigmore, Evidence 332-335 (3d ed. 1940).

To satisfy the constitutional requirement that trials be public it is not necessary to provide facilities large enough \*584 for all who might like to attend a particular trial, since to do so would interfere with the integrity of the trial process and make the publicity of trial proceedings an end in itself. Nor does the requirement that trials be public mean that observers are free to act as they please in the courtroom, for persons who attend trials cannot act in such a way as to interfere with the trial \*\*1654 process, see *Moore v. Dempsey*, supra. When representatives of the communications media attend trials they have no greater rights than other members of the public. Just as an ordinary citizen might be prohibited from using field glasses or a motion picture camera in the courthouse because by so doing he would interfere with the conduct of the trial, representatives of the press and broadcasting industries are subject to similar limitations when they attend court. Since the televising of criminal trials diverts the trial process from its proper end, it must be prohibited. This prohibition does not conflict with the constitutional guarantee of a public trial,

because a trial is public, in the constitutional sense, when a courtroom has facilities for a reasonable number of the public to observe the proceedings, which facilities are not so small as to render the openness negligible and not so large as to distract the trial participants from their proper function, when the public is free to use those facilities, and when all those who attend the trial are free to report what they observed at the proceedings.

Nor does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. Court proceedings, as well as other public matters, are proper subjects for press coverage.

'A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose \*585 none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it.'

FN43. *Craig v. Harney*, 331 U.S. 367, 374, 67 S.Ct. 1249, 1254, 91 L.Ed. 1546. See *Bridges v. State of California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192; *Pennkamp v. State of Florida*, 328 U.S. 331, 66 S.Ct. 1029, 90 L.Ed. 1295.

So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgment of the freedom of press. The right of the communications media to comment on court proceedings does not bring with it the right to inject themselves into the fabric of the trial process to alter the purpose of that process.

In summary, television is one of the great inventions of all time and can perform a large and useful role in society. But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights.<sup>FN44</sup> The television industry, like other institutions, has a proper area of activities and limitations beyond which it cannot go with its cameras. That area does not extend into an American courtroom. On entering that \*586 hallowed sanctuary, where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.

FN44. Compare *Olmstead v. United States*, 277 U.S. 438, 471, 48 S.Ct. 564, 570, 72 L.Ed. 944 (dissenting opinion of Mr. Justice Brandeis); *On Lee v. United States*, 343 U.S. 747, 762, 72 S.Ct. 967, 976, 96 L.Ed. 1270 (dissenting opinion of Mr. Justice Douglas); *Silverman v. United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed.2d 734; *Lopez v. United States*, 373 U.S. 427, 445-446, 83 S.Ct. 1381, 1391-1392, 10 L.Ed.2d 462 (opinion concurring in the result), 373 U.S. 465, 83 S.Ct. 1402 (dissenting opinion of Mr. Justice Brennan).

(For opinion of HARLAN, J., concurring, see post, p. 1662.)

**\*\*1655** APPENDIX TO OPINION OF MR. CHIEF JUSTICE WARREN.

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**\*\*1662 \*587** Mr. Justice HARLAN, concurring.

I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion.

The constitutional issue presented by this case is far-reaching in its implications for the administration of justice in this country. The precise question is whether the Fourteenth Amendment prohibits a State, over the objection of a defendant, from employing television in the courtroom to televise contemporaneously, or subsequently by means of videotape, the courtroom proceedings of a criminal trial of widespread public interest. The issue is no narrower than this because petitioner has not asserted any isolatable prejudice resulting from the presence of television apparatus within the courtroom or from the contemporaneous or subsequent broadcasting of the trial proceedings. On the other hand, the issue is no broader, for we are concerned here only with a criminal trial of great notoriety, and not with criminal proceedings of a more or less routine nature.

The question is fraught with unusual difficulties. Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the States from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.

**\*588** Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, 'commercials' at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.

## I.

No constitutional provision guarantees a right to televise trials. The 'public trial' guarantee of the Sixth Amendment, which reflects a concept fundamental to the administration of justice in this Country, *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682, certainly does not require that television be admitted to the courtroom. See *United Press Assns. v. Valente*, 308 N.Y. 71, 123 N.E.2d 777. Essentially, the publictrial guarantee embodies a view of human nature, true as a general rule, that

judges, lawyers, witnesses, and jurors will perform their respective functions more responsibly in an open court than in secret proceedings. In *re Oliver*, supra, 333 U.S. at 266-273, 68 S.Ct., at 504-507. A fair trial is the objective, and 'public trial' is an institutional safeguard for attaining it.

Thus the right of 'public trial' is not one belonging to the public, but one belonging to the accused, and inhering in the institutional process by which justice is administered. Obviously, the public trial guarantee is not violated if an individual member of the public cannot gain admittance to a courtroom because there are no available seats. The guarantee will already have been met, for the 'public' will be present in the form of those **\*\*1663** persons **\*589** who did gain admission. Even the actual presence of the public is not guaranteed. A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

The free speech and press guarantees of the First and Fourteenth Amendments are also asserted as embodying a positive right to televise trials, but the argument is greatly overdrawn. Unquestionably, television has become a very effective medium for transmitting news. Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into

the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

**\*590** I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accouterments of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and note books. If it were, I would not hesitate to say that such physical paraphernalia should be barred.

## II.

The probable impact of courtroom television on the fairness of a trial may vary according to the particular kind of case involved. The impact of television on a trial exciting wide popular interest may be one thing; the impact on a run-of-the-mill case may be quite another. Furthermore, the propriety of closed circuit television for the purpose of making a court recording or for limited use in educational institutions obviously presents markedly different considerations. The *Estes* trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases; in so doing, however, I wish to make it perfectly clear that I am by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved. When the issue of television in a non-notorious trial is presented it may appear that

no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice, though less severe, are nonetheless of constitutional proportions. Compare *Powell v. State of Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595; *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799. The resolution of those further questions should await an appropriate \*\*1664 case; the \*591 Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members of the majority who unreservedly join the Court's opinion would resolve those questions now.

I do not deem the constitutional inquiry in this case ended by the finding in effect conceded by petitioner's counsel, that no isolatable prejudice was occasioned by the manner in which television was employed in this case.<sup>FN1</sup> Courtroom television introduces into the conduct of a criminal trial the element of professional 'showmanship,' an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena. In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense counsel, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?

FN1. The trial judge ordered that there was to be no audio transmission of the witnesses' testimony. The witnesses, however, were present at the September hearing when everything was broadcast, and the record does not show affirmatively that they were aware that the microphone which confronted them during the actual trial was not being used for the same purpose.

\*592 Surely possibilities of this kind carry grave potentialities for distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and, more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions. See *Douglas, The Public Trial and the Free Press*, 46 A.B.A.J. 840 (1960). To be sure, such distortions may produce no telltale signs, but in a highly publicized trial the danger of their presence is substantial, and their effects may be far more pervasive and deleterious than the physical disruptions which all concede would vitiate a conviction. A lively public interest could increase the size of the viewing audience immensely, and the masses of spectators to whom the trial is telecast would have become emotionally involved with the case through the dissemination of pretrial publicity, the usual concomitant of such a case. The presence of television would certainly emphasize to the trial participants that the case is something 'special.' Particularly treacherous situations are presented in cases where pretrial publicity has been massive<sup>FN2</sup> even when jurors positively state they will not be influenced by it; see *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751. To increase the possibility of influence and the danger of a 'popular verdict' by subjecting the jurors to the view of a mass audience whose approach to the case has been conditioned by pretrial publicity can only make a bad situation worse. The entire thrust of rules of evidence and the other protections attendant upon the modern trial is to keep extraneous influences out of the courtroom. *Turner v.*

State of Louisiana, 379 U.S. 466, 472-473, 85 S.Ct. 1665, 549-550, 13 L.Ed.2d 424. As we recently observed in *Turner*, 'Mr. Justice Holmes stated no more than a truism when he observed that 'Any judge who has sat with juries knows that, in spite of forms they \*593 are extremely likely to be impregnated by the enviroing atmosphere.' *Frank v. Mangum*, 237 U.S. 309, at 349, 35 S.Ct. 582, at 595, 59 L.Ed. 969 (dissenting opinion).' *Id.*, at 472, 85 S.Ct., at 549.<sup>FN3</sup> The knowledge on the part of the jury and other trial participants that they are being televised to an emotionally involved audience can only aggravate the atmosphere created by pre-trial publicity.

FN2. Petitioner in this case amassed 11 volumes of pretrial press clippings.

FN3. The Court had occasion to recognize in *Cox v. State of Louisiana*, 379 U.S. 559, 565, 85 S.Ct. 476, 481, 13 L.Ed.2d 487, that even 'judges are human' and not immune from outside environmental influences.

The State argues that specific prejudice must be shown for the Due Process Clause to apply. I do not believe that the Fourteenth Amendment is so impotent when the trial practices in question are instinct with dangers to constitutional guarantees. I am at a loss to understand how the Fourteenth Amendment can be thought not to encompass protection of a state criminal trial from the dangers created by the intrusion of collateral and wholly irrelevant influences into the courtroom. The Court has not hesitated in the past to condemn such practices, even without any positive showing of isolatable prejudice. In *Turner v. State of Louisiana*, *supra*, decided just this Term, we held that the 'potentialities' for distortion of the trial created by a key witness serving as bailiff to a sequestered jury were sufficient to violate the Due Process Clause of the Fourteenth Amendment. In *Jackson v. Denno*, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908, the Court made the judgment that a trial judge's determination of a coerced-confession issue is more

likely to avoid prejudice than a jury determination, a judgment which indeed overrode a long-standing contrary state practice. And in *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, we held that flamboyant pretrial publicity cast sufficient doubt on the impartiality of the jury to vitiate a conviction, even in the face of statements by all the jurors that they were not subject to its influence. See 366 U.S., at 729, 81 S.Ct., at 1646 (Frankfurter, J., concurring). Other examples of \*594 instances in which the Court has exercised its judgment as to the effects of one thing or another on human behavior are plentiful. See, e.g., *Griffin v. State of California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106; *Tancil v. Woolls*, 379 U.S. 19, 85 S.Ct. 157, 13 L.Ed.2d 91; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (compare *People v. Defore*, 242 N.Y. 13, 150 N.E. 585); *Avery v. State of Georgia*, 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749.

The judgment that the presence of television in the courtroom represents a serious danger to the trial process is supported by a vast segment of the Bar of this country, as evidenced by Canon 35 of the Canons of Judicial Ethics of the American Bar Association, counseling against such practices,<sup>FN4</sup> the views of the Judicial Conference of the United States (*infra*, p. 1669), Rule 53 of the Federal Rules of Criminal Procedure, and even the 'personal views' (*post*, p. 1669) of the Justices on the dissenting side of the present case.

FN4. The consistent position of the American Bar Association is set out in the Appendix.

The arguments advanced against the constitutional banning of televised trials seem to me peculiarly unpersuasive. It is said that the pictorial broadcasting of trials will serve to educate the public as to the nature of the judicial process. Whatever force such arguments might \*1666 have in run-of-the-mill cases, they carry little weight in cases of

the sort before us, where the public's interest in viewing the trial is likely to be engendered more by curiosity about the personality of the well-known figure who is the defendant (as here), or about famous witnesses or lawyers who will appear on the television screen, or about the details of the particular crime involved, than by innate curiosity to learn about the workings of the judicial process itself. Indeed it would be naive not to suppose that it would be largely such factors that would qualify a trial for commercial television \*595 'billing,' and it is precisely that kind of case where the risks of permitting television coverage of the proceedings are at their greatest.

It is also asserted that televised trials will cause witnesses to be more truthful, and jurors, judges, and lawyers more diligent. To say the least this argument is sophistic, for it is impossible to believe that the reliability of a trial as a method of finding facts and determining guilt or innocence increases in relation to the size of the crowd which is watching it. Attendance by interested spectators in the courtroom will fully satisfy the safeguards of 'public trial.' Once openness is thus assured, the addition of masses of spectators would, I venture to say, detract rather than add to the reliability of the process. See *Cox v. State of Louisiana*, 379 U.S. 559, 562, 85 S.Ct. 476, 479, 13 L.Ed.2d 487. A trial in Yankee Stadium, even if the crowd sat in stony silence, would be a substantially different affair from a trial in a traditional courtroom under traditional conditions, and the difference would not, I think, be that the witnesses, lawyers, judges, and jurors in the stadium would be more truthful, diligent, and capable of reliably finding facts and determining guilt or innocence.<sup>FN5</sup> There will be no disagreement, I am sure, among those competent to judge that precisely the opposite would likely be the case.

FN5. There may, of course, be a difference in impact upon the atmosphere and trial participants between the physical presence of masses of people and the presence of a

camera lens which permits masses of people to observe the process remotely. However, the critical element is the knowledge of the trial participants that they are subject to such visual observation, an element which is, of course, present in this case.

Finally, we should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional \*596 judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause. At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned. On these premises I concur in the opinion of the Court.

APPENDIX TO OPINION OF MR. JUSTICE  
HARLAN, CONCURRING.

The development of Canon 35 is set out at length in the amicus curiae brief of the American Bar Association, pp. 3-8, as follows:

'It (Canon 35) was originally adopted on September 30, 1937 by the House of Delegates<sup>FN1</sup> in the following form:

FN1. 'The House of Delegates is not only the governing body of the American Bar Association; because of the presence of representatives of all State Bar Associations, the largest and most important local bar associations, and of other important national professional groups, it is in fact a broadly representative policy forum for the profession as a whole.'

"Proceedings in court should be conducted

with fitting dignity and decorum. The taking of photographs\*\*1667 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.' 62 A.B.A.Rep. 1134-35 (1937).

'A Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings had reported to the Association its grave concern with the dangers attendant upon the use of radio in connection with trials, particularly\*597 in light of the spectacular publicity and broadcast of the trial of Bruno Hauptmann.<sup>FN2</sup> The Committee specifically referred to the evil of 'trial in the air'.<sup>FN3</sup> 62 A.B.A.Rep. 860 (1937).

FN2. 'See State v. Hauptmann, 115 N.J.L. 412, 180 Atl. 809 (Ct.Err. & App.), cert. denied, 296 U.S. 649, (56 S.Ct. 310, 80 L.Ed. 461) (1935).'

FN3. 'Prior to the adoption of Judicial Canon 35, the impropriety of permitting radio broadcasts of court proceedings was recognized by the Committee on Professional Ethics and Grievances of the Association in its Opinion No. 67, March 21, 1932. The Committee had recourse to Judicial Canon 34 which provides that a judge should not administer his office 'for the purpose of advancing his personal ambitions or increasing his popularity.' The Committee found that radio broadcasting of a trial changes 'what should be the most serious of human institutions either into an enterprise for the entertainment of the public or of one for promoting publicity for the judge.' American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 163 (1957).'

'After the adoption of Judicial Canon 35, the direct radio broadcasting of court proceedings was disapproved by the Association's Committee on Professional Ethics and Grievances in its Opinion No. 212, March 15, 1941, as being specifically condemned. The Committee quoted with approval the following statement of the Michigan and Detroit Bar Associations:

"Such broadcasts are unfair to the defendant and to the witnesses. The natural embarrassment and confusion of a citizen on trial should not be increased by a realization that his voice and his difficulties are being used as entertainment for a vast radio audience. The fear expressed by most persons when facing an audience or microphone is a matter of common knowledge, and but few defendants or witnesses can properly concentrate on facts and testify fully and fairly when so handicapped. \* \* \* Such broadcasts are unfair to the Judge, who should be permitted to devote his undivided attention to the case, unmindful of the effect which his comments or decision may \*598 have upon the radio audience.' American Bar Association, Opinions of the Committee on Professional Ethics and Grievances 426 (1957).

'In 1952, the growing prominence of television as a medium of mass communication was dealt with in a report of the Special Committee on Televising and Broadcasting Legislative and Judicial Proceedings (headed by the late John W. Davis). 77 A.B.A.Rep. 607 (1952). In condemning the practice of televising judicial proceedings, the Committee called attention to the fact that:

"The attention of the court, the jury, lawyers and witnesses should be concentrated upon the trial itself and ought not to be divided with the television or broadcast audience who for the most part have merely the interest of curiosity in the proceedings. It is not difficult to conceive that all participants may become over-concerned with the impression their actions,\*\*1668 rulings or testimony will make on the absent multitude.' Id. at 610.

‘As a result of this report, and the recommendation of the Committee on Professional Ethics and Grievances, Judicial Canon 35 was amended by inserting a ban on the ‘televising’ of court proceedings and inserting the descriptive phrase ‘distract the witness in giving his testimony’ before the phrase ‘degrade the court.’ In addition, a second paragraph was added providing for the televising and broadcasting of certain ceremonial proceedings. Id. at 110-11.

‘In October, 1954, the Board of Governors authorized the appointment of a Special Bar-Media Conference Committee on Fair Trial-Free Press to meet with representatives of the press, radio, and television. The views of both sides were thoroughly explored and were presented in detail in the September, 1956 issue of the American Bar Association Journal.<sup>FN4</sup> After extensive joint debate, \*599 no solutions or agreements were reached. 83 A.B.A.Rep. 790-91 (1958). The Committee did report that it was convinced that

FN4. ‘42 A.B.A.J. 834, 838, 843 (1956).’

“courtroom photographing or broadcasting or both would impose undue police duties upon the trial judge(.) \* \* \* that the broadcasting and the photographing in the courtroom might have an adverse psychological effect upon trial participants, judges, lawyers, witnesses and juries(.) \* \* \* (and) that partial broadcasts of trials, particularly on television, might influence public opinion which in turn might influence trial results. \* \* \* Id. at 645.

‘Following the presentation of the Bar-Media Conference Committee report and in connection with the consideration of a report and recommendation of a Special Committee of the American Bar Foundation created in July, 1955 (83 A.B.A.Rep. 643-45 (1958)), the House of Delegates conducted a hearing as a ‘Committee of the Whole’ during its February, 1958 session at which proponents and opponents of Judicial Canon 35 were fully heard. 83 A.B.A.Rep. 648-69 (1958). Thereafter, at the August, 1958 meeting of the House of Delegates, it

was decided to have a Special Committee study Canon 35 and

“conduct further studies of the problem, including the obtaining of a body of reliable factual data on the experience of judges and lawyers in those courts where either photography, televising or broadcasting, or all of them, are permitted. \* \* \* The fundamental objective of the Committee and of all others interested must be to consider and make recommendations which will preserve the right of fair trial.’ 83 A.B.A.Rep. 284 (1958).

‘The Special Committee filed an Interim Report and Recommendations with the House of Delegates in August, \*600 1962 setting forth the ‘Area and Perspective’ of its survey and studies. The report included portions of testimony by media representatives taken at a hearing held in Chicago on February 18, 1962, as well as a summary of the Committee’s informal conference with certain representatives from Colorado and Texas. In addition, the report included written comments by officers of State Bar Associations responding to a Committee survey, and certain general correspondence received by the Committee regarding Judicial Canon 35. The report also listed significant publications favoring either revision or retention of the Canon. \* \* \* (Hereinafter cited Int. Rep.)

‘The Special Committee thereafter submitted its final report and recommendations, concluding that the substantive provisions of Judicial Canon 35 remain valid and ‘should be retained as essential safeguards of the individual’s inviolate \*\*1669 and personal right of fair trial.’ \* \* \* The Committee did recommend certain minor deletions \* \* \* and changes \* \* \* which were adopted by the House of Delegates, after full debate, on February 5, 1963:

“The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings (are calculated to) detract from the essential dignity of the proceedings, distract (the) participants and witnesses in giving (his) testimony,

(degrade the court) and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>FN5</sup>

FN5. 'The full text of Judicial Canon 35, as amended, is as follows:

**"IMPROPER PUBLICIZING OF COURT PROCEEDINGS**

"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 or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

"Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization."

\*601 'A vast majority of the states have voluntarily adopted Judicial Canon 35 in one form or another, and it has been embodied in principle in Rule 53 of the Federal Rules of Criminal Procedure. In a recent Resolution of the Judicial Conference of the United States, the philosophy of Canon 35 was unanimously reaffirmed:

"Resolved, That the Judicial Conference of the United States condemns the taking of photographs in the courtroom or its environs in connection with any judicial proceeding, and the broadcasting of judicial proceedings by radio, television, or other

means, and considers such practices to be inconsistent with fair judicial procedure and that they ought not to be permitted in any federal court. Int. Rep. p. 97.'

(Footnotes numbered and partially omitted.)

Mr. Justice STEWART, whom Mr. Justice BLACK, Mr. Justice BRENNAN, and Mr. Justice WHITE join, dissenting.

I cannot agree with the Court's decision that the circumstances of this trial led to a denial of the petitioner's Fourteenth Amendment rights. I think that the introduction of television into a courtroom, is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of a courtroom. But I am unable to escalate this personal view into a per se constitutional \*602 rule. And I am unable to find, on the specific record of this case, that the circumstances attending the limited televising of the petitioner's trial resulted in the denial of any right guaranteed to him by the United States Constitution.

On October 22, 1962, the petitioner went to trial in the Seventh Judicial District Court of Smith County, Texas, upon an indictment charging him with the offenses of (1) swindling, (2) theft by false pretenses, and (3) theft by a bailee. After a week spent in selecting a jury, the trial itself lasted some three and a half days. At its conclusion the jury found the petitioner guilty of the offense of swindling under the first count of the indictment. The trial judge permitted portions of the trial proceedings \*\*1670 to be televised, under the limitations described below. He also gave news photographers permission to take still pictures in the courtroom under specified conditions.

The Texas Court of Criminal Appeals affirmed the petitioner's conviction, and we granted certiorari, limited to a single question. The question, as phrased by the petitioner, is this:

'Whether the action of the trial court, over peti-

381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, 1 Media L. Rep. 1187  
 (Cite as: 381 U.S. 532, 85 S.Ct. 1628)

tioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas.'

The two Canons of Judicial Ethics referred to in the petitioner's statement of the question presented are set \*603 out in the margin.<sup>FN1</sup> But, as the Court rightly says, the problem before us is not one of choosing between the conflicting guidelines reflected in these Canons of Judicial Ethics. It is a problem rooted in the Due Process Clause of the Fourteenth Amendment. We deal here with matters subject to continuous and unforeseeable change—the \*604 techniques of public communication. In an area where all the \*\*1671 variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

FN1. Canons of Judicial Ethics. American Bar Association: Judicial Canon 35. Improper publicizing of Court proceedings.

'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 or televising of court proceedings detract from the essential dignity of the proceed-

ings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

'Provided that this restriction shall not apply to the broadcasting or televising, under the supervision of the court, of such portions of naturalization proceedings (other than the interrogation of applicants) as are designed and carried out exclusively as a ceremony for the purpose of publicly demonstrating in an impressive manner the essential dignity and the serious nature of naturalization.'

Canons of Judicial Ethics, Integrated State Bar of Texas: Judicial Canon 28. Improper Publicizing of Court Proceedings.

'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 or televising of court proceedings unless properly supervised and controlled, may detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public. The supervision and control of such trial coverage shall be left to the trial judge who has the inherent power to exclude or control coverage in the proper case in the interest of justice.

'In connection with the control of such coverage the following declaration of principles is adopted:

'(1) There should be no use of flash bulbs or other artificial lighting.

'(2) No witness, over his expressed objection, should be photographed, his voice

broadcast or be televised.

‘(3) The representatives of news media must obtain permission of the trial judge to cover by photograph, broadcasting or televising, and shall comply with the rules prescribed by the judge for the exercise of the privilege.

‘(4) Any violation of the Court's Rules shall be punished as a contempt.

‘(5) Where a judge has refused to allow coverage or has regulated it, any attempt, other than argument by representatives of the news media directly with the Court, to bring pressure of any kind on the judge, pending final disposition of the cause in trial, shall be punished as a contempt.’

#### I.

The indictment was originally returned by a grand jury in Reeves County, Texas, and it engendered widespread publicity. After some preliminary proceedings there, the case was transferred for trial to Smith County, more than 500 miles away. The trial was set for September 24, 1962, but it did not commence on that date. Instead, that day and the next were spent in hearings on two motions filed by defense counsel: a motion to bar television and news cameras from the trial, and a motion to continue the trial to a later date. Those proceedings were themselves telecast ‘live,’ and news photographers were permitted to take pictures in the courtroom. The activities of the television crews and news photographers led to considerable disruption of the hearings.<sup>FN2</sup> At the conclusion\*605 of the hearings the motion for a continuance was granted, and the case reset for trial on October 22. The motion to bar television and news photographers from the trial was denied.<sup>FN3</sup>

FN2. A contemporary newspaper account described the scene as follows:

‘A television motor van, big as an inter-

continental bus, was parked outside the courthouse and the second-floor courtroom was a forest of equipment. Two television cameras had been set up inside the bar and four more marked cameras were aligned just outside the gates.

‘A microphone stuck its 12-inch snout inside the jury box, now occupied by an overflow of reporters from the press table, and three microphones confronted Judge Dunagan on his bench. (C)ables and wires snaked over the floor.’ The New York Times, September 25, 1962, p. 46, col. 4.

FN3. In ruling on the motion, the trial judge stated:

‘In the past, it has been the policy of this Court to permit televising in the court room under the rules and supervision of the Court. Heretofore, I have not encountered any difficulty with it. I was unable to observe any detraction from the witnesses or the attorneys in those cases. We have watched television, of course, grow up from its infancy and now into its maturity; and it is a news media. So I really do not see any justified reason why it should not be permitted to take its proper seat in the family circle. However, it will be under the strict supervision of the Court. I know there has been pro and con about televising in the court room. I have heard some say that it makes a circus out of the Court. I had the privilege yesterday morning of sitting in my home and viewing a sermon by the First Baptist Church over in Dallas and certainly it wasn't any circus in that church; and I feel that if it is a proper instrument in the house of the Lord, it is not out of place in the court room, if properly supervised.

‘Now, television is going to be televising whatever the scene is here. If you want to

watch a ball game and that is what they televise, you are going to see a ball game. If you want to see a preacher and hear a sermon, you tune in on that and that is what you are going to get. If the Court permits a circus in this court room, it will be televised, that is true, but they will not be creating a circus.

‘Now, the most important point is whether or not it would interfere with a fair and impartial trial of this Defendant. That is the most important point, and that is the purpose, or will be the primary purpose of the Court, to insure that he gets that fair trial.

‘There is not anything the Court can do about the interest in this case, but I can control your activities and your conduct here; and I can assure you now that this Court is not going to be turned into a circus with TV or without it. Whatever action is necessary for the Court to take to insure that, the Court will take it.

‘There has been one consideration that the Court has given and it is that this is a small court room and there will be hundreds of people trying to get into this court room to witness this trial. I believe we would have less confusion if they would stay at home and stay out of the court room and look in on the trial. With all of those people trying to crowd in and push into this court room, that is another consideration I have given to it.’

**\*\*1672 \*606** On October 1, the trial judge issued an order delineating what coverage he would permit during the trial.<sup>FN4</sup> As a result of that order and ensuing conferences between the judge and representatives of the news media, the environment for the trial, which began on October 22, was in sharp contrast to that of the September hearings. The actual extent of television and news photography in the **\*607** courtroom was described by the

judge, after the trial had ended, in certifying the petitioner's bill of exceptions. This description is confirmed by my understanding of the entire record and was agreed to and accepted by defense counsel:

FN4. ‘In my statement of September 24, 1962, admitting television and other cameras in the court room during the trial of Billie Sol Estes, I said cameras would be allowed under the control and direction of the Court so long as they did not violate the legal rights of the Defendant or the State of Texas.

‘In line with my statement of September 24, 1962, I am at this time informing both television and radio that live broadcasting or telecasting by either news media cannot and will not be permitted during the interrogation of jurors in testing their qualifications, or of the testimony given by the witnesses, as to do so would be in violation of Art. 644 of the Code of Criminal Procedure of Texas, which provides as follows: ‘At the request of either party, the witnesses on both sides may be sworn and placed in the custody of an officer and removed out of the court room to some place where they can not hear the testimony as delivered by any other witness in the case. This is termed placing witnesses under rule.’

\* \* \* (E)ach television network and the local television station will be allowed one film camera without sound in the court room and the film will be made available to other television stations on a pool basis. Marshall Pengra, manager of Television Station KLTV, Tyler, will be in charge of the independent pool and independent stations may contact him. The same will be true of cameras for the press, which will be limited to the local press, Associated Press and United Press.

'I am making this statement at this time in order that the two news media affected may have sufficient notice before the case is called on October 22nd.

'The rules I have set forth above concerning the use of cameras are subject to change if I find that they are too restrictive or not workable, for any reason.'

'Prior to the trial of October 22, 1962, there was a booth constructed and placed in the rear of the courtroom painted the same or near the same color as the courtroom with a small opening across the top for the use of cameras. \* \* \*

'Live telecasting and radio broadcasting were not permitted and the only telecasting was on film without sound, and there was not any broadcasting of the trial by radio permitted. Each network, ABC, NBC, CBS and KRLD (KLTN) Television in Tyler was allowed a camera in the courtroom. \* \* \* The telecasting on film of this case was not a continuous camera operation and only pictures being taken at intervals during the day to be used on their regular news casts later in the day. There were some days during the trial that cameras of only one or two stations were in operation, the others not being in attendance upon the Court each and every day. The Court did not permit any cameras other than those that were noiseless nor were flood lights and \*\*1673 flash bulbs allowed to be used in the courtroom. The Court permitted one news photographer with \*608 Associated Press, United Press International and Tyler Morning Telegraph and Courier Times. However, they were not permitted inside the Bar; and the Court did not permit any telecasting or photographing in the hallways leading into the courtroom or on the second floor of the courthouse where the courtroom is situated, in order that the Defendant and his attorneys would not be hindered, molested or harassed in approaching or leaving the courtroom. The Court did permit live telecasting of the arguments of State's counsel and the returning of the verdict by the Jury and its acceptance by the Court. The opening argument of the

District Attorney of Smith County was carried by sound and because of transmission difficulty, there was not any picture. The closing argument for the State by the District Attorney of Reeves County was carried live by both picture and sound. The arguments of attorneys for Defendant, John D. Cofer and Hume Cofer, were not telecast or broadcast as the Court granted their Motion that same not be permitted.

'There was not any televising at any time during the trial except from the booth in the rear of the courtroom, and during the argument of counsel to the jury, news photography was required to operate from the booth so that they would not interfere or detract from the attention of either the jurors or the attorneys.

'During the trial that began October 22nd, there was never at any time any radio broadcasting equipment in the courtroom. There was some equipment in a room off of the courtroom where there were periodic news reports given; and throughout the trial that began October 22nd, not any witness requested not to be televised or photographed while they were testifying. Neither did any juror, while being interrogated\*609 on voir dire or at any other time, make any request of the Court not to be televised.'

Thus, except for the closing arguments for the prosecution and the return of the jury's verdict, there was no 'live' telecasting of the trial. And, even for purposes of delayed telecasting on later news programs, no words or other sounds were permitted to be recorded while the members of the jury were being selected or while any witness was testifying. No witnesses and no jurors were televised or photographed over their objection.<sup>FN5</sup>

FN5. There were nine witnesses for the prosecution and no witnesses for the defense.

Finally, the members of the jury saw no telecasts and no pictures of anything that went on dur-

ing the trial. In accord with Texas law, the jurors were sequestered, day and night, from the beginning of the trial until it ended.<sup>FN6</sup> The jurors were lodged each night in quarters provided for that purpose in the courthouse itself. On the evening of November 6, by agreement of counsel and special permission of the court, the members of the jury were permitted to watch the election returns on television for a short period. For this purpose a portable television was brought into the jury's quarters by a court officer, and operated by him. Otherwise the jurors were not permitted to watch television at any time during the trial. The only newspapers permitted the jury were ones from which all coverage of the trial had been physically removed.

FN6. Arts. 668, 745 and 725, Tex.Code Crim.Proc.

## II.

It is important to bear in mind the precise limits of the question before us in this case. The petition for a writ of **\*\*1674** certiorari asked us to review four separate constitutional claims. We declined to review three of them, among which was the claim that the members of the jury 'had received through the news media damaging and prejudicial\***610** evidence \* \* \*.'<sup>FN7</sup> We thus left undisturbed the determination of the Texas Court of Criminal Appeals that the members of the jury were not prejudiced by the widespread publicity which preceded the petitioner's trial. One ingredient of this pretrial publicity was the telecast of the September hearings. Despite the confusion in the courtroom during those hearings, all that a potential juror could have possibly learned from watching them on television was that the petitioner's case had been called for trial, and that motions had been made and acted upon for a continuance, and to exclude cameras and television. At those hearings, there was no discussion whatever of anything bearing on the petitioner's guilt or innocence. This was conceded by the petitioner's counsel at the trial.<sup>FN8</sup>

FN7. Petition for Writ of Certiorari, Question 3, p. 3.

FN8. 'A. (Mr. Hume Cofer, counsel for petitioner). \* \* \* The publicity that was given this trial on the last occasion and the number of cameras here, I think was sufficient to spread the news of this case throughout the county, to every available juror; and it is my opinion that on that occasion, there were so many cameras and so much paraphernalia here that it gave an opportunity for every prospective juror in Smith County to know about this case.

'Q. Not about the facts of the case?

'A. No, sir; not about the facts, nor any of the evidence.'

Because of our refusal to review the petitioner's claim that pretrial publicity had a prejudicial effect upon the jurors in this case, and because, insofar as the September hearings were an element of that publicity, the claim is patently without merit, that issue is simply not here. Our decision in *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663, therefore, has no bearing at all in this case. There the record showed that the inhabitants of the small Louisiana parish where the trial was held had repeatedly been exposed to a television film showing 'Rideau, in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff.' 373 U.S., **\*611** at 725, 83 S.Ct., at 1419. We found that '(a)ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.' *Id.*, at 726, 83 S.Ct., at 1419. See also *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751.

The *Rideau* case was no more than a contemporary application of enduring principles of procedural due process, principles reflected in such earlier cases as *Moore v. Dempsey*, 261 U.S. 86, 43 S.Ct. 265, 67 L.Ed. 543; *Brown v. State of Mississippi*, 297 U.S. 278, 56 S.Ct. 461, 80 L.Ed. 682; and *Chambers v. State of Florida*, 309 U.S. 227,

235-241, 60 S.Ct. 472, 476-479, 84 L.Ed. 716. 'Under our Constitution's guarantee of due process,' we said, 'a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge.' 373 U.S., at 726-727, 83 S.Ct., at 1419. We had occasion to apply the same basic concepts of procedural due process earlier this Term in *Turner v. State of Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424. 'In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.' 379 U.S., at 472-473, 85 S.Ct., at 550.

**\*\*1675** But we do not deal here with mob domination of a courtroom, with a kangaroo trial, with a prejudiced judge or a jury inflamed with bias. Under the limited grant of certiorari in this case, the sole question before us is an entirely different one. It concerns only the regulated presence of television and still photography at the trial itself, which began on October 22, 1962. Any discussion of pre-trial events can do no more than obscure the important question which is actually before us.

### III.

It is obvious that the introduction of television and news cameras into a criminal trial invites many serious constitutional hazards. The very presence of photographers<sup>\*612</sup> and television cameramen plying their trade in a courtroom might be so completely and thoroughly disruptive and distracting as to make a fair trial impossible. Thus, if the scene at the September hearing had been repeated in the courtroom during this jury trial, it is difficult to conceive how a fair trial in the constitutional sense could have been afforded the defendant.<sup>FN9</sup> And even if, as was true here, the television cameras are so controlled and concealed as to be hardly perceptible in the courtroom itself, there are risks of con-

stitutional dimensions that lurk in the very process of televising court proceedings at all.

FN9. See note 2.

Some of those risks are catalogued in the amicus curiae brief filed in this case by the American Bar Association: '(P)otential or actual jurors, in the absence of enforceable and effective safeguards, may arrive at certain misconceptions regarding the defendant and his trial by viewing televised pre-trial hearings and motions from which the jury is ordinarily excluded. Evidence otherwise inadmissible may leave an indelible mark. \* \* \* Once the trial begins, exposure to nightly rebroadcasts of selected portions of the day's proceedings will be difficult to guard against, as jurors spend frequent evenings before the television set. The obvious impact of witnessing repeated trial episodes and hearing accompanying commentary, episodes admittedly chosen for their news value and not for evidentiary purposes, can serve only to distort the jurors' perspective. \* \* \* Despite the court's injunction not to discuss the case, it seems undeniable that jurors will be subject to the pressure of television-watching family, friends and, indeed, strangers. \* \* \* It is not too much to imagine a juror being confronted with his wife's television-oriented viewpoint. \* \* \* Additionally, the jurors' daily television appearances may make them recognizable celebrities, likely to be stopped by passing <sup>\*613</sup> strangers, or perhaps harried by intruding telephone calls. \* \* \*' Constitutional problems of another kind might arise if a witness or juror were subjected to being televised over his objection.

The plain fact of the matter, however, is that none of these things happened or could have happened in this case. The jurors themselves were prevented from seeing any telecasts of the trial, and completely insulated from association with any members of the public who did see such telecasts. This case, therefore, does not remotely resemble *Turner v. State of Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424, where, during the trial, the jurors were subjected outside the courtroom to un-

measured and unmeasurable influences by key witnesses for the prosecution.

In the courtroom itself, there is nothing to show that the trial proceeded in any way other than it would have proceeded if cameras and television had not been present. In appearance, the courtroom was practically unaltered. There was no obtrusiveness and no distraction, no noise and no special lighting. There is no indication anywhere in the record of **\*\*1676** any disturbance whatever of the judicial proceedings. There is no claim that the conduct of the judge, or that any deed or word of counsel, or of any witness, or of any juror, was influenced in any way by the presence of photographers or by television.

Furthermore, from a reading of the record it is crystal clear that this was not a trial where the judge was harassed or confused or lacking in command of the proceedings before the jury. Nor once, after the first witness was called, was there any interruption at all of the trial proper to secure a ruling concerning the presence of cameramen in the courtroom. There was no occasion, during the entire trial-until after the jury adjourned to reach its verdict-for any cautionary word to members of the press in the courtroom. The only time a motion was made, the jury was not in the courtroom. The trial itself was a **\*614** most mundane affair, totally lacking in the lurid and completely emotionless. The evidence related solely to the circumstances in which various documents had been signed and negotiated. It was highly technical, if not downright dull. The petitioner called no witnesses, and counsel for petitioner made only a brief closing argument to the jury. There is nothing to indicate that the issues involved were of the kind where emotion could hold sway. The transcript of the trial belies any notion that frequent interruptions and inconsistent rulings communicated to the jury any sense that the judge was unable to concentrate on protecting the defendant and conducting the trial in a fair manner, in accordance with the State and Federal Constitutions.

#### IV.

What ultimately emerges from this record, therefore, is one bald question-whether the Fourteenth Amendment of the United States Constitution prohibits all television cameras from a state courtroom whenever a criminal trial is in progress. In the light of this record and what we now know about the impact of television on a criminal trial, I can find no such prohibition in the Fourteenth Amendment or in any other provision of the Constitution. If what occurred did not deprive the petitioner of his constitutional right to a fair trial, then the fact that the public could view the proceeding on television has no constitutional significance. The Constitution does not make us arbiters of the image that a televised state criminal trial projects to the public.

While no First Amendment claim is made in this case, there are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in **\*615** the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. See *Speiser v. Randall*, 357 U.S. 513, 525, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460. And the proposition that nonparticipants in a trial might get the 'wrong impression' from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the 'essential requirement of the fair and orderly administration of justice,' '(f)reedom of discussion should be given the widest range.' *Pennekamp v. State of Florida*, 328 U.S. 331, 347, 66 S.Ct. 1029, 1037, 90 L.Ed. 1295; *Bridges v. State of California*, 314 U.S. 252, 62 S.Ct. 190, 86 L.Ed. 192. Cf. *Cox v. State of Louisiana*, 379 U.S. 559, 563, 85 S.Ct. 476, 480, 13 L.Ed.2d 487.

I do not think that the Constitution denies to the State or to individual trial judges all discretion to conduct criminal trials with television cameras present, no **\*\*1677** matter how unobtrusive the cameras may be. I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the Constitution absolutely bars television cameras from every criminal courtroom, even if they have no impact upon the jury, no effect upon any witness, and no influence upon the conduct of the judge.

For these reasons I would affirm the judgment. Mr. Justice WHITE, with whom Mr. Justice BRENNAN joins, dissenting.

I agree with Mr. Justice STEWART that a finding of constitutional prejudice on this record entails erecting a flat ban on the use of cameras in the courtroom and believe that it is premature to promulgate such a broad constitutional principle at the present time. This is the first case in this Court dealing with the subject of television **\*616** coverage of criminal trials; our cases dealing with analogous subjects are not really controlling, cf. *Rideau v. State of Louisiana*, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663; and there is, on the whole, a very limited amount of experience in this country with television coverage of trials. In my view, the currently available materials assessing the effect of cameras in the courtroom are too sparse and fragmentary to constitute the basis for a constitutional judgment permanently barring any and all forms of television coverage. As was said in another context, 'we know too little of the actual impact \* \* \* to reach a conclusion on the bare bones of the \* \* \* evidence before us.' *White Motor Co. v. United States*, 372 U.S. 253, 261, 83 S.Ct. 696, 701, 9 L.Ed.2d 738. It may well be, however, that as further experience and informed judgment do become available, the use of cameras in the courtroom, as in this trial, will prove to pose such a serious hazard to a defendant's rights that a violation of the Fourteenth Amendment will be found without a showing on the record of specific demonstrable prejudice to the de-

fendant. Compare *Wolf v. People of State of Colorado*, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782, with *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Betts v. Brady*, 316 U.S. 455, 62 S.Ct. 1252, 86 L.Ed. 1595, with *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799; *Stein v. People of State of New York*, 346 U.S. 156, 73 S.Ct. 1077, 97 L.Ed. 1522, with *Jackson v. Denno*, 378 U.S. 368, 389-390, 84 S.Ct. 1774, 1787-1788, 12 L.Ed.2d 908.

The opinion of the Court in effect precludes further opportunity for intelligent assessment of the probable hazards imposed by the use of cameras at criminal trials. Serious threats to constitutional rights in some instances justify a prophylactic rule dispensing with the necessity of showing specific prejudice in a particular case. *Rideau v. State of Louisiana*, 373 U.S. 723, 727, 83 S.Ct. 1417, 1419, 10 L.Ed.2d 663; *Jackson v. Denno*, 378 U.S. 368, 389, 84 S.Ct. 1774, 1787, 12 L.Ed.2d 908. But these are instances in which there has been ample experience on which to base an informed judgment. Here, although our experience is inadequate and our judgment correspondingly infirm, the Court discourages further meaningful study of the use of television at criminal trials. Accordingly, I dissent.

**\*617** Mr. Justice BRENNAN.

I write merely to emphasize that only four of the five Justices voting to reverse rest on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances. Although the opinion announced by my Brother CLARK purports to be an 'opinion of the Court,' my Brother HARLAN subscribes to a significantly less sweeping proposition. He states:

'The *Estes* trial was a heavily publicized and highly sensational affair. I therefore put aside all other types of cases \* \* \*. The resolution of **\*\*1678** those further questions should await an appropriate case; the Court should proceed only step by step in this unplowed field. The opinion of the Court necessarily goes no farther, for only the four members

of the majority who unreservedly join the Court's opinion would resolve those questions now.' Ante, p. 1663. (Emphasis supplied.)

Thus today's decision is not a blanket constitutional prohibition against the televising of state criminal trials.

While I join the dissents of my Brothers STEWART and WHITE, I do so on the understanding that their use of the expressions 'the Court's opinion' or 'the opinion of the Court' refers only to those views of our four Brethren which my Brother HARLAN explicitly states he shares.

U.S.Tex. 1965.

Estes v. State of Tex.

381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, 1 Media L. Rep. 1187

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# Tab 6



Supreme Court of the United States  
 Noel CHANDLER and Robert Granger, Appellants,  
 v.  
 State of FLORIDA.

No. 79-1260.  
 Argued Nov. 12, 1980.  
 Decided Jan. 26, 1981.

Defendant's convictions of conspiracy to commit burglary, grand larceny and possession of burglary tools were affirmed by the Florida District Court of Appeal, 366 So.2d 64, and the Florida Supreme Court, 376 So.2d 1157, denied certiorari. Defendants appealed. The Supreme Court, Chief Justice Burger, held that, consistent with constitutional guarantees, a state could provide for radio, television and still photographic coverage of a criminal trial for public broadcast, notwithstanding the objection of the defendants.

Affirmed.

Justice Stewart filed an opinion concurring in the result.

Justice White filed an opinion concurring in the judgment.

#### West Headnotes

### [1] Federal Courts 170B 501

170B Federal Courts  
 170BVII Supreme Court  
 170BVII(E) Review of Decisions of State Courts  
 170Bk501 k. In General. Most Cited Cases

United States Supreme Court has no supervisory jurisdiction over state courts and, in reviewing state court judgment, is confined to evaluating it in

relation to Federal Constitution.

### [2] Criminal Law 110 633.16

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases  
 (Formerly 110k633(1))

Consistent with constitutional guarantees, state could provide for radio, television, and still photographic coverage of criminal trial for public broadcast, notwithstanding objection of defendants. U.S.C.A.Const. Amend. 14.

### [3] Criminal Law 110 633.16

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k633.16 k. Cameras, Recording Devices, Sketches, and Drawings. Most Cited Cases  
 (Formerly 110k633(1))

### Criminal Law 110 633.32

110 Criminal Law  
 110XX Trial  
 110XX(B) Course and Conduct of Trial in General  
 110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases  
 (Formerly 110k633(1))

Risk of juror prejudice is present in any publication of trial, but appropriate safeguard against such prejudice is defendant's right to demonstrate that media's coverage of case, be it printed or broadcast,

compromised ability of the particular jury that heard the case to adjudicate fairly. U.S.C.A.Const. Amend. 14.

#### [4] Constitutional Law 92 ↪4605

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)4 Proceedings and Trial

92k4603 Public Trial

92k4605 k. Publicity. Most Cited

Cases

(Formerly 92k268(2.1), 92k268(2))

#### Criminal Law 110 ↪633.32

110 Criminal Law

110XX Trial

110XX(B) Course and Conduct of Trial in General

110k633.32 k. Publicity, Media Coverage, and Occurrences Extraneous to Trial. Most Cited Cases

(Formerly 110k633(1))

Defendant has right on review to show that media's coverage of case, printed or broadcast, compromised ability of jury to judge him fairly and, alternatively, defendant might show that broadcast coverage of his particular case had adverse impact on trial participants sufficient to constitute denial of due process. U.S.C.A.Const. Amend. 14.

**\*\*802 Syllabus** FN\*

FN\* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

**\*560** The Florida Supreme Court, following a pilot program for televising judicial proceedings in the State, promulgated a revised Canon 3A(7) of the Florida Code of Judicial Conduct. The Canon

permits electronic media and still photography coverage of judicial proceedings, subject to the control of the presiding judge and to implementing guidelines placing on trial judges obligations to protect the fundamental right of the accused in a criminal case to a fair trial. Appellants, who were charged with a crime that attracted media attention, were convicted after a jury trial in a Florida trial court over objections that the televising and broadcast of parts of their trial denied them a fair and impartial trial. The Florida District Court of Appeal affirmed, finding no evidence that the presence of a television camera hampered appellants in presenting their case, deprived them of an impartial jury, or impaired the fairness of the trial. The Florida Supreme Court denied review. The Florida courts did not construe *Estes v. Texas*, 381 U.S. **\*\*803** 532, 85 S.Ct. 1628, 14 L.Ed.2d 543, as laying down a *per se* constitutional rule barring broadcast coverage under all circumstances.

*Held* : The Constitution does not prohibit a state from experimenting with a program such as is authorized by Florida's Canon 3A(7). Pp. 807-814.

(a) This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, is confined to evaluating it in relation to the Federal Constitution. P. 807.

(b) *Estes v. Texas*, *supra*, did not announce a constitutional rule that all photographic, radio, and television coverage of criminal trials is inherently a denial of due process. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964 when *Estes* was decided, and is, even now, in a state of continuing change. Pp. 807-809.

(c) An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, conduct of the broadcasting process or prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or inno-

cence uninfluenced by extraneous matter. The appropriate safeguard against juror prejudice is the defendant's right \*561 to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. Pp. 809-810.

(d) Whatever may be the “mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process,” *Estes v. Texas*, *supra*, 381 U.S. at 587, 85 S.Ct. at 1662, at present no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. Pp. 810-812.

(e) Nor have appellants shown either that the media's coverage of their trial—printed or broadcast—compromised the jury's ability to judge them fairly or that the broadcast coverage of their particular trial had an adverse impact on the trial participants sufficient to constitute a denial of due process. Pp. 812-813.

(f) Absent a showing of prejudice of constitutional dimensions to these appellants, there is no reason for this Court either to endorse or to invalidate Florida's experiment. P. 813.

376 So.2d 1157, affirmed.

Joel Hirschhorn, Miami, Fla., for appellants.

Calvin L. Fox, Asst. Atty. Gen., and Jim Smith, Atty. Gen., State of Fla., for appellee.

\*562 Chief Justice BURGER delivered the opinion of the Court.

The question presented on this appeal is whether, consistent with constitutional guarantees, a state may provide for radio, television, and still photographic coverage of a criminal trial for public

broadcast, notwithstanding the objection of the accused.

I

A

*Background.* Over the past 50 years, some criminal cases characterized as “sensational” have been subjected to extensive coverage by news media, sometimes seriously interfering with the conduct of the proceedings and creating a setting wholly inappropriate for the administration of justice. Judges, lawyers, and others soon became concerned, and in 1937, after study, the American Bar Association House of Delegates \*563 adopted Judicial Canon 35, declaring that all photographic and broadcast coverage of courtroom proceedings should be prohibited. \*\*804<sup>FN1</sup> In 1952, the House of Delegates amended Canon 35 to proscribe television coverage as well. 77 A.B.A.Rep. 610-611 (1952). The Canon's proscription was reaffirmed in 1972 when the Code of Judicial Conduct replaced the Canons of Judicial Ethics and Canon 3A(7) superseded Canon 35. E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973). Cf. Fed.Rules Crim.Proc. 53. A majority of the states, including Florida, adopted the substance of the ABA provision and its amendments. In Florida, the rule was embodied in Canon 3A(7) of the Florida Code of Judicial Conduct.<sup>FN2</sup>

FN1. 62 A.B.A.Rep. 1134-1135 (1937). As adopted on September 30, 1937, Judicial Canon 35 read:

“Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, 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.”

FN2. As originally adopted in Florida, Canon 3A(7) provided:

“A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

“(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

“(b) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

“(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions;

“(i) the means of recording will not distract participants or impair the dignity of the proceedings;

“(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

“(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

“(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.”

In February 1978, the American Bar Association Committee on Fair Trial-Free Press proposed revised standards. These \*564 included a provision permitting courtroom coverage by the electronic

media under conditions to be established by local rule and under the control of the trial judge, but only if such coverage was carried out unobtrusively and without affecting the conduct of the trial.<sup>FN3</sup>

The revision was endorsed by the ABA's Standing Committee on Standards for Criminal Justice and by its Committee on Criminal Justice and the Media, but it was rejected by the House of Delegates on February 12, 1979. 65 A.B.A.J. 304 (1979).

FN3. Proposed Standard 8-3.6(a) of the ABA Project on Standards for Criminal Justice, Fair Trial and Free Press (Tent. Draft 1978).

In 1978, based upon its own study of the matter, the Conference of State Chief Justices, by a vote of 44 to 1, approved a resolution to allow the highest court of each state to promulgate standards and guidelines regulating radio, television, and other photographic coverage of court proceedings.<sup>FN4</sup>

FN4. Resolution I, Television, Radio, Photographic Coverage of Judicial Proceedings, adopted at the Thirtieth Annual Meeting of the Conference of Chief Justices, Burlington, Vt., Aug. 2, 1978.

*The Florida Program.* In January 1975, while these developments were unfolding, the Post-Newsweek Stations of Florida petitioned the Supreme Court of Florida urging a change in Florida's Canon 3A(7). In April 1975, the court invited presentations in the nature of a rulemaking proceeding, and, in January 1976, announced an experimental program for televising one civil and one criminal trial under specific guidelines. *Petition of Post-Newsweek Stations, Florida, Inc.*, 327 So.2d 1. These initial guidelines required the consent of all parties. It developed, however, that in practice such consent could not be obtained. The Florida Supreme Court then supplemented its order and established a new 1-year pilot program\*565 \*\*805 during which the electronic media were permitted to cover all judicial proceedings in Florida without reference to the consent of participants, subject to

detailed standards with respect to technology and the conduct of operators. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 347 So.2d 402 (1977). The experiment began in July 1977 and continued through June 1978.

When the pilot program ended, the Florida Supreme Court received and reviewed briefs, reports, letters of comment, and studies. It conducted its own survey of attorneys, witnesses, jurors, and court personnel through the Office of the State Court Coordinator. A separate survey was taken of judges by the Florida Conference of Circuit Judges. The court also studied the experience of 6 States<sup>FN5</sup> that had, by 1979, adopted rules relating to electronic coverage of trials, as well as that of the 10 other States that, like Florida, were experimenting with such coverage.<sup>FN6</sup>

FN5. Alabama, Colorado, Georgia, New Hampshire, Texas, and Washington.

FN6. The number of states permitting electronic coverage of judicial proceedings has grown larger since 1979. As of October 1980, 19 States permitted coverage of trial and appellate courts, 3 permitted coverage of trial courts only, 6 permitted appellate court coverage only, and the court systems of 12 other States were studying the issue. Brief for the Radio Television News Directors Association et al. as *Amici Curiae*. On November 10, 1980, the Maryland Court of Appeals authorized an 18-month experiment with broadcast coverage of both trial and appellate court proceedings. 49 U.S.L.W. 2335 (1980).

Following its review of this material, the Florida Supreme Court concluded “that on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage.” *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 780 (1979). The Florida court was of the view that because of the significant effect of

the courts on the day-to-day lives of the citizenry, it was essential that the people have confidence in the process. It felt that broadcast coverage\*566 of trials would contribute to wider public acceptance and understanding of decisions. *Ibid*. Consequently, after revising the 1977 guidelines to reflect its evaluation of the pilot program, the Florida Supreme Court promulgated a revised Canon 3A(7). *Id.*, at 781. The Canon provides:

“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.” *Ibid*.

The implementing guidelines specify in detail the kind of electronic equipment to be used and the manner of its use. *Id.*, at 778-779, 783-784. For example, no more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida Supreme Court has the right to revise these

rules as experience dictates, or indeed to bar all broadcast coverage or photography in courtrooms.

**\*567 \*\*806 B**

In July 1977, appellants were charged with conspiracy to commit burglary, grand larceny, and possession of burglary tools. The counts covered breaking and entering a well-known Miami Beach restaurant.

The details of the alleged criminal conduct are not relevant to the issue before us, but several aspects of the case distinguish it from a routine burglary. At the time of their arrest, appellants were Miami Beach policemen. The State's principal witness was John Sion, an amateur radio operator who, by sheer chance, had overheard and recorded conversations between the appellants over their police walkie-talkie radios during the burglary. Not surprisingly, these novel factors attracted the attention of the media.

By pretrial motion, counsel for the appellants sought to have experimental Canon 3A(7) declared unconstitutional on its face and as applied. The trial court denied relief but certified the issue to the Florida Supreme Court. However, the Supreme Court declined to rule on the question, on the ground that it was not directly relevant to the criminal charges against the appellants. *State v. Granger*, 352 So.2d 175 (1977).

After several additional fruitless attempts by the appellants to prevent electronic coverage of the trial, the jury was selected. At *voir dire*, the appellants' counsel asked each prospective juror whether he or she would be able to be "fair and impartial" despite the presence of a television camera during some, or all, of the trial. Each juror selected responded that such coverage would not affect his or her consideration in any way. A television camera recorded the *voir dire*.

A defense motion to sequester the jury because of the television coverage was denied by the trial judge. However, the court instructed the jury not to

watch or read anything about the case in the media and suggested that jurors "avoid the local news and watch only the national news on television." \*568 App. 13. Subsequently, defense counsel requested that the witnesses be instructed not to watch any television accounts of testimony presented at trial. The trial court declined to give such an instruction, for "no witness' testimony was [being] reported or televised [on the evening news] in any way." *Id.*, at 14.

A television camera was in place for one entire afternoon, during which the State presented the testimony of Sion, its chief witness.<sup>FN7</sup> No camera was present for the presentation of any part of the case for the defense. The camera returned to cover closing arguments. Only 2 minutes and 55 seconds of the trial below were broadcast-and those depicted only the prosecution's side of the case.

FN7. At one point during Sion's testimony, the judge interrupted the examination and admonished a cameraman to discontinue a movement that the judge apparently found distracting. App. 15. Otherwise, the prescribed procedures appear to have been followed, and no other untoward events occurred.

The jury returned a guilty verdict on all counts. Appellants moved for a new trial, claiming that because of the television coverage, they had been denied a fair and impartial trial. No evidence of specific prejudice was tendered.

The Florida District Court of Appeal affirmed the convictions. It declined to discuss the facial validity of Canon 3A(7); it reasoned that the Florida Supreme Court, having decided to permit television coverage of criminal trials on an experimental basis, had implicitly determined that such coverage did not violate the Federal or State Constitutions. Nonetheless, the District Court of Appeal did agree to certify the question of the facial constitutionality of Canon 3A(7) to the Florida Supreme Court. The District Court of Appeal found no evidence in the

trial record to indicate that the presence of a television camera had hampered appellants in presenting their case or had deprived them of an impartial jury.

**\*\*807** The Florida Supreme Court denied review, holding that the appeal, which was limited to a challenge to Canon 3A(7), **\*569** was moot by reason of its decision in *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764 (1979), rendered shortly after the decision of the District Court of Appeal.

## II

At the outset, it is important to note that in promulgating the revised Canon 3A(7), the Florida Supreme Court pointedly rejected any state or federal constitutional right of access on the part of photographers or the broadcast media to televise or electronically record and thereafter disseminate court proceedings. It carefully framed its holding as follows:

“While we have concluded that the due process clause does not prohibit electronic media coverage of judicial proceedings per se, by the same token we reject the argument of the [Post-Newsweek stations] that the first and sixth amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings.” *Id.*, at 774.

The Florida court relied on our holding in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 55 L.Ed.2d 570 (1978), where we said:

“In the first place, ... there is no constitutional right to have [live witness] testimony recorded and broadcast. Second, while the guarantee of a public trial, in the words of Mr. Justice Black, is ‘a safeguard against any attempt to employ our courts as instruments of persecution,’ it confers no special benefit on the press. Nor does the Sixth Amendment require that the trial-or any part of it-be broadcast live or on tape to the public. The requirement of a public trial is satisfied

by the opportunity of members of the public and the press to attend the trial and to report what they have observed.” *Id.*, at 610, 98 S.Ct., at 1318 (citations omitted).

The Florida Supreme Court predicated the revised Canon 3A(7) upon its supervisory authority over the Florida courts, **\*570** and not upon any constitutional imperative. Hence, we have before us only the limited question of the Florida Supreme Court's authority to promulgate the Canon for the trial of cases in Florida courts.

[1] This Court has no supervisory jurisdiction over state courts, and, in reviewing a state-court judgment, we are confined to evaluating it in relation to the Federal Constitution.

## III

[2] Appellants rely chiefly on *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), and Chief Justice Warren's separate concurring opinion in that case. They argue that the televising of criminal trials is inherently a denial of due process, and they read *Estes* as announcing a *per se* constitutional rule to that effect.

Chief Justice Warren's concurring opinion, in which he was joined by Justices Douglas and Goldberg, indeed provides some support for the appellants' position:

“While I join the Court's opinion and agree that the televising of criminal trials is inherently a denial of due process, I desire to express additional views on why this is so. In doing this, I wish to emphasize that our condemnation of televised criminal trials is not based on generalities or abstract fears. The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.” *Id.*, at 552, 85 S.Ct., at 1637.

If appellants' reading of *Estes* were correct, we

would be obliged to apply that holding and reverse the judgment under review.

The six separate opinions in *Estes* must be examined carefully to evaluate the claim that it represents a *per se* constitutional rule forbidding all electronic coverage. Chief Justice Warren and Justices Douglas \*\*808 and Goldberg joined Justice Clark's opinion announcing the judgment, thereby creating \*571 only a plurality. Justice Harlan provided the fifth vote necessary in support of the judgment. In a separate opinion, he pointedly limited his concurrence:

"I concur in the opinion of the Court, subject, however, to the reservations and only to the extent indicated in this opinion." *Id.*, at 587, 85 S.Ct., at 1662.

A careful analysis of Justice Harlan's opinion is therefore fundamental to an understanding of the ultimate holding of *Estes*.

Justice Harlan began by observing that the question of the constitutional permissibility of televised trials was one fraught with unusual difficulty:

"Permitting television in the courtroom undeniably has mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process. Forbidding this innovation, however, would doubtless impinge upon one of the valued attributes of our federalism by preventing the states from pursuing a novel course of procedural experimentation. My conclusion is that there is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment." *Ibid.* (emphasis added).

He then proceeded to catalog what he perceived as the inherent dangers of televised trials.

"In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be \*572 appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?" *Id.*, at 591, 85 S.Ct., at 1664.

Justice Harlan faced squarely the reality that these possibilities carry "grave potentialities for distorting the integrity of the judicial process," and that, although such distortions may produce no tell-tale signs, "their effects may be far more pervasive and deleterious than the physical disruptions which all would concede would vitiate a conviction." *Id.*, at 592, 85 S.Ct. at 1664. The "countervailing factors" alluded to by Justice Harlan were, as here, the educational and informational value to the public.

Justice STEWART, joined by Justices BLACK, BRENNAN, and WHITE in dissent, concluded that no prejudice had been shown and that *Estes'* Fourteenth Amendment rights had not been violated. While expressing reservations not unlike those of Justice Harlan and those of Chief Justice Warren, the dissent expressed unwillingness to "escalate this personal view into a *per se* constitutional rule." *Id.*, at 601, 85 S.Ct. at 1669. The four dissenters disagreed both with the *per se* rule embodied in the plurality opinion of Justice Clark and with the judgment of the Court that "the *circumstances of [that]*

trial led to a denial of [Estes'] Fourteenth Amendment rights." *Ibid.* (emphasis added).

Parsing the six opinions in *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. In an area \*573 charged with constitutional nuances, perhaps more should not be expected. Nonetheless, it is fair to say that \*\*809 Justice Harlan viewed the holding as limited to the proposition that "what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment," *id.*, 587, 85 S.Ct., at 1662 (emphasis added), he went on:

"At the present juncture I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.*, at 596, 85 S.Ct., at 1666 (emphasis added).

Justice Harlan's opinion, upon which analysis of the constitutional holding of *Estes* turns, must be read as defining the scope of that holding; we conclude that *Estes* is not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances.<sup>FN8</sup> It does not stand as an absolute ban on \*574 state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.

FN8. Our subsequent cases have so read *Estes*. In *Sheppard v. Maxwell*, 384 U.S. 333, 352, 86 S.Ct. 1507, 1516, 16 L.Ed.2d 600 (1966), the Court noted *Estes* as an instance where the "totality of circumstances" led to a denial of due process. In *Murphy v. Florida*, 421 U.S. 794, 798, 95 S.Ct. 2031, 2035, 44 L.Ed.2d 589 (1975), we described it as "a state-court conviction obtained in a trial atmosphere that had been utterly corrupted by press coverage."

And, in *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 552, 96 S.Ct. 2791, 2799, 49 L.Ed.2d 683 (1976), we depicted *Estes* as a trial lacking in due process where "the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself" prevented a sober search for the truth.

In his opinion concurring in the result in the instant case, Justice STEWART restates his dissenting view in *Estes* that the *Estes* Court announced a *per se* rule banning all broadcast coverage of trials as a denial of due process. This view overlooks the critical importance of Justice Harlan's opinion in relation to the ultimate holding of *Estes*. It is true that Justice Harlan's opinion "sounded a note" that is central to the proposition that broadcast coverage inherently violates the Due Process Clause. *Post*, at 815. But the presence of that "note" in no sense alters Justice Harlan's explicit reservations in his concurrence. Not all of the dissenting Justices in *Estes* read the Court as announcing a *per se* rule; Justice BRENNAN, for example, was explicit in emphasizing "that only four of the five Justices [in the majority] rest[ed] on the proposition that televised criminal trials are constitutionally infirm, whatever the circumstances." *Id.*, at 617, 85 S.Ct., at 1677. Today, Justice STEWART concedes, *post*, at 815, and n. 3, that Justice Harlan purported to limit his conclusion to a subclass of cases. And, as he concluded his opinion, Justice Harlan took pains to emphasize his view that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *Id.*,

at 595, 85 S.Ct., at 1666 (emphasis added). That statement makes clear that there was not a Court holding of a *per se* rule in *Estes*. As noted in text, Justice Harlan pointedly limited his conclusion to cases like the one then before the Court, those “utterly corrupted” by press coverage. There is no need to “overrule” a “holding” never made by the Court.

#### IV

Since we are satisfied that *Estes* did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process, we turn to consideration, as a matter of first impression, of the appellants' suggestion that we now promulgate such a *per se* rule.

#### A

[3] Any criminal case that generates a great deal of publicity presents some risks that the publicity may compromise the right of the defendant to a fair trial. Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law. Over the years, courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations. See, e. g., *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 563-565, 96 S.Ct. 2791, 2804, 2805, 49 L.Ed.2d 683 (1976).

**\*\*810** An absolute constitutional ban on broadcast coverage of **\*575** trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage. A case attracts a high level of public attention because of its intrinsic interest to the public and the manner of reporting the event. The risk of juror pre-

judice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case—be it printed or broadcast—compromised the ability of the particular jury that heard the case to adjudicate fairly. See Part IV-D, *infra*.

#### B

As we noted earlier, the concurring opinions in *Estes* expressed concern that the very presence of media cameras and recording devices at a trial inescapably gives rise to an adverse psychological impact on the participants in the trial. This kind of general psychological prejudice, allegedly present whenever there is broadcast coverage of a trial, is different from the more particularized problem of prejudicial impact discussed earlier. If it could be demonstrated that the mere presence of photographic and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required.

In confronting the difficult and sensitive question of the potential psychological prejudice associated with broadcast coverage of trials, we have been aided by *amici* briefs submitted by various state officers involved in law enforcement, the Conference of Chief Justices, and the Attorneys General **\*576** of 17 States <sup>FN9</sup> in support of continuing experimentation such as that embarked upon by Florida, and by the American College of Trial Lawyers, and various members of the defense bar <sup>FN10</sup> representing essentially the views expressed by the concurring Justices in *Estes*.

FN9. Brief for the Attorneys General of Alabama, Alaska, Arizona, Iowa, Kentucky, Louisiana, Maryland, Montana, Nevada, New Mexico, New York, Ohio, Rhode Island, Tennessee, Vermont, West Virginia, and Wisconsin as *Amici Curiae*.

FN10. Brief for the California State Public Defenders Association, the California Attorneys for Criminal Justice, the Office of the California State Public Defender, the Los Angeles County Public Defenders Association, the Los Angeles Criminal Courts Bar Association, and the Office of the Los Angeles County Public Defender as *Amici Curiae*.

Not unimportant to the position asserted by Florida and other states is the change in television technology since 1962, when *Estes* was tried. It is urged, and some empirical data are presented,<sup>FN11</sup> that many of the negative factors found in *Estes*-cumbersome \*\*811 equipment, cables, distracting lighting, numerous camera technicians-are less substantial factors today than they were at that time.

FN11. Considerable attention is devoted by the parties to experiments and surveys dealing with the impact of electronic coverage on the participants in a trial other than the defendant himself. The Florida pilot program itself was a type of study, and its results were collected in a postprogram survey of participants. While the data thus far assembled are cause for some optimism about the ability of states to minimize the problems that potentially inhere in electronic coverage of trials, even the Florida Supreme Court conceded the data were "limited," *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764, 781 (1979), and "non-scientific," *id.*, at 768. Still, it is noteworthy that the data now available do not support the proposition that, in every case and in all circumstances, electronic coverage creates a significant adverse effect upon the participants in trials-at least not one uniquely associated with electronic coverage as opposed to more traditional forms of coverage. Further research may change the picture. At the moment, however, there is no unimpeach-

able empirical support for the thesis that the presence of the electronic media, *ipso facto*, interferes with trial proceedings.

It is also significant that safeguards have been built into the \*577 experimental programs in state courts, and into the Florida program, to avoid some of the most egregious problems envisioned by the six opinions in the *Estes* case. Florida admonishes its courts to take special pains to protect certain witnesses-for example, children, victims of sex crimes, some informants, and even the very timid witness or party-from the glare of publicity and the tensions of being "on camera." *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d, at 779.

The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. The Florida Canon, being one of the few permitting broadcast coverage of criminal trials over the objection of the accused, raises problems not present in the rules of other states. Inherent in electronic coverage of a trial is a risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leave no evidence of how the conduct or the trial's fairness was affected. Given this danger, it is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court. See, e. g., *Green v. State*, 377 So.2d 193, 201 (Fla.App.1979). In addition to providing a record for appellate review, a pretrial hearing enables a defendant to advance the basis of his objection to broadcast coverage and allows the trial court to define the steps necessary to minimize or eliminate the risks of prejudice to the accused. Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation. Here, the record does not indicate that appellants requested an evidentiary hearing to show

adverse impact or injury. Nor does the record reveal anything more than generalized allegations of prejudice.

\*578 Nonetheless, it is clear that the general issue of the psychological impact of broadcast coverage upon the participants in a trial, and particularly upon the defendant, is still a subject of sharp debate—as the *amici* briefs of the American College of Trial Lawyers and others of the trial bar in opposition to Florida's experiment demonstrate. These *amici* state the view that the concerns expressed by the concurring opinions in *Estes*, see Part III, *supra*, have been borne out by actual experience. Comprehensive empirical data are still not available—at least on some aspects of the problem. For example, the *amici* brief of the Attorneys General concedes:

“The defendant's interests in not being harassed and in being able to concentrate on the proceedings and confer effectively with his attorney are crucial aspects of a fair trial. There is not much data on defendant's reactions to televised trials available now, but what there is indicates that it is possible to regulate the media so that their presence does not weigh heavily on the defendant. *Particular attention should be paid to this area of concern as study of televised trials continues.*” Brief for the Attorney General of Alabama et al. as *Amici Curiae* 40 (emphasis added).

The experimental status of electronic coverage of trials is also emphasized by the *amicus* brief of the Conference of Chief Justices:

“Examination and reexamination, by state courts, of the in-court presence of the electronic news media, *vel non*, is an exercise of authority reserved to the states under our federalism.” Brief for Conference of Chief Justices as *Amicus Curiae* 2.

Whatever may be the “mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere \*\*812 which should always surround the judicial process,” *Estes v. Texas*, 381

U.S., at 587, 85 S.Ct., at 1662, at present no one has been able to present empirical data sufficient to establish that the mere \*579 presence of the broadcast media inherently has an adverse effect on that process. See n. 11, *supra*. The appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage—let alone that all broadcast trials would be so tainted. See Part IV-D, *infra*.<sup>FN12</sup>

FN12. Other courts that have been asked to examine the impact of television coverage on the participants in particular trials have concluded that such coverage did not have an adverse impact on the trial participants sufficient to constitute a denial of due process. See, e. g., *Bradley v. Texas*, 470 F.2d 785 (CA5 1972); *Bell v. Patterson*, 279 F.Supp. 760 (Colo.), *aff'd*, 402 F.2d 394 (CA10 1968), *cert. denied*, 403 U.S. 955, 91 S.Ct. 2279, 29 L.Ed.2d 865 (1971); *Gonzales v. People*, 165 Colo. 322, 438 P.2d 686 (1968). On the other hand, even the *amici* supporting Florida's position concede that further experimentation is necessary to evaluate the potential psychological prejudice associated with broadcast coverage of trials. Further developments and more data are required before this issue can be finally resolved.

Where, as here, we cannot say that a denial of due process automatically results from activity authorized by a state, the admonition of Justice Brandeis, dissenting in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386, 76 L.Ed. 747 (1932), is relevant:

“To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the coun-

try. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable.... But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.” (Footnote omitted.)

\*580 This concept of federalism, echoed by the states favoring Florida’s experiment, must guide our decision.

### C

*Amici* members of the defense bar, see n. 10, *supra*, vigorously contend that displaying the accused on television is in itself a denial of due process. Brief for the California State Public Defenders Association et al. as *Amici Curiae* 5-10. This was a source of concern to Chief Justice Warren and Justice Harlan in *Estes* : that coverage of select cases “singles out certain defendants and subjects them to trials under prejudicial conditions not experienced by others.” 381 U.S., at 565, 85 S.Ct. at 1644 (Warren, C. J., concurring). Selection of which trials, or parts of trials, to broadcast will inevitably be made not by judges but by the media, and will be governed by such factors as the nature of the crime and the status and position of the accused-or of the victim; the effect may be to titillate rather than to educate and inform. The unanswered question is whether electronic coverage will bring public humiliation upon the accused with such randomness that it will evoke due process concerns by being “unusual in the same way that being struck by lightning” is “unusual.” *Furman v. Georgia*, 408 U.S. 238, 309, 92 S.Ct. 2726, 2762, 33 L.Ed.2d 346 (1972) (STEWART, J., concurring). Societies and political systems, that, from time to time, have put on “Yankee Stadium” “show trials” tell more about the power of the state than about its concern for the decent administration of justice-with every citizen receiving the same kind of justice.

The concurring opinion of Chief Justice War-

ren joined by Justices Douglas and Goldberg in *Estes* can fairly be read as viewing the very broadcast of some trials as potentially a form of punishment in itself\*\*813 -a punishment before guilt. This concern is far from trivial. But, whether coverage of a few trials will, in practice, be the equivalent of a “Yankee Stadium” setting-which Justice Harlan likened to the public \*581 pillory long abandoned as a barbaric perversion of decent justice-must also await the continuing experimentation.

### D

[4] To say that the appellants have not demonstrated that broadcast coverage is inherently a denial of due process is not to say that the appellants were in fact accorded all of the protections of due process in their trial. As noted earlier, a defendant has the right on review to show that the media’s coverage of his case-printed or broadcast-compromised the ability of the jury to judge him fairly. Alternatively, a defendant might show that broadcast coverage of his particular case had an adverse impact on the trial participants sufficient to constitute a denial of due process. Neither showing was made in this case.

To demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such as to attract the attention of broadcasters. *Murphy v. Florida*, 421 U.S. 794, 800, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). No doubt the very presence of a camera in the courtroom made the jurors aware that the trial was thought to be of sufficient interest to the public to warrant coverage. Jurors, forbidden to watch all broadcasts, would have had no way of knowing that only fleeting seconds of the proceeding would be reproduced. But the appellants have not attempted to show with any specificity that the presence of cameras impaired the ability of the jurors to decide the case on only the evidence before them or that their trial was affected adversely by the impact on any of the participants of the presence of cameras and the prospect of broadcast.

Although not essential to our holding, we note that at *voir dire*, the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. Each answered that the camera would not prevent him or her from considering the case solely on the merits. App. \*582 8-12. The trial court instructed the jurors not to watch television accounts of the trial, *id.*, at 13-14, and the appellants do not contend that any juror violated this instruction. The appellants have offered no evidence that any participant in this case was affected by the presence of cameras. In short, there is no showing that the trial was compromised by television coverage, as was the case in *Estes*.

## V

It is not necessary either to ignore or to discount the potential danger to the fairness of a trial in a particular case in order to conclude that Florida may permit the electronic media to cover trials in its state courts. Dangers lurk in this, as in most experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment. We are not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees are we authorized to intervene. We must assume state courts will be alert to any factors that impair the fundamental rights of the accused.

The Florida program is inherently evolutionary in nature; the initial project has provided guidance for the new canons which can be changed at will, and application of which is subject to control by the trial judge. The risk of prejudice to particular defendants is ever present and must be examined carefully as cases arise. Nothing of the “Roman circus” or “Yankee Stadium” atmosphere, as in *Estes*, prevailed here, however, nor have appellants attempted to show that the unsequestered jury was exposed to “sensational” coverage, in the sense of *Estes* or of *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966). Absent a show-

ing of prejudice of constitutional dimensions to these defendants,\*\*814 there is no reason for this Court either to endorse or to invalidate Florida's experiment.

In this setting, because this Court has no supervisory authority over state courts, our review is confined to whether \*583 there is a constitutional violation. We hold that the Constitution does not prohibit a state from experimenting with the program authorized by revised Canon 3A(7).

*Affirmed.*

Justice STEVENS took no part in the decision of this case.

Justice STEWART, concurring in the result.

Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543.

I believe now, as I believed in dissent then, that *Estes* announced a *per se* rule that the Fourteenth Amendment “prohibits all television cameras from a state courtroom whenever a criminal trial is in progress.” *Id.*, at 614, 85 S.Ct., at 1676; see also, *id.*, at 615, 85 S.Ct., at 1676 (WHITE, J., dissenting). Accordingly, rather than join what seems to me a wholly unsuccessful effort to distinguish that decision, I would now flatly overrule it.

While much was made in the various opinions in *Estes* of the technological improvements that might some day render television coverage of criminal trials less obtrusive, the restrictions on television in the *Estes* trial were not significantly different from those in the trial of these appellants. The opinion of the Court in *Estes* set out the limitations placed on cameras during that trial:

“A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestric-

ted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

“[L]ive telecasting was prohibited during a great portion of the actual trial. Only the opening and closing arguments of the State, the return of the jury's verdict \*584 and its receipt by the trial judge were carried live with sound. Although the order allowed videotapes of the entire proceeding without sound, the cameras operated only intermittently, recording various portions of the trial for broadcast on regularly scheduled newscasts later in the day and evening. At the request of the petitioner, the trial judge prohibited coverage of any kind, still or television, of the defense counsel during their summations to the jury.” *Id.*, at 537, 85 S.Ct., at 1630 (footnote omitted).

In his concurring opinion, Justice Harlan also remarked upon the physical setting:

“Some preliminary observations are in order: All would agree, I am sure, that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, kleig lights, interviews with the principal participants, commentary on their performances, ‘commercials’ at frequent intervals, special wearing apparel and makeup for the trial participants—certainly such things would not conduce to the sound administration of justice by any acceptable standard. *But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.*” *Id.*, at 588, 85 S.Ct., at 1662 (emphasis added).

The constitutional violation perceived by the *Estes* Court did not, therefore, stem from physical disruption that might one day disappear with technological advances in television equipment. The violation inhered, rather, in the hypothesis that the mere presence of cameras and recording devices might have an effect on the trial \*\*815 participants

prejudicial to the accused.<sup>FN1</sup> See *id.*, at 542-550, 85 S.Ct., at 1632-1636 (opinion of the Court). \*585 And Justice Harlan sounded a note in his concurring opinion that is the central theme of the appellants here: “Courtroom television introduces into the conduct of a criminal trial the element of professional ‘showmanship,’ an extraneous influence whose subtle capacities for serious mischief in a case of this sort will not be underestimated by any lawyer experienced in the elusive imponderables of the trial arena.” *Id.*, at 591, 85 S.Ct., at 1664.

FN1. Certain aspects of the *Estes* trial made that case an even easier one than this one in which to find no substantial threat to a fair trial. For example, the jurors in *Estes* were sequestered day and night, from the first day of the trial until it ended. The jurors in the present case were not sequestered at all. Aside from a court-monitored opportunity for the jurors to watch election returns, the *Estes* jurors were not permitted to watch television at any time during the trial. In contrast, the jurors in the present case were left free to watch the evening news programs—and to look for a glimpse of themselves while watching replays of the prosecution's most critical evidence.

It can accurately be asserted that television technology has advanced in the past 15 years, and that Americans are now much more familiar with that medium of communication. It does not follow, however, that the “subtle capacities for serious mischief” are today diminished, or that the “imponderables of the trial arena” are now less elusive.

The Court necessarily<sup>FN2</sup> relies on the concurring opinion of Justice Harlan in its attempt to distinguish this case from *Estes*. It begins by noting that Justice Harlan limited his opinion “to a notorious criminal trial such as [the one in *Estes* ]....” *Ante*, at 808 (emphasis of the Court). But the Court disregards Justice Harlan's concession that such a

limitation may not be meaningful.<sup>FN3</sup> Justice Harlan admitted \*586 that “it may appear that no workable distinction can be drawn based on the type of case involved, or that the possibilities for prejudice [in a ‘run-of-the-mill’ case], though less severe, are nonetheless of constitutional proportions.” 381 U.S., at 590, 85 S.Ct., at 1663. Finally, Justice Harlan stated unambiguously that he was “by no means prepared to say that the constitutional issue should ultimately turn upon the nature of the particular case involved.” *Ibid.*<sup>FN4</sup>

FN2. The Court today concedes that Justice Clark's opinion for the Court in *Estes* announced a *per se* rule; that the concurring opinion of Chief Justice Warren, joined by Justices Douglas and Goldberg, pointed to “the inherent prejudice of televised criminal trials”; and that the dissenting Justices objected to the announcement of a *per se* rule, *ante*, at 807, 808.

FN3. The Court also seems to disregard its own description of the trial of the appellants, a description that suggests that the trial was a “notorious” one, at least in the local community. The Court's description notes that “several aspects of the case distinguish it from a routine burglary ... [and] [n]ot surprisingly, these novel factors attracted the attention of the media.” *Ante*, at 806. Indeed, the Court's account confirms the wisdom of Justice Harlan's concession that a *per se* rule limited only to cases with high public interest may not be workable.

FN4. The fact is, of course, that a run-of-the-mill trial-of a civil suit to quiet title, or upon a “routine burglary” charge for example-would hardly attract the cameras of public television. By the same token, the very televising of a trial serves to make that trial a “notorious” or “heavily publicized” one.

The Court in *Estes* found the admittedly unob-

trusive presence of television cameras in a criminal trial to be inherently prejudicial, and thus violative of due process of law. Today the Court reaches precisely the opposite conclusion. I have no great trouble in agreeing with the Court today, but I would acknowledge our square departure from precedent.

Justice WHITE, concurring in the judgment.

The Florida rule, which permits the televising of criminal trials under controlled conditions, is challenged here on its face and as applied. Appellants contend that the rule is facially invalid because the televising of *any* criminal trial over the objection\*\*816 of the defendant inherently results in a constitutionally unfair trial; they contend that the rule is unconstitutional as applied to them because their case attracted substantial publicity and, therefore, falls within the rule established in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965).<sup>FN\*</sup> The Florida court rejected both of these claims.

FN\* In their motion in the Florida Circuit Court to declare Florida's rule unconstitutional, appellants claimed that their case had “received a substantial amount of publicity” and then argued that “[a]s ... in *Estes v. Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965), the presence of television cameras ... will substantially harm and impair the Defendant's right to a fair and impartial trial...” App. 4. In their brief on the merits, appellants described their case as “not ‘notorious’ [but] at least ‘more than routine’ ” and asked the Court to extend the *Estes* rule to it. Brief for Appellants 10.

\*587 For the reasons stated by Justice STEWART in his concurrence today, I think *Estes* is fairly read as establishing a *per se* constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.

It is arguable, however, that *Estes* should be

read more narrowly, in light of Justice Harlan's concurring opinion, as forbidding the televising of only widely publicized and sensational criminal trials. Justice Harlan, the fifth vote in *Estes*, characterized *Estes* as such a case and concurred in the opinion of the Court only to the extent that it applied to a "criminal trial of great notoriety." *Id.*, at 587, 85 S.Ct., at 1662. He recognized that there had been no showing of specific prejudice to the defense, *id.*, at 591, 85 S.Ct., at 1664, but argued that no such showing was required "in cases like this one."

Whether the decision in *Estes* is read broadly or narrowly, I agree with Justice STEWART that it should be overruled. I was in dissent in that case, and I remain unwilling to assume or conclude without more proof than has been marshaled to date that televising criminal trials is inherently prejudicial even when carried out under properly controlled conditions. A defendant should, of course, have ample opportunity to convince a judge that televising his trial would be unfair to him, and the judge should have the authority to exclude cameras from all or part of the criminal trial. But absent some showing of prejudice to the defense, I remain convinced that a conviction obtained in a state court should not be overturned simply because a trial judge refused to exclude television cameras and all or part of the trial was \*588 televised to the public. The experience of those States which have, since *Estes*, permitted televised trials supports this position, and I believe that the accumulated experience of those States has further undermined the assumptions on which the majority rested its judgment in *Estes*.

Although the Court's opinion today contends that it is consistent with *Estes*, I believe that it effectively eviscerates *Estes*. The Florida rule has no exception for the sensational or widely publicized case. Absent a showing of specific prejudice, any kind of case may be televised as long as the rule is otherwise complied with. *In re Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So.2d 764,

774 (Fla.1979). Thus, even if the present case is precisely the kind of case referred to in Justice Harlan's concurrence in *Estes*, the Florida rule overrides the defendant's objections. The majority opinion does not find it necessary to deal with appellants' contention that because their case attracted substantial publicity, specific prejudice need not be shown. By affirming the judgment below, which sustained the rule, the majority indicates that not even the narrower reading of *Estes* will any longer be authoritative.

Moreover, the Court now reads *Estes* as merely announcing that on the facts of that case there had been an unfair trial—*i. e.*, it established no *per se* rule at all. Justice Clark's plurality opinion, however, expressly recognized that no "isolatable" or "actual" prejudice had been or need be shown, 381 U.S., at 542-543, 85 S.Ct., at 1632, 1633, \*\*817 and Justice Harlan expressly rejected the necessity of showing "specific" prejudice in cases "like this one." *Id.*, at 593, 85 S.Ct., at 1665. It is thus with telling effect that the Court now rules that "[a]bsent a showing of prejudice of constitutional dimensions to these defendants," there is no reason to overturn the Florida rule, to reverse the judgment of the Florida Supreme Court, or to set aside the conviction of the appellants. *Ante*, at 813.

By reducing *Estes* to an admonition to proceed with some caution, the majority does not underestimate or minimize the \*589 risks of televising criminal trials over a defendant's objections. I agree that those risks are real and should not be permitted to develop into the reality of an unfair trial. Nor does the decision today, as I understand it, suggest that any State is any less free than it was to avoid this hazard by not permitting a trial to be televised over the objection of the defendant or by forbidding cameras in its courtrooms in any criminal case.

Accordingly, I concur in the judgment.

U.S.Fla.,1981.  
Chandler v. Florida

101 S.Ct. 802

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449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 7 Media L. Rep. 1041

**(Cite as: 449 U.S. 560, 101 S.Ct. 802)**

449 U.S. 560, 101 S.Ct. 802, 66 L.Ed.2d 740, 7

Media L. Rep. 1041

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# Tab 7

## **Proposed Rule 4-401:**

### Rule 4-401. Electronic Media Coverage of Court Proceedings.

#### *Intent:*

To establish uniform standards and procedures for electronic media coverage of proceedings in the courts of the state.

To permit electronic media coverage of courtroom proceedings while protecting the rights of parties to a fair trial, legitimate personal privacy and safety interests, the decorum and dignity of judicial proceedings, and the fair administration of justice.

#### *Applicability:*

This rule applies to the courts of record and not of record.

This rule governs electronic media coverage and conduct of courtroom proceedings that are open to the public.

This rule does not govern coverage of courtroom proceedings by a news reporter who is not using a camera or electronic equipment to photograph or create audio or video recordings or transmissions of judicial proceedings.

Except as provided by this rule, the use of cameras, cellular phones, personal computers or other portable electronic devices to photograph or create audio or video recordings or transmissions of courtroom proceedings without the express permission of the judge is prohibited.

This rule shall not diminish the authority conferred by statute, rule, or common law of the judge or court to control the conduct of proceedings in the courtroom or areas immediately adjacent to the courtroom.

#### *Statement of the Rule:*

##### (1) *Definitions.*

(A) “Judge” as used in this rule means the particular judge, justice, or judicial officer who is presiding over the public proceeding.

(B) “Proceeding” as used in this rule means any trial, hearing, motion, or any other matter held in open court which the public is entitled to attend.

(C) “Electronic media coverage” as used in this rule means a news reporter taking photographs or broadcasting, televising, recording, streaming, or transmitting images or sounds by electronic means, including but not limited to video cameras, still cameras, cellular phones, audio recorders, computers, or other portable electronic devices.

(D) “News reporter” as used in this rule means any person who gathers, records, photographs, reports, or publishes information for the primary purpose of disseminating news and information to the public, and any newspaper, magazine, or other periodical publication, press association or wire service, radio station, television station, satellite broadcast, cable system or other organization with whom that person is connected.

(2) *Presumption of electronic media coverage; restrictions on coverage.*

(A) There is a presumption that electronic media coverage shall be permitted in courtroom proceedings that are open to the public. Limitations on electronic media coverage must be supported by reasons found by the judge to be sufficiently compelling to outweigh the presumption.

(B) When determining whether the presumption of electronic media coverage has been overcome and whether such coverage should be prohibited or restricted beyond the limitations provided in this rule, a judge shall consider some or all of the following factors:

- (i) whether there is a reasonable likelihood that electronic media coverage would prejudice the rights of the parties to a fair proceeding;
- (ii) whether there is a reasonable likelihood that electronic media coverage would jeopardize the safety or well-being of any individual;
- (iii) whether there is a reasonable likelihood that electronic media coverage would jeopardize the interests or well-being of a minor;
- (iv) whether there is a reasonable likelihood that electronic media coverage would constitute an unwarranted invasion of personal privacy of any party or witness;
- (v) whether electronic media coverage would create adverse effects that would be greater than those caused by traditional media coverage;
- (vi) the adequacy of the physical facilities of the court for electronic media coverage;
- (vii) the public interest in and newsworthiness of the proceeding;
- (viii) potentially beneficial effects of allowing public observation of the proceeding through electronic media coverage; and

(ix) any other factor affecting the fair administration of justice.

(C) The judge shall make particularized findings on the record supporting a prohibition of electronic media coverage or restrictions on such coverage beyond the limitations provided by this rule. Such findings may be made orally or in a written order. Any written order granting or denying a request for electronic media coverage shall be made part of the record of the proceedings.

(D) Any reasons found sufficient to support restrictions on electronic media coverage beyond the limitations provided in this rule shall relate to the specific circumstances of the case before the court rather than reflecting merely generalized views or preferences.

(3) *Duty of news reporters to obtain permission; termination or suspension of coverage.*

(A) News reporters desiring permission to provide electronic media coverage of a proceeding shall file a written request with the court at least 24 hours prior to the proceeding; however, the judge may grant such a request on shorter notice or waive the requirement for a written request upon a showing of good cause.

(B) A judge may terminate or suspend electronic media coverage at any time without prior notice when it is determined that a news reporter has violated the limitations set forth in this rule or ordered by the court, or that continued electronic media coverage is no longer appropriate based upon a consideration of one or more of the factors set forth in Rule 4-401(2)(B). If permission to provide electronic media coverage is terminated or revoked, the judge shall make oral or written particularized findings on the record.

(4) *Conduct in the courtroom; pool coverage.*

(A) A judge may position news reporters and equipment in the courtroom to permit reasonable news coverage. No more than one video camera person and one still photographer shall be permitted in the courtroom. The camera operator and still photographer may use tripods, but shall not change location when court is in session.

(B) If more than one news reporter has requested permission to provide electronic media coverage, it is the responsibility of news reporters to determine who will participate at any given time or, in the alternative, how they will pool their coverage. The pooling arrangement shall be reached outside the courtroom and before court session, and without imposing on the judge or court staff.

(C) News reporters shall designate a representative with whom the court may consult regarding pool coverage, and shall provide the court with the name and contact information for such representative.

(D) To be eligible to participate in a camera pool, a news reporter must apply for permission to provide electronic media coverage pursuant to Rule 4-401(3)(A). The pool photographer shall use equipment that is capable of disseminating photographs, video or audio to pool recipients in a generally accepted format.

(E) It shall be the responsibility of news reporters to make arrangements for the sharing and dissemination of photographs, video or audio produced by pool coverage. Neither judges nor court personnel shall be called upon to resolve disputes concerning pooling arrangements.

(F) Photographers shall not use flash or strobe lights. News reporters shall use normally available courtroom equipment unless the judge and court administrator approve modifications, which shall be installed and maintained without public expense. Any such modifications, including microphones and related wiring, shall be as unobtrusive as possible, shall be installed in advance of the proceeding or during adjournment, and shall not interfere with the movement of those in the courtroom.

(G) Proceedings in the courtroom shall not be disrupted. Photographers and news reporters in the courtroom shall:

- (i) not use equipment that produces loud or distracting sounds;
  - (ii) not place equipment in or remove equipment from the courtroom while court is in session;
  - (iii) conceal on all cameras any identifying business names, marks, call letters, logos or symbols;
  - (iv) not make comments in the courtroom during the court proceedings;
  - (v) not comment to or within the hearing of the jury or any member thereof at any time before the jury is dismissed;
  - (vi) present a neat appearance and conduct themselves in a manner consistent with the dignity of the proceedings;
  - (vii) not conduct interviews in the courtroom except as permitted by the judge;
- and

(viii) comply with the orders and directives of the court.

(5) *Violations.*

In addition to contempt and any other sanctions allowed by law, a judge may remove anyone violating these rules from the courtroom and revoke permission to provide electronic media coverage.

(6) *Limitations on electronic media coverage.*

Notwithstanding an authorization to conduct electronic media coverage of a proceeding, and unless otherwise authorized by the judge, there shall be no:

(A) electronic media coverage of a juror or prospective juror until the person is dismissed;

(B) electronic media coverage of the face of a person known to be a minor;

(C) electronic media coverage of an exhibit or a document that is not part of the official public record;

(D) audio recording or transmission of the content of bench conferences or in camera hearings; or

(E) audio recording or transmission of the content of confidential communications between counsel and client, between clients, or between co-counsel.

(F) A judge may order further limitations on electronic media coverage as deemed appropriate in consideration of the factors set forth in Rule 4-401(2)(B).

# Tab 8

## **Existing Rule 4-401:**

### Rule 4-401. Media in the courtroom.

#### Intent:

To establish uniform standards and procedures for conduct and the use of photographic equipment in the courts of the state.

To permit access to the courtroom by the news media while preserving the participants' rights to privacy and a fair proceeding.

#### Applicability:

This rule applies to the courts of record and not of record.

This rule governs photography and conduct during sessions of court and recesses between sessions.

This rule shall not diminish the authority conferred by statute, rule or common law of the judge to control the conduct of proceedings in the courtroom.

As used in this rule, the term "courtroom" includes the courtroom and areas immediately adjacent to the courtroom.

#### Statement of the Rule:

(1)(A) Filming, video recording, and audio recording in a trial courtroom are prohibited except to preserve the official record of proceedings. With the permission of the judge presiding at the proceeding, an audio or video signal of proceedings may be transmitted and copied.

(1)(B) Filming, video recording, and audio recording in an appellate courtroom are permitted to preserve the official record of proceedings and as permitted by procedures of those courts. With the permission of the judge presiding at the proceeding, an audio or video signal of proceedings may be transmitted and copied.

(2) Still photography, filming and audio and video recording in the courtroom for ceremonial or court approved public information programs are permitted when arranged through the presiding judge of the court.

(3) No one may photograph a juror or prospective juror before the person is dismissed.

(4) Still photography in a courtroom is prohibited, but it may be permitted in the discretion of the judge presiding at the proceeding. Except on such terms as the judge presiding at the proceeding may prescribe, no one may photograph in the courtroom an exhibit or a document that is not part of the official public record or the face of a person known to the photographer to be a minor. A request to photograph in a courtroom shall be filed with the judge presiding at the proceeding at least 24 hours prior to the proceeding. A judge may permit photography with less than 24 hours notice upon a showing of good cause. In determining whether to permit still photography and, if so, how to regulate it, the judge presiding at the proceeding should consider whether:

(4)(A) photography can be accommodated without distracting the participants;

(4)(B) there is a substantial likelihood photography would jeopardize the right to a fair proceeding; or

(4)(C) the privacy interests of the victim of a crime, a party in a civil case or a witness outweigh the interest of the public in access to a photograph of the person.

(5) Conduct in the courtroom.

(5)(A) The judge presiding at the proceeding may position reporters and equipment in the courtroom to permit reasonable news coverage. Media representatives must share a single photographer.

(5)(B) Photographers shall not use flash or strobe lights. Media representatives shall use normally available courtroom equipment unless the presiding judge and the judge presiding at the proceeding approve modifications, which shall be installed and maintained without public expense.

(5)(C) Proceedings in the courtroom shall not be disrupted. Members of the media in the courtroom shall:

(5)(C)(i) avoid calling attention to themselves;

(5)(C)(ii) not place equipment in or remove equipment from the courtroom while court is in session;

(5)(C)(iii) not make comments in the courtroom during the court proceedings;

(5)(C)(iv) not comment to or within the hearing of the jury or any member thereof at any time before the jury is dismissed;

(5)(C)(v) present a neat appearance in keeping with the dignity of the proceedings;

(5)(C)(vi) not conduct interviews in the courtroom until the proceeding is concluded and the court is recessed;

(5)(c)(vii) not use a camera or tape recorder to conduct interviews in the courtroom; and

(5)(C)(viii) comply with the orders and directives of the court.

(6) In addition to contempt and any other sanctions allowed by law, the court may remove anyone violating these rules from the courtroom and revoke the privileges contained in this rule.

# Tab 9

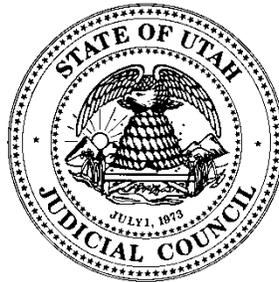


# Utah State Courts

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## Social Media Subcommittee of the Judicial Outreach Committee

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Report and Recommendations on the Possession and Use  
of Electronic Devices in Court Facilities

July 14, 2011

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**Report and Recommendations of the Social Media Subcommittee of the Judicial Outreach Committee on the Possession and Use of Electronic Devices in Court Facilities**

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## **Report and Recommendations of the Social Media Subcommittee of the Judicial Outreach Committee on the Possession and Use of Electronic Devices in Court Facilities**

### **(1) Introduction**

Electronic devices such as PDA's, smartphones, and tablet and laptop computers have become a common and necessary tool for people observing or participating in judicial proceedings. They are the everyday tools of lawyers and the clients they represent: as necessary today as pen and paper and books have always been. Jurors, witnesses, consultants, parties and public have come to expect that their ability to communicate—and to continue the business of their everyday lives—will not automatically cease when entering a courthouse. The press are increasingly using these technologies to report on judicial proceedings in a more effective and timely manner.

We believe that banning electronic devices from courthouses or significantly restricting their use is a policy bound to fail. Consider that an electronic device—small enough to fit into a briefcase, purse or even in the palm of one's hand—accesses television, radio, newspapers, movies, whole libraries of books, the West National Reporter series, law reviews and treatises, dictionaries, mail, bank accounts, and business inventory. Plus any number of computer programs run by businesses small and large around the world. The list is nearly endless. Modern life revolves around electronic devices. The notion that the judiciary can create an island that limits their influence is naïve. Rather, the judiciary should view electronic devices as an unequalled opportunity to welcome the public into our courthouses; to make transparency and public access real, not just ideals.

The near universal use of electronic devices presents challenges for the judiciary: security and personal safety; maintaining dignity and decorum in the courtroom; and conducting fair and impartial hearings. But the judiciary has faced these challenges for centuries. The challenges are, perhaps, heightened by the proliferation of evolving technologies, but they are, in concept, nothing new.

Our recommended policy attempts to properly balance the interests of the public and the judiciary. It is built on the philosophy that the judiciary should focus not on regulating the types of electronic devices that may or may not be allowed in the courthouse, but on regulating conduct that is injurious to the judicial process. The policy regulates using electronic devices if the judiciary has an interest in controlling particular conduct, but permits free reign—or at least loose reign—while using electronic devices for other conduct, conduct which the judiciary has never attempted to control the analogue equivalent.

In formulating the proposed policy, the subcommittee has surveyed policies already in place in other judicial systems, reviewed studies and recommendations by the National Center for State Courts, the American Trial Lawyers Association and various media advocacy groups. We have reviewed the emerging case law addressing these issues.

We believe that this policy acknowledges the realities of today's technologically sophisticated and dependent society; reflects a reasoned approach and a fair accommodation of the needs of all participants in the judicial process; and preserves the fair and impartial administration of justice.

Respectfully submitted,

Social Media Subcommittee of the Judicial Outreach Committee

Randy L. Dryer, Chair  
Brock Beattie  
Duane Betournay  
Ron Bowmaster  
Judge Michele Christiansen  
Megan Crowley

Judge Jeffrey Noland  
Rob Parkes  
Tim Shea  
Judge Andrew Stone  
Jessica Van Buren  
Nancy Volmer

## **(2) Possession and use of electronic devices in courthouses**

(A) Subject to the limitations herein, all persons granted entrance to the courthouse are permitted to possess and use, while inside the courthouse, any pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, electronic calendar, and/or any other electronic device that can transmit, broadcast, record, take photographs or access the internet (hereinafter “electronic device”).

(B) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors subject to further restrictions on the time, place, and manner of such use that are appropriate to maintain safety, decorum, and order.

(C) All electronic devices are subject screening or inspection by court security officers at the time of entry to the courthouse and at any time within the environs of the courthouse in accordance with Rule 3-414.

## **(3) Possession and use of electronic devices in courtrooms.**

(A) Inside courtrooms, persons may silently use an electronic device for any purpose consistent with this policy without obtaining prior authorization.

(B) Persons may not use electronic devices to take photographs or for audio or video recording or transmission except that photographs may be taken by the media in accordance with Rule 4-401 of the Rules of Judicial Administration.

(C) A judge presiding over a proceeding may prohibit or further restrict use of electronic devices if they interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceeding, or is necessary to reasonably protect the privacy of a minor.

(D) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings. Judges should instruct counsel to instruct witnesses who have been excluded from the courtroom to not receive or view accounts of other witnesses’ testimony prior to giving their testimony.

(E) This policy is applicable to attorneys, but may be expanded or restricted in the discretion of the judge presiding over the relevant proceeding. As officers of the court, attorneys may be subject to additional sanctions for violating this policy.

## **(4) Additional limitations on juror possession and use of electronic devices**

During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Jurors may not use an electronic device while in the courtroom and may not possess an electronic device while deliberating.

**(5) Possessions and use of electronic devices in court chambers**

Persons may possess electronic devices in court chambers without obtaining prior approval, but may not use them in chambers without prior approval from the judge.

**(6) Miscellaneous**

(A) Nothing herein shall restrict in any way:

(i) the possession or use of electronic devices by judges, commissioners or courtroom personnel with prior approval of the judge presiding over the proceeding; or

(ii) the authority of judges or commissioners to permit others to possess or use electronic devices in chambers or administrative offices or during judicial ceremonial proceedings.

(B) All electronic devices are subject to confiscation and search by court personnel if the judge presiding over the proceeding has a reasonable basis to believe that a device is or will be used in violation of this policy. Violations may be subject to contempt of court.

(C) A person may use an electronic device to make an audio or video recording of a non judicial public meeting taking place in a court facility.

(D) Notices setting forth the permitted and prohibited uses of electronic devices should be posted in the courthouse, on the judicial website, contained in the summons to prospective jurors, reflected in the Court's instructions to impaneled jurors, posted in the jury room and contained in a courtroom announcement to the public, parties and lawyers. Suggested notices, instructions and announcements are attached as Appendix A.

**(7) Appendix A: Jurors' use of social media in judicial proceedings. Suggested notices, instructions and announcements.**

**(a) Notice in summons to prospective jurors**

You may be unfamiliar with the court system, and you may have many questions about what to expect from your jury service. To answer some common questions, see the court's webpage <http://www.utcourts.gov/juryroom/>.

A fair trial requires that jurors make decisions based on evidence presented at trial, rather than on information that has not been examined in the courtroom. It is important that you do not conduct any research about the case or about the parties or lawyers. Even research on sites such as Google, Bing, Yahoo, Wikipedia, Facebook or blogs—which may seem completely harmless—may lead you to information that is incomplete or inaccurate.

**(b) Instruction to impaneled jurors**

Model Utah Jury Instruction CV 101. General admonitions.

Now that you have been chosen as jurors, you are required to decide this case based only on the evidence that you see and hear in this courtroom and the law that I will instruct you about. For your verdict to be fair, you must not be exposed to any other information about the case. This is very important, and so I need to give you some very detailed explanations about what you should do and not do during your time as jurors.

First, you must not try to get information from any source other than what you see and hear in this courtroom. It's natural to want to investigate a case, but you may not use any printed or electronic sources to get information about this case or the issues involved. This includes the internet, reference books or dictionaries, newspapers, magazines, television, radio, computers, Blackberries, iPhones, Smartphones, PDAs, or any social media or electronic device. You may not do any personal investigation. This includes visiting any of the places involved in this case, using Internet maps or Google Earth, talking to possible witnesses, or creating your own experiments or reenactments.

Second, you must not communicate with anyone about this case or your jury service, and you must not allow anyone to communicate with you. This also is a natural thing to want to do, but you may not communicate about the case via emails, text messages, tweets, blogs, chat rooms, comments or other postings, Facebook, MySpace, LinkedIn, or any other social media.

You may notify your family and your employer that you have been selected as a juror and you may let them know your schedule. But do not talk with anyone about the case, including your family and employer. You must not even talk with your fellow jurors until I give you the case for deliberation. If you are asked or approached in any way about your jury service or anything about this case, you must respond that you have been

ordered not to discuss the matter. And then please report the contact to the clerk or the bailiff, and they will notify me.

Also, do not talk with the lawyers, parties or witnesses about anything, not even to pass the time of day.

I know that these restrictions affect activities that you consider to be normal and harmless and very important in your daily lives. However, these restrictions ensure that the parties have a fair trial based only on the evidence and not on outside information. Information from an outside source might be inaccurate or incomplete, or it might simply not apply to this case, and the parties would not have a chance to explain or contradict that information because they wouldn't know about it. That's why it is so important that you base your verdict only on information you receive in this courtroom.

Courts used to sequester jurors to keep them away from information that might affect the fairness of the trial, but we seldom do that anymore. But this means that we must rely upon your honor to obey these restrictions, especially during recesses when no one is watching.

Any juror who violates these restrictions jeopardizes the fairness of the proceedings, and the entire trial may need to start over. That is a tremendous expense and inconvenience to the parties, the court and the taxpayers. Violations may also result in substantial penalties for the juror.

If any of you have any difficulty whatsoever in following these instructions, please let me know now. If any of you becomes aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well. Notify the bailiff or the clerk, who will notify me.

These restrictions must remain in effect throughout this trial. Once the trial is over, you may resume your normal activities. At that point, you will be free to read or research anything you wish. You will be able to speak—or choose not to speak—about the trial to anyone you wish. You may write, or post, or tweet about the case if you choose to do so. The only limitation is that you must wait until after the verdict, when you have been discharged from your jury service.

So, keep an open mind throughout the trial. The evidence that will form the basis of your verdict can be presented only one piece at a time, and it is only fair that you do not form an opinion until all of the evidence is in.

**(c) Courtroom announcement (to jurors, public, parties and lawyers)**

(Conform to final policy adopted by the Judicial Council)

While court is in session, lawyers are permitted to use their electronic devices, such as computers and smart phones, because so much of a lawyer's job depends on those devices.

Also, parties and the public can use electronic devices, but they cannot record these proceedings by audio or video and they cannot take pictures inside the courtroom. Further, the devices must be used silently, so they do not disrupt the proceedings. If these rules are violated, I will tell the person to leave the courtroom or I will tell the bailiff to confiscate the device.

Jurors, however, are not allowed to use electronic devices in the courtroom. Jurors must decide the facts based only on the evidence presented in this courtroom, and they must not discuss the case with anyone. But electronic devices and the social media they access are made primarily for those two purposes: research and communication. Experience has shown that the risk of a mistrial is simply too great to allow jurors to use electronic devices. Consequently, Utah law allows jurors to possess but not to use electronic devices while you are in the courtroom. Later, when you deliberate among yourselves to reach a verdict, you will not even be allowed to possess these devices. I realize this is contrary to what many of you do every day, but it is required because of the special needs of a trial, and I thank you for your understanding.

**(d) Summary of restrictions for placement in the jury room**

A fair trial means:

- Jurors must decide the facts based on the evidence presented in the courtroom.
- Jurors must not be influenced by information from sources outside the courtroom.
- Jurors must not communicate with anyone about the trial until the trial is over, and must not allow anyone to communicate with them, including by electronic devices and social media.
- Jurors must not research the case until the trial is over, including by electronic devices, social media, television, radio and newspapers.

# Tab 10

# **ELECTRONIC MEDIA REPORT**

**Judge Thomas L. Kay  
Judge David N. Mortensen  
Judge Douglas B. Thomas  
Judge Robert P. Faust  
Commissioner Catherine S. Conklin**

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## **ISSUES PRESENTED BY ELECTRONIC MEDIA IN THE COURTROOM AND IN THE JURY ROOM**

Reuters Legal, using data from Westlaw, found that at least 90 verdicts have been subject to legal challenge because of alleged internet juror misconduct since 1999. Half of those challenges have come in the last two years. That same research has indicated that 21 mistrials have been reported since January 2009 resulting from Internet or cell phone related juror misconduct. More concerning than these statistics is the fact that, in all probability the majority of juror misconduct is unreported and never brought to the attention of judges.

While it has been widely reported that many jurisdictions are confronting the issue, it should also be recognized that this is a relatively new phenomenon, one which will likely grow as a concern for the justice system, and an issue to be addressed in the future by judges in particular. American Law Reports has a section at 48 A.L.R. 6<sup>th</sup> 135 entitled: "Prejudicial Effect of Juror Misconduct Arising from Internet Usage." Accordingly, as the legal community becomes more attentive to the prejudicial effect of inappropriate electronic media usage by jurors, the issue will likely be presented to the courts with more frequency.

Courts are just beginning to tackle the issue in appellate decisions which are somewhat split. The problem in any event is significant. Jurors have communicated overt bias during the jury selection process through e-mail and twitter, only to fail to disclose such bias to the attorneys and the court. Comedian Steve Martin tweeted: "REPORT FROM JURY DUTY: Defendant looks like a murderer. GUILTY. Waiting for opening remarks." Later he tweeted: "REPORT FROM JURY DUTY: The guy I thought was up for murder turns out to be defense attorney. I bet he murdered someone anyway." While this is a joke, researchers found that many jurors express similar comments not meant at all as a joke. The fundamental principle of an impartial fact-finder is being undermined.

Reports have included frequent circumstances of potential jurors expressing opinions about the case during jury selection, specifically on the issues of a criminal defendant's guilt or which civil litigant should prevail. One juror during deliberations established a poll on Facebook as to a criminal defendant's guilt. Numerous jurors have communicated with persons outside the courthouse as to the status of juror deliberations.

At the same time general electronic media increasingly finds its way into the courtroom through attorneys, the public and the press. Most cell phones, iPods, MP3 devices, and laptops have audio and video recording capability. As those devices are present in the courtroom judges will increasingly need to be cognizant of their presence and their possible disruption of the administration of justice. The Board of District Court Judges has surveyed the situation throughout the country and makes the following recommendations to the bench.

## **EMPIRICAL STRATEGIES TO ADDRESS SOCIAL MEDIA AND TECHNOLOGY IN THE COURTROOM**

### **I. General Overview of the Issues Facing Courts**

The emergence of social media and handheld internet devices has caused courts to reexamine their jury instructions and courtroom media policies. A number of concerns arise as courts try to formulate uniform rules and policies that will eliminate the threat not only of juror misconduct, but also misuse by other courtroom and courthouse patrons. While a complete ban on electronic devices inside courthouse walls (as well as sequestering all juries) would solve these issues, such a far-reaching proposal may not be practical.

This memorandum will discuss the varying approaches that other jurisdictions have taken regarding these issues, as well as provide a list of proposals that Utah courts may consider.

### **II. Jury**

#### **A. While in Court (voir dire, jury box, deliberations)**

##### **Indiana:** Rule 26(b) Final Jury Instructions<sup>1</sup>

“The court shall instruct the bailiff to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations. The court may authorize appropriate communications (i.e. arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff. Such devices shall be returned upon completion of deliberations or when the court permits separation during deliberations. Courts that prohibit such devices in the courthouse are not required to provide this instruction. All courts shall still admonish jurors regarding the limitations associated with the use of such devices if jurors are permitted to separate during deliberations.”

**Maryland:** Administrative Judge Marcella A. Holland issued an order banning the “use of any device used to transmit information on Twitter, Facebook, LinkedIn or any other current or future form of social networking from any of the courthouses within the Circuit Court for Baltimore City.”<sup>2</sup>

**Minnesota** recently enacted a policy prohibiting jurors from bringing any wireless communication device to court.<sup>3</sup>

<sup>1</sup> Indiana Court Rule 26(b). (Amended July 1, 2010)

<sup>2</sup> In the Circuit Court for Baltimore City Addendum to Administrative Order on Use of Cell Phones and Other Communication Devices, dated Feb. 14, 2006.

<sup>3</sup> Anita Ramasastry, FindLaw.com Legal Commentary, *Why Courts Need to Ban Jurors' Electronic Communications Devices* (Aug. 11, 2009). See <http://writ.news.findlaw.com/ramasastry/20090811.html>.

Pennsylvania: a judge held a juror in contempt for making a phone call during deliberations.<sup>4</sup>

Some states confiscate jurors' electronic devices during trial and deliberation, but allow their use at other times.<sup>5</sup>

## **B. While Outside Court (during recess, at home)**

Oregon: Courts give the following instruction: "Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, friends or members of your family. 'No Discussion' also means no emailing, text messaging, tweeting, blogging or any other form of communication." It further adds, "In our daily lives we may be used to looking for information online and to Google something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should."<sup>6</sup>

Michigan Supreme Court: This was the first state court of last resort to promulgate a rule requiring judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom. The jury is read standard jury instructions, then they are given added instructions:<sup>7</sup>

- The court shall instruct the jurors that until their service is concluded, they shall not
  - Discuss the case with others, including other jurors, except as otherwise authorized by the court;
  - Read or listen to any news reports about the case;
  - Use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose prohibited information
  - Use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:

<sup>4</sup> "What Part of 'No Cell Phones' Was Unclear?", Jur-E Bulletin, Sept. 17, 2004.

[http://www.ncsconline.org/WC/Publications/KIS\\_JurInnJurE9-17-04](http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE9-17-04).

<sup>5</sup> Talia Buford, *New Juror Policy Accounts for New Technology*, Providence J. Bull., May 17, 2009 at A. Available at 2009 WL RN 9405485.

<sup>6</sup> Gregory S. Hurley, National Center for State Courts Jur-E Bulletin, *CellPhone Policies, Instructions/Instructions for Jurors* (May 1, 2009).

<sup>7</sup> Michigan Court Rule 2.511 (amended Sept. 1, 2009).

- o Information about a party, witness, attorney, or court officer
- o News accounts of the case
- o Information collected through juror research on any topic the juror might think would be helpful in deciding the case

In Florida, many judges provide brief reminders throughout the course of the trial.<sup>8</sup> For example, the judge might ask: “Have you been able to follow all of my instructions, including not discussing the case and not doing any research? Has anyone contacted you or have you contacted anyone or done any writing (including Facebook, Twitter, etc.) or research (Google) about the case?”<sup>9</sup>

Texas: U.S. District Court Judge Barbara M.G. Lynn requires jurors in her court to swear a second oath , with the newly added one including limitations on such practices as electronic research.<sup>10</sup>

The Judicial Conference’s Committee on Court Administration and Case Management (CACM) in 2010 endorsed a set of jury instructions<sup>11</sup> detailing prohibitions on using technology to conduct research on or communicate about the case. CACM suggests giving certain instructions before trial and a different instruction at the close of trial.

*Before Trial*: The instruction makes specific reference to cell phones and other devices, as well as web-based communication tools such as Twitter and to “other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube.”

*At the Close of the Case*: elaborates the jury’s duty not to discuss the case with anyone, and makes specific reference to technology such as cell phone, smart phone, iPhone, Blackberry, the internet, any internet service, or any text or instant messaging service, or any internet chat room, blog, or website of any kind including Facebook, MySpace, LinkedIn, YouTube and Twitter.

Some courts provide telephones and computer terminals at the courthouse for jurors to use during their service. Courts can control web access by installing filters or other software that prevents the user from accessing forbidden web sites or applications.<sup>12</sup>

<sup>8</sup> Artigliere, supra note 1.

<sup>9</sup> Id.

<sup>10</sup> *Smart Phones Left at Courtroom Door Quiver with Volume of Calls*, American Bar Association Judicial Division: Annual Meeting 2010, Aug. 8, 2010.

<sup>11</sup> Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management regarding Juror Use of Electronic Communications Technologies (Jan. 28, 2010).

<sup>12</sup> Superior Court of the District of Columbia, Special Operations Division, Juror’s Office, [http://www.dccourts.gov/dccourts/superior/special\\_ops/jurors.jsp](http://www.dccourts.gov/dccourts/superior/special_ops/jurors.jsp).

Some states confiscate jurors' electronic devices during trial and deliberation, but allow their use at other times.<sup>13</sup>

### **C. General Proposals Regarding Juries**

- Instruct the bailiff to collect all electronic devices from jurors at the start of deliberations.
  - Alternatively, the court might instruct the bailiff to collect all devices during both trial and deliberations.
- Inform jurors in their jury summons that they are not to bring any electronic devices to the courthouse when they report for jury duty. This will provide jurors with advanced notice and allow each of them to make arrangements with employers, family members, and daycare providers.<sup>14</sup>
- Provide more extensive jury instructions<sup>15</sup> in which the jurors are specifically told not to use certain electronic devices<sup>16</sup> as well as visit certain websites<sup>17</sup> during the time they are serving on the jury. Jurors should be reminded of these instructions throughout the proceedings.<sup>18</sup>
- Instruct all jurors to report any violation of the court's instructions, including any communication of any juror with the outside about the case or any attempt to bring into court information from outside the trial.<sup>19</sup>
- After the traditional oath is taken by jurors, ask that the jury swear a second oath which addresses issues relating to social media, handheld electronic devices, and websites providing information about the trial.<sup>20</sup>
- During voir dire, inquire as to jurors' usage of the Internet generally, and social media specifically. Inquire as to what websites jurors frequent, how often they

<sup>13</sup> Buford, *supra* note 8.

<sup>14</sup> The court might provide jurors with a courthouse telephone number where others can call in case of an emergency.

<sup>15</sup> The best option is to give instructions to the chosen jury during empanelling. At this point, jurors have a better idea of what is off-limits, as they have been through voir dire and probably understand the general contours of the case they are about to hear. Also, now that they have been placed on the jury, they are more likely to pay close attention and understand that the rules given truly apply to them. (Conn. Public Service and Trust Comm'n, Jury Committee Report and Recommendation 18 (2009), <http://www.jud.ct.gov/committees/pst/jury/juryreport.pdf>).

<sup>16</sup> PDA, Blackberry, iPhone, iPod Touch, iPad, Smart Phone, or any other device capable of sending or receiving data of any kind.

<sup>17</sup> Facebook, Twitter, MySpace, YouTube, LinkedIn, or any other social media website. Additionally, jurors should understand that they are not to "google" or otherwise research anything related to the case for which they are serving as juror.

<sup>18</sup> Where there has been extensive media coverage about a particular case, the trial judge may wish to consider asking the jurors at the start of each day of trial whether any of them has seen or heard anything in the media about the case. If so, the judge and counsel should discuss the matter outside the presence of the other jurors to determine the nature of the information. The juror should be admonished not to share that information with fellow jurors.

<sup>19</sup> Artigliere, *supra* note 1.

<sup>20</sup> Remind jurors of the penalties for conducting outside research, or ask jurors to sign declarations stating that they will not research the case in any way,

- access those sites, and if they post<sup>21</sup> to those websites. Ask whether the jurors blog.
- Explain to the empanelled jury the possibility that questions might arise during the trial that could prompt a juror to look elsewhere (online) for answers, and urge them to resist the temptation to do so.<sup>22</sup>

### **III. Technology and Electronics in the Courtroom (media and public)**

Federal judge Mark Bennett, a tech-savvy judge who allows reporters to blog during court proceedings said, “I thought that the public’s right to know what goes on in federal court and the transparency that would be given the proceedings by live-blogging outweighed any potential prejudice to the defendant.”<sup>23</sup>

Delaware: Some counties ban personal electronic devices. Exempt are judicial officers, state and court employees, attorneys showing an ID, law enforcement, and maintenance.<sup>24</sup>

Iowa’s 3<sup>rd</sup> District: “It is therefore ordered that cell phones that are brought into the courthouses may be used as telephones in the public areas only. The use of the camera/video function on these devices is prohibited in the same floor as the courtrooms or in the courtroom. Special conditions for the usage of the camera/video function may exist which requires the express permission of the presiding judge. All cell phones are to be turned off before entering a courtroom and shall remain off while in the courtroom. Court employees who are not in the courtroom may use cell phones, provided that such use does not become disruptive or negatively affect the employee’s performance.”<sup>25</sup>

New Mexico, Eddy and Roswell counties: “Employees of the courthouse can bring phones into the building for use in their offices...but members of the public will be required to leave their phones at home or in their vehicles.”<sup>26</sup>

North Carolina: “All cell phones, including those belonging to or in the possession of the public, county, or state employees, must be turned off in court. The bailiff will confiscate any phones that ring while court is in session.”<sup>27</sup>

<sup>21</sup> Update Facebook status, Tweet, Instant Message, post comments at the end of news stories, etc.

<sup>22</sup> Denise Zamore, *Can Social Media Be Banned from Playing a Role in Our Judicial System?*, Minority Trial Lawyer Q. (American Bar Association), Spring 2010.

<sup>23</sup> Debra Cassens Weiss, *Judge Explains Why He Allowed Reporter to Live Blog During Federal Criminal Trial*, ABA Journal, Jan. 16, 2009.

<sup>24</sup> *Prohibition on Cellular Telephones and other Personal Communication Devices in the New Castle County Courthouse*, Sept. 23, 2005.

<sup>25</sup> Iowa Third Judicial District, <http://blog.justiceserved.com/wp-content/uploads/2008/09/ncsc-cellphonepoliciesbystate.pdf>.

<sup>26</sup> See: [http://www.ncsonline.org/d\\_kis/courtsecurity/view\\_cs\\_cont.asp?NCSC\\_CMS\\_CONTENT\\_ID=2029](http://www.ncsonline.org/d_kis/courtsecurity/view_cs_cont.asp?NCSC_CMS_CONTENT_ID=2029).

<sup>27</sup> Hon. Graham C. Mullen, Chief U.S. District Court Judge, Order: *In Re: Electronic Devices in the Courtroom*, <http://www.ncwd.uscourts.gov/documents/ElectronicDevices.pdf>, Nov. 21, 2005.

## **EXAMPLES OF ELECTRONIC MEDIA PROBLEMS**

### **IN UTAH COURTROOMS**

3<sup>RD</sup> DISTRICT – A person sitting in the gallery texted information regarding witness testimony to another witness who was in the hall pursuant to the exclusionary rule.

3<sup>RD</sup> DISTRICT – A person in the courtroom texted his wife to warn her that the judge had issued a warrant for her arrest.

6<sup>TH</sup> DISTRICT – A defendant was caught streaming the trial’s audio to the Internet from his laptop.

8<sup>TH</sup> DISTRICT – A bailiff noticed a person recording the proceedings. The person said it was for personal use because he had poor hearing.

### **NATIONAL JURY ISSUES**

Since 1999, at least 90 verdicts have been challenged because of Internet-related jury misconduct. More than half of those occurred in the last two years.

### **INTERNET RESEARCH**

FLORIDA – After the verdict was read in a rape trial, the clerk found printouts from Wikipedia regarding sexual assault and “rape trauma syndrome” in the jury room. The information was not part of the evidence at trial and had been printed by one of the jurors and provided to the rest of the panel.

OHIO – A juror used his home computer to look up the defendant’s criminal background on the court docket. The judge had to declare a mistrial.

KENTUCKY – A juror went to YouTube during the trial and looked up an episode of a TV show that focused on the case.

FLORIDA – After eight weeks of trial, the judge discovered that a juror had been doing outside research on the Internet and had found information that was specifically excluded from evidence. In questioning the panel, the judge discovered that eight other jurors had been doing the same thing. With three-fourths of the panel tainted, the judge was forced to declare a mistrial.

## **JUROR COMMUNICATIONS**

NEW YORK – A juror posted reports on his blog about what was happening in the jury room. A law professor in Texas stumbled on the blog postings and notified the judge.

NEW JERSEY – A potential juror was removed from the pool after trying to “friend request” the defendant on Facebook.

ARKANSAS – During a civil trial involving a buildings products company, a juror used Twitter to send messages about the proceedings, including warning people not to buy products from the defendant and giving advance notice of the verdict.

PENNSYLVANIA – A juror in a federal corruption trial posted on Facebook and Twitter that a “big announcement” was forthcoming, referring to the verdict.

UNITED KINGDOM – A juror in a child abduction and sexual assault trial posted confidential trial details on her Facebook page. She then held an online poll, inviting her friends to help her decide whether the defendants were innocent or guilty.

CALIFORNIA – A juror was chastised for writing blog posts that exposed details of a gang murder trial while the trial was pending.

## CONCLUSION AND RECOMMENDATIONS

The potential damage caused by electronic media in the courtroom and jury room cannot be ignored. A policy should be implemented that is clear and easy to enforce. A complex policy that would require court security to try to distinguish between different types and purposes of electronic devices would quickly lose efficacy. The policy should be consistent with the U.S. District Court so that attorneys know what is expected regardless of which court is hearing a case. The policy must balance the legitimate need for attorneys to use electronic devices (such as a cell phone for scheduling or a laptop for file storage or presentations) with the mere convenience that electronic devices offer most users. The policy should also allow some flexibility in the event that a patron has need that this committee cannot foresee.

We proposed the following policy be adopted:

1. No electronic devices of any kind may be brought into the courthouse except:
  - a. Attorneys appearing before the court;
  - b. Court employees;
  - c. Law enforcement or Department of Corrections employees;
  - d. Electronic dictionaries for interpreters; or
  - e. A device for which the patron has obtained written approval from the judge whose court the patron will be attending.
2. Members of the press may apply for an exception to this rule using the same procedure to request permission to take photographs in the courtroom. Consistent with the federal court, in the event that a high profile case is being heard, at the court's discretion a separate room may be arranged for the media in which electronic devices may be used.
3. Court security will not hold or store any electronic devices. Patrons who bring such devices to the courthouse will be required to return them to their vehicles or store them elsewhere. Notice should be posted to this effect along with the notices regarding weapons.
4. Jury instructions should be drafted to inform the jury of the restrictions regarding electronic media, including the ban of such media in the courthouse and the prohibition against utilizing any form of electronic media to research or communicate about the case. (There is an instruction in the civil section of MUJI II, #CV101B.)
5. The judiciary should recommend that the Legislature enact a statute making a juror's violation of these instructions a Class B misdemeanor. Jurors should be instructed of the possible penalty for failure to abide by the court's instructions.

# Tab 11

## **Proposed Policy:**

### Possession and Use of Electronic Portable Devices in Court Facilities

#### *(1) Possession and use of electronic portable devices in courthouses.*

(A) Subject to the limitations herein, all persons granted entrance to the courthouse are permitted to possess and use, while inside the courthouse, any pager, laptop/notebook/personal computer, handheld PC, PDA, audio or video recorder, wireless device, cellular telephone, electronic calendar, and/or any other electronic device that can transmit, broadcast, record, take photographs or access the internet (hereinafter “electronic device”).

(B) Persons possessing an electronic device may use that device while in common areas of the courthouse, such as lobbies and corridors, subject to further restrictions imposed by the Presiding Judge(s) as to the time, place, and manner of such use that are appropriate to maintain safety, decorum, and order.

(C) All electronic devices are subject to screening or inspection by court security officers at the time of entry to the courthouse and at any time within the environs of the courthouse in accordance with Rule 3-414.

#### *(2) Possession and use of electronic portable devices in courtrooms.*

(A) Inside courtrooms, persons may silently use an electronic device for any purpose consistent with this policy without obtaining prior authorization, subject to subsection (C), below.

(B) Persons may not use electronic devices to take photographs or for audio or video recording or transmission except as allowed in accordance with Rule 4-401 of the Rules of Judicial Administration.

(C) A judge may prohibit or further restrict use of electronic devices in his or her courtroom if they interfere with the administration of justice, disrupt the proceedings, pose any threat to safety or security, compromise the integrity of the proceeding, or threaten the interests of a minor.

(D) It should be anticipated that reporters, bloggers and other observers seated in the courtroom may use electronic devices to prepare and post online news accounts and commentary during the proceedings. Judges should instruct counsel

to instruct witnesses who have been excluded from the courtroom to not receive or view accounts of other witnesses' testimony prior to giving their testimony.

(E) This policy is applicable to attorneys, but may be expanded or restricted in the discretion of the judge presiding over the relevant proceeding. As officers of the court, attorneys may be subject to additional sanctions for violating this policy.

(3) *Additional limitations on juror possession and use of electronic portable devices.*

During trial and juror selection, prospective, seated, and alternate jurors are prohibited from researching and discussing the case they are or will be trying. Once selected, jurors shall not use an electronic device while in the courtroom and shall not possess an electronic device while deliberating.

(4) *Possession and use of electronic portable devices in court chambers.*

Persons may possess electronic devices in court chambers without obtaining prior approval, but may not use them in chambers without prior approval from the judge.

(5) *Miscellaneous*

(A) Nothing herein shall restrict in any way:

(i) the possession or use of electronic devices by judges, commissioners or courtroom personnel with prior approval of the judge presiding over the proceeding; or

(ii) the authority of judges or commissioners to permit others to possess or use electronic devices in chambers or administrative offices or during judicial ceremonial proceedings.

(B) All electronic devices are subject to confiscation and search by court personnel if the judge presiding over the proceeding has a reasonable basis to believe that a device is or will be used in violation of this policy. Violations may be subject to contempt of court.